

**IN THE COURT OF APPEALS OF IOWA**

No. 1-682 / 11-0554  
Filed September 21, 2011

**DUSTIN PICKARD,**  
Petitioner-Appellant,

**vs.**

**AMANDA DURNIN,**  
Respondent-Appellee.

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Appeal for the Iowa District Court for Dubuque County, Alan L. Pearson,  
Judge.

A father appeals the district court order placing the parties' minor child in  
the physical care of the mother. **AFFIRMED.**

Natalia H. Baskovitch of Reynolds & Kenline, L.L.P., Dubuque, for  
appellant.

Leah A. Johnson, Iowa Legal Aid, Dubuque, for appellee.

Considered by Vogel, P.J., Danilson, J., and Schechtman, S.J.\*

\*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**SCHECHTMAN, S.J.****I. Background Facts & Proceedings**

Dustin Pickard and Amanda Durnin are the unwed parents of a female child born in 1998 in Waterloo, when each was sixteen years old. They lived together for about six months after the child's birth. Since that time, the child has been in Amanda's care in Waterloo, presently in a small two-bedroom apartment. Dustin resides in Dubuque, in his girlfriend's house with her friend's young son.

Dustin filed a petition to establish custody, physical care, and visitation of the minor child. A temporary order placed the child in Amanda's physical care, with liberal visitation to Dustin. An attorney, appointed as the guardian ad litem, filed a written report recommending the child's primary care be entrusted to Dustin.

The court granted the parties joint legal custody, with Amanda awarded physical care, subject to liberal visitation privileges for Dustin, including five weeks during the summer. Dustin now appeals.

**II. Standard of Review**

Issues ancillary to a determination of paternity are tried in equity. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). We review equitable actions de novo. Iowa R. App. P. 6.907. When we consider the credibility of witnesses in equitable actions, we give weight to the findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

### III. Physical Care

Dustin admits Amanda has continuously been the child's primary caregiver, but asserts that she has demonstrated a lack of stability by her poor choices of male companions, rendering the child's environment unsafe; that she does not have regular employment and has experienced problems in the past with drug use and criminal activity.

In determining physical care for a child, our first and governing consideration is the best interest of the child. Iowa R. App. P. 6.904(3)(o). Our analysis is the same whether the parents have been married, or remain unwed. *Lambert v. Everist* 418 N.W.2d 40, 42 (Iowa 1998); *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994).

The district court, in frank terms, captured the essence of this dispute: "All parties are entitled to be treated with respect by the court and the legal process. An honest analysis of the case requires the statement that neither party is what we wish for in a parent."

The evidence corroborates that summation. The parties' relationship began with a teenage pregnancy when they were barely fifteen years of age. Immediately, housing and finances were daily concerns. Dustin's tenure as a live-in parent was brief. Each did manage to complete high school. It is undisputed that Amanda has been the primary caregiver, without interruption, since the child's birth.

Amanda has made two other poor choices for male companions, each ending up in prison, one for stabbing her with a pair of scissors, an event

witnessed by the child. She has completed abuse counseling, including developing a personal safety plan. Amanda has used marijuana, received a deferred judgment, participated in substance abuse treatment, and has not used marijuana since mid-2009. She has had a bevy of traffic charges and been unable to pay the fines, thereby losing her driver's license for an extended period, which complicated transportation for her and her child. At the time of trial, however, she had a valid driver's license.

Dustin has had unstable relationships. He was the father of another child, also born when he was sixteen, for whom his parental rights were terminated. Yet another child, now seven, resides with his mother in Dubuque; he is exercising regular visitation with him. Dustin used marijuana when a teen. As the district court found: "The petitioner has demonstrated issues with anger impulsivity." Dustin's live-in girlfriend filed a domestic abuse complaint, to which he pled guilty, received a deferred sentence, and attended a batterer's education program. Dustin needed to leave the house with the child on two occasions (each a visitation) due to heated arguments with his girlfriend, who owns the house. The evidence further indicates that he consumes alcohol more regularly than he admits and in inappropriate amounts, sometimes during visitation. He is employed, but actually underemployed, at a restaurant and pet store, earning around \$20,000 per year.

The good news is the child, now a teenager, has flourished under Amanda's care. She has done very well in school with above-average grades (on the honor roll). She engages in extra-curricular activities and consults a

counselor. Her health is fine. A teacher recently selected one of her poems for publication. She appears content with her surroundings and indicates a strong preference to remain with her mother. Amanda cooperates with arranging visitation with Dustin, including several weeks in the summer.

We often give careful consideration to the trial court's findings in cases of this type. *In re Marriage of Wilson*, 532 N.W.2d 493, 496 (Iowa Ct. App. 1995). Though a de novo review, the trial court as a first-hand observer has a distinct advantage over an appellate tribunal, who needs to rely on a "cold transcript." *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989).

We have considered the factors in Iowa Code § 598.41(3) (2009), as well as those set forth *In re Marriage of Winter*, 223 N.W.2d 165, 166-167 (Iowa 1974). We find that placing the child with Amanda, her mother, will most likely bring her to a healthy, physical, mental, and social maturity. See *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

We fully support the conclusive reasoning of the experienced trial court and are unable to improve upon its profound synopsis:

Balancing all of the competing interests, Amanda Durnin is the best choice for [the child's] physical care provider. In spite of serious concerns about choices and decisions she has made as a person and a parent, she has reared a daughter who has been described, without dispute, as respectful, trustworthy, unselfish and nice. She is successful at school and is relating well to both parents. After being in her mother's care for twelve years, it is unwise to change her care provider when [the child] is in no imminent danger and is not exhibiting behaviors that call into question the appropriateness of remaining in her mother's care.

#### **IV. Evidence**

**A.** Dustin claims the district court should have given greater weight to the report and recommendation of the guardian ad litem, a neutral witness. The court clearly considered his recommendation as it stated “[h]is personal investigation of the parties makes his input particularly valuable.” The court was not required to come to the same conclusion as the guardian ad litem. See *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993) (“The recommendation of an independent custodial investigator may be considered in determining primary physical custody, but it is not controlling.”). We conclude the district court adequately considered the recommendations of the guardian ad litem.

**B.** Dustin also contends the district court should not have admitted or considered the report of the child’s counselor. It was objected to for lack of foundation as the counselor was not present to testify or available for cross-examination. Amanda’s response was that, under the trial scheduling order, Dustin should have objected to any documents on the grounds of foundation three days prior to trial. The district court noted that they were in equity, and the report would be admitted. The district court’s decree mentions the counselor’s report as follows: “[The child] has a counselor as a result of an interim order in this case and he recommends that [the child’s] desire is to stay with the mother.”

In equity, the proper procedure is to admit the evidence, subject to the objection. *In re Estate of Evjen*, 448 N.W.2d 23, 24 (Iowa 1989). The court followed this procedure. Furthermore, while the court commented on the report,

the court did not rely upon this report in reaching its conclusions. On our de novo review, we likewise do not rely upon that written report.

**V. Conclusion**

We affirm the decision of the district court placing the child in Amanda's physical care, it being in her best interest.

**AFFIRMED.**