

IN THE COURT OF APPEALS OF IOWA

No. 7-779 / 07-0159
Filed December 28, 2007

**IN RE THE MARRIAGE OF STEVEN DALE ANDERSON
AND CHRISTINE ANN ANDERSON**

**Upon the Petition of
STEVEN DALE ANDERSON,**
Petitioner-Appellee,

**And Concerning
CHRISTINE ANN ANDERSON,**
Respondent-Appellant.

Appeal from the Iowa District Court for Greene County, William C.
Ostlund, Judge.

Respondent appeals the custody provisions of the parties' dissolution
decree. **AFFIRMED.**

Jennie L. Hughes of Waller & Hughes, Perry, for appellant.

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf & Copeland,
P.C., Jefferson, for appellee.

Heard by Huitink, P.J., Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

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

Steven and Christine Anderson were married in 2004. The parties began living together in 1998, when Christine was only sixteen years old. They have one child, Camden, who was born in 2005. Both parties have a history of substance abuse. Christine had attended a substance abuse treatment center for methamphetamine use prior to the time she began living with Steven. Steven was charged with possession of marijuana in 1998 and 2002. Both parties claim they are no longer using illegal substances.

The parties had a conflicted relationship, and police officers were often called to their home to intervene in domestic disputes. Christine was convicted of domestic abuse in 2003, and given a deferred judgment. Both parties claim the other party was the aggressor in these conflicts.

Steven is employed as a molder for Quinn Machine and Foundry, and has been employed there for three years. He has a close relationship with his family. His grandparents cared for Camden during the day, while the parties were working. Christine is employed as a nurse's aide at Greene County Medical Center. She has received some written reprimands at work. Christine has a relationship with her mother, but does not see her father or brother, who are in prison.

Steven filed a petition for dissolution of marriage on March 27, 2006. Shortly thereafter Christine obtained a protective order under Iowa Code chapter 236. She stated she "was afraid [Steven] was going to do something to me when

I was moving.” She moved into a duplex next to her friends, Jimmy and Joey Ann Godwin, who are brother and sister. Jimmy has a history of criminal activity, and several witnesses testified he was not a good influence on Christine.

On July 26, 2007, Christine filed an application, under Iowa Code section 598.12(1) (Supp. 2005), for the appointment of a guardian ad litem (GAL) for Camden. Steven resisted the appointment due to the cost involved. The district court appointed Christine Sand, an *attorney*, as “guardian ad litem” pursuant to *section 598.12(1)*, and capped her fees at \$500. Sand filed an initial report and was prepared to file a supplemental report. Immediately prior to the trial on November 1, 2006, Steven objected to the court’s consideration of Sand’s reports.

The district court ruled that Sand’s report was to be stricken and removed from the court file, and the supplemental report could not be filed. The court also ruled Sand could not testify as a witness. The court determined Sand’s role was limited under section 598.12, and she could only call and/or question witnesses. Sand did not call any additional witnesses. She questioned Steven briefly about his prior marijuana use. After that she asked to be excused. The court stated, “Sure. Unless you want to stay and participate. No. You’re excused.”

The district court granted the parties joint legal custody of Camden, with Steven having physical care. The court found Steven could provide more stability for the child. Christine was granted visitation on one evening per week, every other weekend, alternating holidays, and five weeks during the summer.

She was ordered to pay child support of \$285 per month. Christine appeals the custody provisions of the parties' dissolution decree.

II. Standard of Review

In this equitable action, our review is de novo. Iowa R. App. P. 6.4. "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them." Iowa R. App. P. 6.14(6)(g).

III. Guardian ad Litem

Christine raises several issues regarding the scope of the duties of Sand in this case. She claims the district court should not have stricken Sand's reports, she should have been allowed to call Sand as a witness, and Sand should not have been dismissed from the trial.

We note there is an inherent inconsistency in the application and order appointing attorney Sand in this case. Christine requested the appointment of a GAL, but cited to section 598.12(1), which provides "[t]he court may appoint an attorney to represent the legal interests of the minor child or children of the parties." The court's authority to appoint a GAL is found in section 598.12(2).¹ The court's order stated, "upon Respondent's request that the Court appoint a Guardian ad Litem for the minor child of the parties, Camden Anderson, as provided for in Iowa Code § 598.12(1), this Court finds that said request is appropriate and should be granted."

¹ Section 598.12(2) provides, "The court may appoint a guardian ad litem to represent the best interests of the minor child or children of the parties."

Section 598.12(1) applies to a child's attorney and provides, "The attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify before the court on matters pertinent to the legal interests of the children." In considering this statute, the supreme court has stated:

Significantly the attorney is to investigate and to secure the testimony of witnesses helpful to the cause of the children. There is no provision that he "report" or that he make recommendations. His findings are not made admissible as evidence in the case. It appears the legislature recognized that in the rancor and bitterness of a custody fight parents might well be insensitive to the best interests of their children. It provided that the children have representation separate and apart from either parent.

In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979). An attorney for a child may not testify as a witness. *In re Marriage of Gaumer*, 303 N.W.2d 136, 138 (Iowa 1981). A report or recommendation of the attorney for a child may be considered by the court only by the agreement or stipulation of the parties. *Joens*, 284 N.W.2d at 329; *In re Marriage of Gravatt*, 365 N.W.2d 48, 49 (Iowa Ct. App. 1985).

Christine argues Sand was actually appointed as a GAL under section 598.12(2). A GAL has more extensive duties, including interviewing the parties, visiting the home, interviewing others providing services to the child, and "[o]btaining firsthand knowledge, if possible, of facts, circumstances, and parties involved in the matter." Iowa Code § 598.12(2)(a). We note, however, that section 598.12(2)(b) provides that the order appointing a GAL must give the GAL authority to interview witnesses, and copy and inspect records. The order in this case did not give Sand authority to do these things. Furthermore, the code section cited by the court in appointing Sand was section 598.12(1). We

conclude Sand was not appointed as a GAL under section 598.12(2); she was appointed to be an attorney for the child, under section 598.12(1).

Even if Sand had been a GAL, her report would still be inadmissible as hearsay. The supreme court has stated, "Unless a social worker's written report is properly before the court by agreement or stipulation, it should not be considered after a proper objection." *In re Marriage of Williams*, 303 N.W.2d 160, 163 (Iowa 1981). *See also In re Marriage of Reschly*, 334 N.W.2d 720, 723 (Iowa 1983) (noting a court-ordered custody investigation by a psychiatrist should not have been considered at any stage of the proceedings because it was hearsay).

We conclude the district court properly did not consider the report filed by Sand or her proposed supplemental report. In addition, the court properly found Sand could not testify as a witness. As to Sand's participation in the hearing, we find Sand asked to be excused, and there was no objection by the parties prior to her departure. Therefore, error has not been preserved on the issue of Sand's participation in the hearing. *See Hill v. Fleetguard, Inc.*, 705 N.W.2d 665, 670 (Iowa 2005) (noting we do not consider issues raised for the first time on appeal).

IV. Physical Care

Christine contends she should have been granted physical care of Camden. She claims she was the primary caretaker for the child during the marriage. She asserts Steven should not be granted physical care because he was abusive to her during the marriage. Christine also claims Steven does not support her relationship with the child.

The primary consideration in physical care determinations is the best interest of the child. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007). We consider the factors found in Iowa Code section 598.41(3). We consider which parent will be more likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). “[T]he successful caregiving by one spouse in the past is a strong predictor that future care of the children will be of the same quality.” *Hansen*, 733 N.W.2d at 697.

In granting physical care to Steven, the district court noted several factors that supported its decision. The court noted Christine had a troubled youth, and began using methamphetamine when she was thirteen years old. The court found both parties were involved in services with social workers, and they had adequate parenting skills. The court found, “[t]he evidence establishes that Christine has surrounded herself and continues to surround herself with people of questionable background.” Christine’s good friend Jimmy Godwin had a criminal history. In addition, Christine had a number of conflicts in her employment and had been reprimanded several times. As to the issue of domestic abuse, the court found, “there are no significant findings.”

The district court carefully considered the evidence, and found Steven could provide a safer and more stable environment. We concur in the district court’s conclusions. Christine has not demonstrated the same level of stability as Steven, and this could be detrimental to the child. In addition, Steven has a better support system with his parents and grandparents for taking care of

Camden. After considering all of the evidence, we affirm the district court's decision placing Camden in the physical care of Steven.

We affirm the decision of the district court.

AFFIRMED.