

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE INTEREST OF CORBIN C.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

IN RE INTEREST OF CORBIN C., A CHILD UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE,

V.

IVY C., APPELLEE, AND BRYAN H., APPELLANT.

Filed November 20, 2012. No. A-12-248.

Appeal from the County Court for Hall County: ARTHUR S. WETZEL, Judge. Reversed.

Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

Robert J. Cashoili, Deputy Hall County Attorney, and Mark Young for appellee State of Nebraska.

Rachel A. Daugherty, of Myers & Daugherty, P.C., L.L.O., for appellee Ivy C.

Jerry Fogarty, guardian ad litem.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Corbin C. was removed from the custody of his mother, Ivy C. Temporary custody was awarded to the Nebraska Department of Health and Human Services (DHHS), and Corbin was placed with his maternal grandparents. Bryan H., Corbin's father, requested a change of placement/custody and permission to move Corbin to New York. The county court for Hall County, sitting as a juvenile court, denied Bryan's motion for change in placement and ordered that the temporary custody of Corbin remain with DHHS. Bryan appeals.

**BACKGROUND**

Corbin, born in August 2005, is the biological child of Ivy and Bryan. Ivy and Bryan never married. Corbin has always lived with Ivy. Corbin was removed from Ivy's custody in

January 2012 after she participated in the burglary of a home while Corbin was present. Ivy was also arrested for possession of methamphetamine on her person.

The State filed a petition on January 12, 2012, alleging that Corbin was within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by reason of the faults or habits of his “parent, guardian or custodian.” At the bottom of the petition, under “name & address of parent/custodian,” it listed both Ivy and Bryan at different addresses in Grand Island, Nebraska (although our record shows that the address listed for Bryan was actually his parent’s address). The State alleged that (1) on January 10, Corbin lacked proper parental care, and (2) on January 10, Corbin was “in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile.”

Also filed on January 12, 2012, was the affidavit of Corissa Cemper, a children and family service specialist with DHHS. In her affidavit, Cemper stated: Corbin is the biological child of Ivy and Bryan; Ivy currently resides in Grand Island; Bryan’s address is unknown, it is reported that he is currently serving in the military, and it is believed that he is stationed in Tennessee; on January 10, Cemper responded to a call at an elementary school because Corbin was being placed in a 48-hour hold; Cemper made contact with Investigator Chris Anderson with the Grand Island Police Department; Anderson reported that through the course of his investigation, he learned that Ivy had assisted in the burglary of a home in which four firearms, televisions, and other items had been stolen; Anderson reported that during the burglary, Corbin was present; Anderson advised that he had interviewed Corbin and was able to confirm that Corbin was present during the burglary and was also able to confirm that after the items were stolen, they transported the items to a known drug house; Anderson attempted to locate Ivy, but was unable to do so; and Anderson contacted DHHS and reported that he would be placing Corbin in a 48-hour hold due to him being present while a burglary was committed that included four stolen firearms. Cemper also stated that following the arrest of Ivy, Anderson stated that Ivy told him that Allen Jones (Allen) was “a dealer” and that she found out Allen was “into robbing people;” Ivy told Anderson that she dropped Allen off when he recently stole some televisions, but that she did not drive away after dropping Allen off; Ivy denied participating in the illegal activities; Ivy later admitted to Anderson that she gave Allen a ride to the residence, backed her car into the garage, and then drove Allen to her cousin’s house where Allen traded the big television for some methamphetamine; Ivy told Anderson that she received “like a ten sack” of methamphetamine from Allen for helping him; Ivy still denied knowing that Allen was stealing the televisions; and Ivy reported that Corbin was in the car while Allen was loading the televisions. Cemper further stated that Ivy has a history of partaking in illegal activities in the presence of her son; DHHS received a police report in May 2011 in which Ivy was referred for criminal charges due to stealing at a discount store, and a pipe used for smoking methamphetamine was located in her presence at the time of the theft; Corbin was with Ivy during the incident at the discount store and when the methamphetamine pipe was located.

The juvenile court filed an ex parte custody order on January 12, 2012. The juvenile court found that Ivy had exposed Corbin “to dangerous & illegal activities” and “to situations involving meth.” The juvenile court granted temporary custody and placement of Corbin with DHHS.

On January 18, 2012, Bryan filed a “Motion for Change of Placement/Custody.” In his motion, Bryan alleged that on February 27, 2006, Ivy filed a complaint to establish paternity and support in the district court for Hall County (the complaint is not in our record); on September 19, 2007, a journal entry was filed giving Ivy the care, custody, and control of Corbin and setting a final hearing date for February 8 and 9, 2012 (the journal entry is not in our record); that since September 19, 2007, circumstances have arisen which require an immediate change of placement and/or custody to protect Corbin’s best interests; on January 12, 2012, a petition was filed alleging that Ivy exposed Corbin to dangerous and illegal activities and that she has exposed Corbin to situations involving methamphetamine; and an ex parte custody order was entered placing Corbin in the temporary custody and placement of DHHS. Bryan alleged that he is a fit and proper person to have care, custody, and control of Corbin and that it would be in Corbin’s best interests to be placed in Bryan’s care, custody, and control pending resolution of this matter. Bryan requested that the court enter an order “changing the temporary placement and/or custody of [Corbin] and granting [Bryan] the temporary care, custody, and control of [Corbin].”

At a first appearance hearing on January 19, 2012 (the proceedings of which do not appear in our record), Bryan was not present but was represented by counsel. Ivy was present, and counsel was appointed to represent her. An order titled “First Appearance,” written in checklist form, has a checkmark by “Parent(s) deny allegation.” The preadjudication hearing was set for February 14, and the adjudication hearing was set for March 5.

A hearing on Bryan’s motion for change of placement/custody was held on February 7, 2012. Evidence was adduced solely in the form of affidavits. Received into evidence were the affidavits of Cemper, Bryan, Ivy, and Maletta C. (Ivy’s mother). Also received into evidence were the responsive affidavits of Bryan, Lisa H. (Bryan’s wife), and Mary Karen H. (Bryan’s mother) to the affidavits of Ivy and Maletta. Additionally, the affidavit of Sharon Joseph (the guardian ad litem) was received into evidence.

The affidavit of Cemper was set forth in detail previously in our opinion. Therefore, we do not duplicate such testimony here.

In his affidavit, Bryan stated that he is in the military and stationed at Fort Drum, New York; in a journal entry filed on September 19, 2007, Ivy was awarded Corbin’s temporary care, custody, and control (the journal entry does not appear in our record); on January 12, 2012, a petition was filed in juvenile court alleging that Ivy exposed Corbin to dangerous and illegal activities and has exposed him to various situations involving methamphetamine; and the juvenile court entered an ex parte custody order placing Corbin in the temporary custody and placement of DHHS. Bryan stated that he has personal knowledge that Ivy has been hospitalized in the psychiatric unit at a hospital in Hastings, Nebraska, on at least three occasions since October 2009 (Ivy’s psychiatric records from the hospital were “attached” to Bryan’s affidavit, but appear in a separate binder); Ivy has had problems with methamphetamines and has had suicidal thoughts/tendencies for a long time; the records from Corbin’s counselor indicate that Corbin is having severe emotional issues and behavioral outbursts when he is with Ivy; Corbin has been discharged from the counselor’s office because Ivy refuses to follow the counselor’s recommendations; and Bryan is concerned for Corbin’s health, safety, and welfare. Bryan stated that he is married to Lisa and they live in Watertown, New York, with their daughter; that he is a fit and proper person to have Corbin’s care, custody, and control; and that it is in Corbin’s best

interests to be placed with him. Bryan asked that Corbin be placed with him and be allowed to relocate to New York.

In her affidavit, Ivy stated that Corbin has been in her custody since his birth in 2005 and has resided with her and her parents in Grand Island; Bryan has had very little contact with Corbin, for example there were eight telephone calls and three visits in 2011; Corbin does not know Bryan well and does not feel comfortable being with him for long periods of time; Ivy and her family are the only support system Corbin has known; because Bryan lives in New York, placing Corbin with Bryan will deprive Corbin of any meaningful contact with Ivy and her family; Bryan is a former “user” and has had problems with anger; when Corbin was a baby, Bryan became angry and threw him into a chair; when Corbin was approximately 3 years old, Bryan hit him on the bottom so hard that it made him cry and left a hand print; and Corbin has told Ivy that Bryan hits him routinely. Ivy stated that she is currently at a drug and alcohol treatment center and is scheduled for discharge on February 20, 2012; she is scheduled to participate in the drug court program; and she has previously been a patient at the hospital in Hastings following breakups from Bryan. Ivy requested that Corbin remain in the care, custody, and control of DHHS with placement with her parents until her release. She stated that she is the only family Corbin knows and that she feels that a complete disruption in his life is not in his best interests.

In her affidavit, Maletta (Ivy’s mother) stated that Ivy and Corbin have been together since he was born; Ivy, Corbin, and Bryan never lived together as a family; Bryan has no idea what is going on in Corbin’s life; Bryan has never asked how school, speech, occupational therapy, or checkups for Corbin go; Bryan has made it clear to Ivy that when she can get along with his wife, Lisa, then he will start asking; when Corbin was 6 months old, Bryan picked him up by the arm and threw him on the couch; the first year of Corbin’s life, Bryan was only around when it was convenient for him; Bryan’s contact with Corbin over the years has been minimal; Bryan’s telephone calls to Corbin average once a month to every other month; in 2011, Bryan called Corbin eight times, but the telephone calls “don’t even last five minutes”; Bryan’s mother has never liked Ivy; Ivy has always let Bryan’s parents have Corbin when they asked for him unless Corbin was sick; and Corbin went with Bryan’s parents to Tennessee last February, and every night Corbin would cry saying he wanted to come home. Maletta stated that in 2009, Ivy had a restraining order put on Bryan because his friends threatened to do a driveby shooting (the restraining order does not appear in our record); and Bryan has made comments to Maletta that he would like to “smash Ivy’s face in.”

In his responsive affidavit, Bryan stated that he cannot see Corbin whenever he wants, because he is stationed in New York and has to get Army approval to travel outside of a 250-mile radius of Fort Drum, and that he contacts Corbin every time his parents have Corbin, but avoids calling Corbin at Ivy’s home in order to avoid fights. Bryan stated that Corbin does know who Bryan is and is not scared around him; he has never hit or spanked Corbin; he has never taken his anger out on Corbin; and while he may have had an anger issue in the past, he has learned to control himself through his years with the Army. Bryan stated that he never told Ivy, her mother, or anyone else that he wanted to “smash Ivy’s face in” or cause her any other harm; in fact, Ivy hit him in the face and later pled guilty to it in court. Bryan stated that he questions whether Corbin is safe living with Ivy, her parents, and her siblings, because if Corbin

was in a safe place, he would not be around drug use or illegal activity. Bryan stated that he has already spoken to a school in New York about enrolling Corbin and that he made the school aware that Corbin has attention deficit hyperactivity disorder (ADHD), a speech disorder, and an individualized education program. Bryan has also looked into family counseling, as well as individual counseling for Corbin.

In her responsive affidavit, Lisa (Bryan's wife) stated that when Bryan tries to call Corbin at Ivy's home, Bryan has to listen to Ivy "badmouth" him or Lisa before Ivy allows him to speak with Corbin; Bryan calls Corbin on Saturdays, when Corbin is at his paternal grandparent's home; Corbin does not act uncomfortable around Bryan or their family when they have him; the only time Corbin starts acting upset is when they have to take him back to Ivy's house; she has never seen Bryan hit, yell, or have to punish Corbin; Bryan is a loving father to Corbin and their daughter; and the only reason Bryan cannot visit Corbin more is that they live out of state and Bryan cannot go out of a 250-mile radius of Fort Drum without Army approval.

In her responsive affidavit, Mary Karen (Bryan's mother) stated that Bryan entered the Army in 2006 and has spent 15 months in Iraq and 1 year in Afghanistan since 2007; Ivy refuses to allow Corbin to see Bryan when he is home on leave; Ivy does not follow the court-mandated visitation in which the paternal grandparents are supposed to get the same visitation as if Bryan were here (the court order regarding visitation does not appear in our record); when Bryan is home on leave and allowed to see Corbin, they act like typical father and son, and on several occasions, Corbin said he did not want to go home; Corbin is comfortable with Bryan, but Corbin may feel "ill at ease" initially because Ivy has "badmouthed Bryan so much"; Mary Karen has never seen Bryan raise his voice to Corbin nor has Corbin ever said anything about Bryan hitting him; and Bryan may have called Corbin only eight times at Ivy's home, but he calls numerous times when Corbin is in their home. Mary Karen stated that Ivy tried to get two restraining orders against Bryan, but that both were dropped, one by Ivy and the other by the judge (neither the applications for the restraining orders nor resolutions of such appear in our record).

In her affidavit, Joseph (the guardian ad litem) stated that she has seen Corbin with his maternal grandparents and uncle and that he seems appropriately bonded; she has not seen Corbin with his parents or paternal grandparents; Corbin says he enjoys being with both parents and both sets of grandparents; Maletta provided Joseph with a calendar/description of visits and contact between Corbin and Bryan and Corbin's paternal grandparents, and from the schedule, it does not appear that Corbin has regular consistent contact with Bryan; and Maletta advised that there was a court order for the paternal grandparents to have alternate weekend visitation with Corbin. Joseph stated that she reviewed documents from Corbin's therapist at Family Resources, Corbin's elementary school, Howard Psychiatric Services (regarding services provided to Corbin); the individualized education program for Corbin; preschool and elementary school checklists and progress reports; the initial evaluation and progress reports from the Children's Rehab Center regarding Corbin's speech therapy; the initial evaluation, plan of care, and progress notes from the Children's Rehab Center regarding Corbin's occupational therapy; reports from the Munroe-Meyer Institute regarding assessment and treatment of Corbin; and patient reports from the hospital for Ivy's admissions--most of the above documents were attached to Joseph's affidavit. Joseph stated that based on her discussions, personal observations,

and review of the above documents, she believes that it would be in Corbin's best interests for him to remain in the care, custody, and control of DHHS and that placement with the maternal grandparents is appropriate at this time. Joseph stated that she believes Corbin has been receiving services which are appropriate to his needs and that she would be concerned with the possibility of those services being interrupted suddenly, as well as the emotional impact any move would have on Corbin. Joseph states that she does not believe that there is any need to rush placement in this case. Joseph also expressed concerns with the allegations of "violent and potentially abusive behavior" of Bryan, as well as his limited involvement with Corbin to date. Joseph also stated that she did not know whether it was likely that Bryan would be deployed in the near future, but believed that must be considered when determining the best placement for Corbin's well-being. Joseph stated that if there will be a change of placement, she believed it should be a transition that would provide Corbin with an adjustment period, including counseling to prepare him. Joseph did not believe there was adequate information regarding Bryan or his ability to address Corbin's needs. She also lacked information regarding Lisa and her ability to be able to parent an infant and a "very active 6-year-old," especially if Bryan were to be deployed.

Of the documents referenced and attached to Joseph's affidavit, we recount the important information. In the letter from Corbin's therapist, he stated that he had only seen Corbin twice. He also stated:

I believe Corbin has Post Traumatic Stress Disorder from being removed from the school by CPS when his mother was arrested. He has shown signs of anxiety and fear of abandonment. He has suffered from nightmares of being removed from the school again, has regressed to wetting the bed, and defecating in his pants. His Grandparents report that they have to alleviate his fears of someone taking him from school every day. He wants *daily* reassurance that they will be there when he gets home. With court coming up regarding placement he is now having dreams of his father coming to the school and taking him to New York. Corbin does not have much of a relationship with his father. It is my understanding that he came only twice to see Corbin in 2011. . . . I feel that in this stage of Corbin's development and PTSD that it would not be a good idea to allow his father to take him away from all of his support here in GI. I'd like the chance to work with Corbin for awhile [sic] before that happens (if that is the court's wish.) Please, let's not traumatize this little boy any further than what's been done.

Also attached to Joseph's affidavit is the Howard Psychiatric Services' pretreatment assessment of Corbin in which Corbin was diagnosed with "ADHD, Combined Type; R/O OCD; R/O Anxiety DO." Howard Psychiatric Services recommended that Corbin be treated for ADHD and be seen for monitoring and adjustment of his ADHD medications.

In a journal entry filed on February 27, 2012, the juvenile court overruled Bryan's motion for change of placement/custody. The court acknowledged that parental preference was given consideration by the court. However, the court noted Bryan's admissions that he had had very little contact with Corbin. And the court also stated that it considered allegations of Bryan's anger control issues as well as allegations of abuse. The court ordered that temporary custody of Corbin remain with DHHS for appropriate placement. The court stated that it "certainly believes [DHHS] has the authority to make a placement on [its] own with [Bryan] if [it] feel[s] that

placement is in the best interests of the minor child.” Bryan timely appeals the February 27 decision of the juvenile court.

Additional court proceedings occurred after Bryan filed his notice of appeal, and such appear in the supplemental transcripts in the record before us. A court order titled “Adjudication Hearing” filed on May 22, 2012, shows that Ivy pled no contest to the allegations in the petition and that Corbin was “adjudged as alleged.”

A court order titled “Motion,” filed on June 26, 2012, states that a hearing on the “objection to placement” was held that same day. We assume that the objection was filed by Ivy as the ruling states, “Ct overrules the objection to placement and approves the temp placement of the juvenile with the bio. father.”

#### ASSIGNMENT OF ERROR

Bryan alleges that the juvenile court erred in not transferring custody of Corbin to him.

#### STANDARD OF REVIEW

An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court’s findings. *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Emily C.*, 15 Neb. App. 847, 738 N.W.2d 858 (2007).

#### ANALYSIS

In his motion, Bryan sought a change of placement and/or custody. Although his motion was overruled by the juvenile court’s journal entry filed on February 27, 2012 (which order is the basis for Bryan’s appeal), Corbin was subsequently placed with Bryan as noted by the court order titled “Motion” filed on June 26. Therefore, the issue of placement is moot. We note that DHHS retains custody of Corbin and may change his placement upon 7 days’ notice. See Neb. Rev. Stat. § 43-285(3) (Cum. Supp. 2012).

However, Bryan argues that the juvenile court should have transferred custody of Corbin to him in the February 27, 2012, journal entry, and this issue is not moot. Initially, we point out that even though the State’s petition filed on January 12, alleging that Corbin was within the meaning of § 43-247(3)(a) by reason of the faults or habits of his “parent, guardian or custodian,” listed both Ivy and Bryan at different addresses in Grand Island under “name & address of parent/custodian,” it is clear that the petition and its allegations were made against Ivy, not Bryan. Ivy was the one who participated in the burglary of a home while Corbin was present, and she was the one who exposed Corbin to situations involving methamphetamines. Neither the State nor DHHS made allegations against Bryan, the noncustodial parent.

In *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 920, 639 N.W.2d 668, 679 (2002), we said that

the burden is upon the State to allege and prove in a detention hearing that the juvenile court should not place children with their other natural parent after the expiration of the first 48 hours of emergency detention under Neb. Rev. Stat. § 43-250(4) (Cum. Supp.

2000) during a period of temporary detention pending adjudication spawned by allegations under § 43-247(3)(a) against their custodial parent.

The “parental preference doctrine” holds that in a child custody controversy between a biological parent and one who is neither a biological nor an adoptive parent, the biological parent has a superior right to custody of the child. *In re Interest of Stephanie H. et al.*, *supra*. And

“[a] court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is *affirmatively shown* that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.”

*Id.* at 924, 639 N.W.2d at 681, quoting *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

Neither the State nor DHHS made any allegation at any time prior to or during the February 7, 2012, hearing on Bryan’s motion for change of placement/custody that Bryan was unfit to have custody of Corbin or that Bryan forfeited his right to custody. In the State’s written closing argument following the February 7 hearing, the State wrote, “A review of the affidavits offered herein show that there is no evidentiary showing that [Bryan] is unfit or has forfeited his right to custody.” And in its journal entry filed on February 27, the juvenile court did not make any findings that Bryan was unfit to perform his parental duties or that he forfeited his right to perform such duties. Additionally, in its brief on appeal, the State admitted that it “had no evidence showing [Bryan] would be unfit.” Brief for appellee State at 5. However, the State said that Ivy made a showing that Bryan had been abusive toward her and Corbin.

Upon our de novo review of the evidence, we do not find the evidence presented by Ivy to be persuasive. Ivy and Maletta made allegations in their affidavits that when Corbin was a baby, Bryan threw him onto a couch or chair. Ivy also alleged that when Corbin was 3 years old, Bryan “hit him on the bottom so hard that it made him cry and left a hand print.” Finally, Ivy alleged that Corbin has told her that Bryan hits him routinely. These allegations were refuted by Bryan, Lisa, and Mary Karen. Bryan stated in his affidavit that he has never hit or spanked Corbin, nor has he taken his anger out on Corbin. Lisa stated in her affidavit that Bryan is a loving father and that she has never seen Bryan hit, yell, or have to punish Corbin. Mary Karen stated in her affidavit that she has never seen Bryan raise his voice to Corbin nor has Corbin ever said anything about Bryan’s hitting him. In her affidavit, Mary Karen also questioned Ivy’s statement that Bryan “routinely” hits Corbin, since Bryan is only in Nebraska to see Corbin one to two times each year. Finally, in Joseph’s affidavit, she stated that Corbin told her that he enjoyed being with Bryan.

Generally, when the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Emily C.*, 15 Neb. App. 847, 738 N.W.2d 858 (2007). However, in the instant case, all of the testimony and evidence was via affidavit. Because we are seeing exactly what the juvenile court saw, we need not defer to the lower court’s findings of fact, and we review the factual findings de novo. There is no evidence in the record, except for the allegations made by Ivy and Maletta, that Bryan has ever harmed Corbin. And we find it hard to believe that Corbin



would enjoy spending time with Bryan, if in fact Bryan routinely hits him. The State has made no allegations against Bryan, and there is no evidence in our record that criminal charges regarding child abuse were ever filed against Bryan. On the contrary, Ivy has exposed Corbin to criminal activities, including drug use. And both Ivy and Maletta have an interest in preventing Bryan from getting custody of Corbin--as such would result in Corbin's moving to New York and away from them. Upon our de novo review, we find Bryan to be the more credible witness in this case.

Maletta stated in her affidavit that Bryan told her he wanted to "smash Ivy's face in" and that Bryan's friends had threatened to do a driveby shooting. In his responsive affidavit, Bryan denied these allegations. In fact, Bryan stated in his responsive affidavit that in December 2009, Ivy hit him in the face, told him that she hated him, and hoped he was killed in Afghanistan. A psychiatric evaluation of Ivy completed on January 4, 2010, which was received into evidence, verifies that in December 2009, Ivy had a physical altercation with Bryan in a school parking lot and "likely will be charged with misdemeanor assault." Maletta's affidavit states that "Ivy said she nudged [Bryan] out of her face." Ivy was later ticketed by the police, and she went to court and received a \$75 fine. Thus, after our de novo review of the record, we again find Bryan to be the more credible witness.

In her affidavit, Joseph expressed concerns with the allegations of "violent and potentially abusive behavior" of Bryan, as well as his limited involvement with Corbin to date. From our review of Joseph's affidavit, it appears that Joseph's information regarding Bryan's behavior came from Maletta. And as stated previously, we have found that Bryan was the more credible witness when compared to Ivy and Maletta. Joseph also stated that she did not know whether it was likely that Bryan would be deployed in the near future, but believed that must be considered when determining the best placement for Corbin's well-being. She also stated that she lacked information regarding Lisa and her ability to be able to parent an infant and a "very active 6-year-old," especially if Bryan were to be deployed. Whether or not Bryan will be deployed in the future is speculative, and thus, there is no basis upon which to conclude that Bryan is not fit to perform parenting duties.

The State failed to meet its burden of proof in this case. The State did not affirmatively show that Bryan is unfit to perform his parental duties or that he forfeited his custody rights. And the juvenile court made no finding that Bryan was either unfit or that he forfeited his custody rights, and as a result, the parental preference doctrine dictates the result. This is not to say that we are not concerned about the lack of significant contact between Bryan and Corbin or the allegations of extreme discipline. Nonetheless, we have only the affidavits upon which to decide the case, and as said, we find Bryan's parental rights paramount when he has not been proved unfit or to have forfeited his paternal rights. We also note that the juvenile court, in its order filed on June 26, 2012, titled "Motion," approved the temporary placement of Corbin with Bryan. A court-approved placement of Corbin with Bryan demonstrates that Bryan is not unfit to perform his parenting duties. Accordingly, after our de novo review of the record, we find that the juvenile court should have awarded Bryan custody of Corbin in its February 27, 2012, journal entry. We therefore reverse the juvenile court's February 27 journal entry and award Bryan custody of Corbin.

## CONCLUSION

For the reasons stated above, we reverse the juvenile court's February 27, 2012, journal entry overruling Bryan's motion for change of placement/custody and award Bryan custody of Corbin.

REVERSED.