


**BACKGROUND:** Amy is Zachary's mother. Frank represented Zachary's paternal grandparents, William and Joyce, who were appointed by the court to be Zachary's guardians when he was 5 years old. When Zachary was 6 years old, his mother asked the court to terminate the guardianship, arguing that Zachary should be returned to his mother's care asserting that the law allowing the guardianship was unconstitutional and for other reasons.

**TRIAL COURT'S DECISION:** The trial court rejected Amy's constitutional arguments and left Zachary in the care of his grandparents but it granted Amy's request for expanded visitation between Zachary and his mother. Amy was given visitation with Zachary every weekend and for six weeks during each summer.

**APPELLATE COURT'S DECISION:** Frank appealed for the grandparents, arguing that the trial court's grant of visitation to Zachary's mother was not in Zachary's best interests. Amy cross-appealed and again made a constitutional argument. The Iowa Court of Appeals found Iowa's guardianship statute constitutional and agreed that Zachary should remain in his grandparents' care. The Iowa Court of Appeals also found that the trial court was mistaken in granting Zachary's mother every weekend and summer visitation then sent the case back to the trial court for an order requiring limited and supervised visitation.

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*2003 Iowa App. LEXIS 102, \**

IN THE MATTER OF THE GUARDIANSHIP OF Z.B. GRANDPARENT and  
GRANDMOTHER Guardians, Appellants.

No. 2-950 / 01-1565

COURT OF APPEALS OF IOWA

2003 Iowa App. LEXIS 102

January 29, 2003, Filed

**NOTICE: [\*1]** NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION OF THE COURT OF APPEALS MAY NOT BE CITED BY A COURT OR BY A PARTY IN ANY OTHER ACTION.

**PRIOR HISTORY:** Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge. The guardians appeal from the parental visitation provisions of a guardianship order. The ward's mother cross-appeals the trial court's denial of a request to terminate the guardianship and its refusal to appoint a new guardian.

**DISPOSITION:** District court judgment affirmed, and case remanded.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** The Iowa District Court for Linn County found that the child in interest had suffered neglect, and an instance of sexual abuse while in the care of appellee mother, and granted guardianship rights to appellants, the child's grandparents. The child was also placed in the grandparent's physical care. In the instant appeal, the grandparents appealed the trial court's parental visitation provisions of a guardianship order. The mother cross-appealed.


**OVERVIEW:** The mother renewed her constitutional challenges to [Iowa Code § 633.552](#) (2001). The appellate court adopted the trial court's findings, that the mother did indeed neglect her child. For example, there was evidence the child suffered sexual contact by his cousin, and continued to suffer urinary difficulties from stress. Other evidence included the mother's pattern of missing the child's medical appointments, and exposing the child to her husband's intoxicated behavior. Meanwhile, the child had flourished under the care of the grandparents. The appellate court held the mother's constitutional challenge to § 633.552 was fatally flawed, because it failed to consider § 633.552 in pari materia with other relevant guardianship provisions which cured the infirmities dictating the outcomes in the United States Supreme Court decisions in *Troxel* and *Santi*. A nonparent did bear the burden of persuasion throughout guardianship proceedings. The grandparents met that burden. Further, the appellate court held the trial court's granting the mother the right to visit her child every weekend, and six weeks during the summer should have been more restrictive, and excluded overnight visits.


**OUTCOME:** The judgment of the trial court was affirmed, but the visitation issue was remanded to the trial court with instructions to grant the mother more limited, and supervised visitation, excluding overnight visits with the child.


**CORE TERMS:** guardianship, guardian, parental, best interest, appointment, visitation, suitable, custodial, neglect, clear and convincing evidence, unsuitability, nonparent, grandparent, placement, temporary, custody, compelling state interest, parental custody, custodian, writ of habeas corpus, constitutional issues, termination, terminate, ward, constitutional rights, parental preference, narrowly tailored, visitation order, liberty interest, parens patriae


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**HN1**  See [Iowa Code § 633.552](#).


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**HN2**  The appellate court reviews constitutional issues de novo. The appellate court considers a challenged statute in its entirety and in pari materia with other pertinent statutes. [More Like This Headnote](#)


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**HN3**  Statutes are presumed constitutional, imposing on the challenger the heavy burden of rebutting that presumption. Moreover, if a statute is susceptible to more than one construction, one of which is constitutional and the other not, the appellate court is obliged to adopt the construction which will uphold it. A facial attack on a statute, however, implies that it is totally invalid and therefore, incapable of any valid application. [More Like This Headnote](#)


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**HN4**  Guardianship proceedings concerning conflicting custodial claims of parents and nonparents implicate a parent's fundamental liberty interest in parental autonomy. The controlling statutory provision, [Iowa Code § 633.552](#), must therefore be narrowly tailored to serve a compelling state interest. [More Like This Headnote](#)

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**HN5**  In the context of guardianship proceedings concerning conflicting custodial claims of parents and nonparents, the legal and philosophical basis for such proceedings is the doctrine of parens patriae. The doctrine of parens patriae obligates the state to care for the vulnerable and less fortunate. A state's compelling interest under this doctrine is to protect children from physical harm and ensure their general well-being. [More Like This Headnote](#)

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**HN6**  [Iowa Code §§ 633.551](#) and 633.556(1) require proof of necessity by clear and convincing evidence before a guardianship is established. Additionally, [Iowa Code § 633.559](#) recognizes the presumption that fit parents act in the best interest of their


children by requiring appointment of parents as guardians if they are qualified and suitable. The foregoing statutes and [Iowa Code § 633.552](#) are narrowly tailored to address a compelling state interest in a child's well being and presumptively favor the natural parent. [More Like This Headnote](#)


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**HN7**  Actions for the termination of a guardianship are equitable proceedings. The appellate court reviews equitable actions de novo. Iowa R. App. P. 6.4. In equity cases, especially on matters of credibility, the appellate court gives weight to the trial court's findings of fact but is not bound by them. Iowa R. App. P. 6.14(6) (g). [More Like This Headnote](#)

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**HN8**  The parents of a minor child, if suitable and qualified, are preferred over all others as the child's guardian and custodian. [Iowa Code § 633.559](#). The best interests of a child are presumptively advanced by custodial placement with a parent. Any decision to place custody of a child with a nonparent guardian therefore requires the court to make a parental unsuitability determination. [More Like This Headnote](#)


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**HN9**  In the context of guardianship proceedings and a custodial award of a child, the appellate court does not find any reported decision that purports to define or give meaning to the terms "qualified and suitable," as regards the preferred custodian of a child. These concepts are generally viewed them in terms of the harmful or detrimental effect of parental custody rather than comparative judgments about the parties involved. Considerations of parental autonomy and child welfare are not mutually exclusive. When viewed in this light, the best interest of the child is given the intended priority. The presumptive right of parental custody may be relinquished where the welfare and best interest of the child require nonparent custody. [More Like This Headnote](#)


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**HN10**  Because of the fundamental constitutional rights implicated, a nonparent bears the burden of persuasion throughout guardianship proceedings, including initial appointment, modification, or termination to rebut the presumption favoring parental custody by providing clear and convincing evidence of parental unsuitability. If the need for the guardianship and parental unsuitability are established in a prior proceeding, the parent is required to make a prima facie showing of suitability. Upon making the requisite prima facie showing, the guardian has the burden to go forward and prove parental unsuitability. In the absence of an earlier full evidentiary hearing and court determination that parental preference is overcome, the burden remains with a guardian to overcome parental preference. [More Like This Headnote](#)

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**HN11** In the context of guardianship and child custody issues, the appellate court generally defers to the trial court's superior perspective on such issues because of its opportunity to observe and listen to the witnesses at trial. [More Like This Headnote](#)

**COUNSEL:** Frank **Nidey of Nidey** & Peterson, P.L.C., Cedar Rapids, for appellant.

Linda Robbins of Robbins & Pence, L.L.P., Cedar Rapids, for appellee.

**JUDGES:** Considered by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

**OPINIONBY:** HUITINK

**OPINION:**

**HUITINK, P.J.**

The ward, Z.B., was born November 21, 1993. His parents are MOTHER and FATHER. B.B. AND J.B. are Z.B.'s paternal grandparents.

On January 19, 1999, B.B. & J.B. were appointed as Z.B.'s temporary guardians following contested proceedings on the merits of [\*2] their guardianship petition. The resulting order includes the following conclusions:

The Court commends MOTHER'S current efforts to improve her parent skills by attending parenting classes and seeking help from her family. For five years, however, B.B. and J.B. have manifested unwavering love and exercised sound judgment for Z.B.. They have recognized and responded to his physical, emotional and psychological needs. They have undergone significant expense and inconvenience to help MOTHER care for Z.B. and ensure that his relationship with MOTHER was as full and positive as possible. By all accounts, Z.B. has been safe, secure and has flourished under the care of B.B. AND J.B.. They have been responsible for his health and development. Z.B. has developed a close and important bond with B.B. and J.B. as his primary caretakers. It was against Z.B.'s best interest for MOTHER to attempt to unilaterally terminate that relationship, and this Court cannot condone her decision. [Citation omitted.]

In this temporary ruling, the Court does not pass on the extent and relevancy of any learning disability of MOTHER or her ability to care for Z.B. in the past and in the future.

The Court [\*3] concludes that it is in Z.B.'s best interest to restore the status quo and place Z.B. in the primary care of B.B. and J.B. pending final adjudication of this case.

The court stressed that its orders were intended to be temporary and should not control the final resolution of B.B. & J.B.'S appointment as Z.B.'s permanent guardians.

Prior to MOTHER'S August 25, 2000, application to terminate the guardianship, there were no further proceedings concerning either B.B. & J.B.'S appointment or Z.B.'s custody. On February 21, 1999, MOTHER petitioned for a writ of habeas corpus challenging the legality of Z.B.'s placement on constitutional grounds. She also filed a motion to dismiss B.B. & J.B.'S guardianship raising the same constitutional issues. Both the motion to dismiss and petition for writ of habeas corpus were denied. The relevant ruling provides:

The Motion to Dismiss in the present case in effect seeks dismissal of a properly entered Order of a Court with jurisdiction to enter the Order. The Court also notes the Order was not challenged by 179(b) motion or appellate review. The motions to dismiss and for writ of habeas corpus should both be overruled.

As a result, [\*4]MOTHER amended her application to terminate Z.B. 's guardianship to include the following:

The Application for Guardianship in this matter is unconstitutional because the guardianship statute violates MOTHER' S fundamental right to make decisions concerning the care, custody, and control of her son, Z.B. , pursuant to the United States Supreme Court ruling in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (June 2000). The Guardianship Petition and Iowa Code § 633.552 are unconstitutional as applied to this case, under the 14th Amendment of the Constitution of the United States, and Article I, Sections 1 and 9 of the Iowa Constitution.

The trial court, while noting MOTHER'S fundamental liberty interest in parenting Z.B. , determined that the challenged guardianship statute did not suffer from the same constitutional infirmity as the grandparent visitation statute at issue in *Troxel*. The trial court ultimately concluded that Iowa Code section 633.552, when read together with other guardianship provisions, withstood the strict scrutiny test implicated by the fundamental constitutional [\*5] rights at issue and it therefore did not violate either of the constitutional provisions cited in MOTHER'S amended application.

The trial court also resolved the merits of the parties' conflicting custodial claims against MOTHER. The resulting ruling filed August 29, 2001, includes these findings of fact:

Other discrepancies and contradiction in the record are abundant. The Court is satisfied that, if MOTHER enjoyed a presumption that she acts in Z.B.'S best interest and therefore is preferred as a guardian, the presumption has again been rebutted by the evidence presently before the Court the following findings regarding "neglect" only reinforce the court's decision.

....

Even if a showing of some level of neglect was required in this case, the instances in which MOTHER had exclusive care of Z.B. show that MOTHER did indeed neglect Z.B. . For example, Dr. Sevening shared Dr. Marsailles' concerns about neglect because of Z.B. 's conduct in 1998. Z.B. suffered sexual contact by his cousin. He continues to suffer frequent bruises on his face, rashes and urinary difficulties from stress.

Dr. Sevening testified that the facts showed that MOTHER was not attending to all of Z.B. 's [\*6] needs and cast doubt on MOTHER'S parental fitness. According to Dr. Sevening, MOTHER'S neglect of Z.B. is manifested by her:

- . pattern of missing medical appointments;
- . exposing Z.B. to second hand smoke after Dr. Hodge explained the consequences;
- . allowing Z.B. to get burned on a stove when he was only 11 months old;
- . failing to understand basic information about Z.B. only hours after having them explained to her; and
- . allowing Z.B. to observe MOTHER'S HUSBAND'S alcohol consumption and intoxicated behavior.

....

There is an abundance of evidence on which the Court finds that Z.B. was neglected while in the past as well as the contemporary care given and not given by MOTHER.

B.B. & J.B.'s appointment as Z.B.'s guardians was affirmed, and Z.B. was placed in their physical care. MOTHER was granted the right to visit Z.B. every weekend and six weeks during the summer.

As noted earlier, B.B. & J.B.'s appeal from the visitation provisions of the foregoing ruling. In her cross-appeal, MOTHER renews her constitutional challenges to Iowa Code section 633.552 (2001). MOTHER also argues B.B. & J.B. did not prove by clear and convincing [\*7] evidence that she is presently an unfit mother and that the guardianship must be terminated. In the alternative, MOTHER argues the terms of the guardianship are too restrictive and another guardian should be appointed to replace B.B. & J.B. In the absence of relief on cross-appeal, MOTHER requests the court affirm the trial judge's visitation order and grant additional specified holiday visitation.

### **Constitutional Issues.**

As noted earlier, MOTHER contends that Iowa Code section 633.552 is "unconstitutional on its face." Section 633.552 provides in relevant part:

**HN1** Any person may file with the clerk a verified petition for the appointment of a guardian. The petition shall state the following information so far as known to the petitioner.

1. The name, age and post office address of the proposed ward.
2. That the proposed ward is in either of the following categories:

....

b. Is a minor.

**HN2** We review constitutional issues de novo. Stanley v. Fitzgerald, 580 N.W.2d 742, 744 (Iowa 1998). We consider the challenged statute in its entirety and *in pari materia* with other pertinent statutes. State v. Hawk, 616 N.W.2d 527, 529 (Iowa 2000). [\*8]

**HN3** Statutes are presumed constitutional, imposing on the challenger the heavy burden of rebutting that presumption. [Stanley v. Fitzgerald, 580 N.W.2d 742, 744 (Iowa 1998)]. Moreover, if a statute is susceptible to more than one construction, one of which is constitutional and the other not, we are obliged to adopt the construction which will uphold it. Iowa City v. Nolan, 239 N.W.2d 102, 103 (Iowa 1976). A facial attack on a statute, however, implies that it is "totally invalid and therefore, 'incapable of any valid application.'" State v. Brumage, 435 N.W.2d 337, 342 (Iowa 1989) (quoting State v. Duncan, 414 N.W.2d 91, 96 (Iowa 1987)).

Santi v. Santi, 633 N.W.2d 312, 316 (Iowa 2001).

**HN4** Guardianship proceedings concerning conflicting custodial claims of parents and nonparents implicate a parent's fundamental liberty interest in parental autonomy. Reno v. Flores, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1, 16 (1993). The controlling statutory provision must therefore be narrowly tailored to serve a compelling state interest. *Id.*; cf. Hedin v. Gonzales (In re Hedin), 528 N.W.2d 567, 576 (Iowa 1993). [\*9] In Hedin, the court acknowledged that the **HN5** "legal and philosophical basis for such proceedings is the doctrine of *parens patriae*." Hedin, 528 N.W.2d at 571. The doctrine of *parens patriae* "obligates the state to care for the vulnerable and less fortunate." *Id.* (citations omitted.) In Troxel, the court recognized a state's compelling interest under this doctrine to protect children from physical harm and ensure their general well-being. Troxel v.

Granville, 530 U.S. 57, 68, 120 S. Ct. 2054, 2061 147 L. Ed. 2d 49, 58 (2000).

MOTHER', citing *Troxel* and *Santi*, argues section 633.552 is unconstitutional because "it is not narrowly tailored and does not even define what compelling state interest is served." We disagree.

In *Troxel*, the court found Washington's grandparent visitation statute was unconstitutional because it failed to accord any preference to the historical presumption that fit parents act in the best interest of their children. *Troxel*, 530 U.S. at 68-69, 120 S. Ct. at 2061-62, 147 L. Ed. 2d at 58-59; *Santi*, 633 N.W.2d at 319. In *Santi*, the court struck down a similar grandparent statute [\*10] because it failed to afford fit parents the presumption deemed so fundamental in *Troxel*. *Santi*, 633 N.W.2d at 320.

MOTHER's constitutional challenge to section 633.552 is fatally flawed because it fails to consider section 633.552 *in pari materia* with other relevant guardianship provisions which cure the infirmities dictating the outcomes in *Troxel* and *Santi*. Iowa Code sections 633.551 and 633.556(1) <sup>HN6</sup> require proof of necessity by clear and convincing evidence before a guardianship is established. Additionally, Iowa Code section 633.559 recognizes the presumption that fit parents act in the best interest of their children by requiring appointment of parents as guardians if they are qualified and suitable. We, like the trial court, find the challenged guardianship provisions are "narrowly tailored to address the compelling state interest in Z.B.'s well being and presumptively favor the natural parent." We affirm on this issue.

### **Termination of Guardianship.**

<sup>HN7</sup> Actions for the termination of a guardianship are equitable proceedings. *In re B.J.P.*, 613 N.W.2d 670, 672 (Iowa 2000). [\*11] We review equitable actions de novo. Iowa R. App. P. 6.4. In equity cases, especially on matters of credibility, we give weight to the trial court's findings of fact but are not bound by them. Iowa R. App. P. 6.14(6)(g).

<sup>HN8</sup> The parents of a minor child, if suitable and qualified, are preferred over all others as the child's guardian and custodian. Iowa Code § 633.559; *Zvorak v. Beireis*, 519 N.W.2d 87, 89 (Iowa 1994). The best interests of a child are presumptively advanced by custodial placement with a parent. *Zvorak*, 519 N.W.2d at 89 (citations omitted). Any decision to place custody of a child with a nonparent guardian therefore requires the court to make a parental unsuitability determination. Cf. *In re Marriage of Halvorsen*, 521 N.W.2d 725, 729 (Iowa 1994).

<sup>HN9</sup> We have not found, nor have the parties cited, any reported decision that purports to define or give meaning to the terms "qualified and suitable." Prior Iowa cases considering these concepts have generally viewed them in terms of the harmful or detrimental effect of parental custody rather than comparative judgments about the parties involved. [\*12] See e.g., *Zvorak*, 519 N.W.2d at 88-89; *In re Sams*, 256 N.W.2d 570 (Iowa 1977); *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511 (Iowa 1976); *Hulbert v. Hines*, 178 N.W.2d 354 (Iowa 1970); *Garvin v. Garvin*, 260 Iowa 1082, 152 N.W.2d 206 (1967); *Halstead v. Halstead*, 259 Iowa 526, 144 N.W.2d 861 (1966); *Alingh v. Alingh*, 259 Iowa 219, 144 N.W.2d 134 (1966); *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, cert denied, 385 U.S. 949, 87 S. Ct. 317, 17 L. Ed. 2d 227 (1966); *Vanden Heuvel v. Vanden Heuvel*, 254 Iowa 1391, 121 N.W.2d 216 (1963); *McKay v. McKay*, 253 Iowa 1047, 115 N.W.2d 151 (1962); *McKay v. Ruffcorn*, 247 Iowa 195, 73 N.W.2d 78 (1955); *Guardianship of Plucar*, 247 Iowa 394, 72 N.W.2d 455 (1955); *Risting v. Sparboe*, 179 Iowa 1133, 162 N.W. 592 (1917). The gist of these cases is that considerations of parental autonomy and child welfare are not mutually exclusive. When viewed in this light, the best interest of the child is given the intended priority. [\*13] See e.g., *M.R. v. K.R. (In the Interest of K.R.)*, 537 N.W.2d 774, 782 (Iowa



1995) (presumptive right of parental custody relinquished where welfare and best interest of child require nonparent custody) (citations omitted).

**HN10** Because of the fundamental constitutional rights implicated, a nonparent bears the burden of persuasion throughout guardianship proceedings, including initial appointment, modification, or termination to rebut the presumption favoring parental custody by providing clear and convincing evidence of parental unsuitability. *Hedin*, 528 N.W.2d at 581. If the need for the guardianship and parental unsuitability have already been established in a prior proceeding, the parent is required to make a prima facie showing of suitability. *Id.* Upon making the requisite prima facie showing, the guardian has the burden to go forward and prove parental unsuitability. *Cf. id.*; see also *In re Guardianship of Stewart*, 369 N.W.2d 820, 824 (Iowa 1985) (in the absence of earlier full evidentiary hearing and court determination that parental preference was overcome, burden remains with guardian to overcome parental preference).

At the outset we [\*14] highlighted the trial court's January 19, 1999, order which expressly declined to make the requisite findings concerning MOTHER'S parental suitability. That order also expressly provided that the resulting placement was intended to be temporary. Under these circumstances MOTHER continues to enjoy the controlling custodial presumption and B.B. & J.B. have the burden to rebut that presumption with clear and convincing evidence that MOTHER is not a qualified or suitable custodian.

Based on our de novo review of the record we conclude that B.B. & J.B. have met their burden. The findings of fact included in the trial court's August 29, 2001, order enjoy abundant evidentiary support, and we adopt them as our own. While the record contains conflicting evidence on the quality of care MOTHER is capable of providing, the trial court resolved these conflicts against MOTHER. **HN11** We defer to the trial court's superior perspective on these issues because of its opportunity to observe and listen to the witnesses at trial. For the same reasons cited by the trial court, we find Z.B.'s custodial placement with MOTHER would be detrimental to his welfare. MOTHER is neither suitable nor fit to currently serve as Z.B.'s custodian, [\*15] and we accordingly affirm on this issue.

Lastly, we are unable to reconcile the trial court's expanded visitation order with MOTHER'S history of neglecting Z.B. while in her care. The visitation provisions of the decree are therefore vacated. Because of the time elapsed since this court ruled on MOTHER'S termination request, we remand the visitation issue to the district court with instructions to grant MOTHER more limited and supervised visitation excluding overnight visits.

We have considered all of the parties' remaining arguments and find they have no merit or are resolved by the foregoing. The judgment of the district court is affirmed in its entirety.

### **AFFIRMED AND REMANDED.**






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