

IN THE COURT OF APPEALS OF IOWA

No. 8-827 / 08-0004
Filed December 31, 2008

**SALLY ANN ADAMS, n/k/a
SALLY ANN CARLSON,**
Petitioner-Appellant,

vs.

GABRIEL JENE WILK,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson,
Judge.

A mother appeals from the child custody and support provisions of a
district court order. **AFFIRMED.**

Lora McCollom-Sinclair of Skinner, Nielsen & McCollom, P.L.C., West Des
Moines, for appellant.

Carmen Eichmann of Eichmann Law Office, Des Moines, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

PER CURIAM

Sally Carlson appeals from the district court's order granting Gabriel Wilk physical care of their daughter and ordering her to pay child support. We affirm.

I. Background Facts and Proceedings

Gabriel and Sally were never married, but are the parents of Aviva, who was born in January 2004. Prior to Aviva's birth, Gabriel attended birthing classes and "boot camp for dads" classes. Following Aviva's birth, Gabriel and Sally lived together for approximately six months and both contributed to her care. After a physical altercation in June 2004, they ended their relationship. In September 2004, each party filed for a civil protection order based upon the June 2004 altercation alleging that the other had been physically abusive. Subsequently, they entered into a consent order that set forth a physical care and visitation schedule. The consent order expired in October 2005.

In December 2005, Sally filed a petition seeking physical care of Aviva. In January 2006, the district court entered a temporary order granting Sally physical care and Gabriel visitation on Tuesday evenings and alternating weekends. Sally gave birth to her second child, Andrew, in December 2005, and married Andrew's father, Jay Carlson, in February 2006.

Around the time she filed the petition, Sally also began to express concerns that Aviva was not being properly cared for or was being abused by Gabriel or his parents. Numerous professionals became involved with the family, including clinical social workers, psychologists, and Iowa Department of Human Services (DHS) workers. Ultimately, all of the professionals concluded that Sally's allegations were not founded.

On July 11, 2006, although none of Sally's concerns were founded, she began to deny Gabriel visitation. On each occasion Gabriel was scheduled to have visitation, Gabriel attempted to pick up Aviva at Sally's home, but Aviva would not be there. Gabriel reported each instance to the police. Sally also refused to return Gabriel's telephone calls regarding visitation. On September 13, 2006, Gabriel filed an application for contempt based upon Sally's denial of his visitation rights. He later amended this application to request physical care of Aviva. On October 18, 2006, a hearing was held, which included testimony from Gabriel, Sally, Aviva's pediatrician, and a child psychologist.

On October 20, 2006, the district court issued a ruling, stating:

Based upon the Court's observations, the Court finds that Gabriel Wilk is a credible witness The counselors, therapists, and physicians that have dealt with him in this matter have not expressed any concerns regarding his conduct or exercising visitation with Aviva. The Court finds that he has the best interests of his daughter at heart and is not the cause of Aviva's injury or any suspected sexual abuse.

On the other hand, I do not find Sally Adams Carlson to be very credible. Her demeanor while testifying evidenced a person who is obsessed, if not close to hysterical, over this situation. She would not directly respond to questions, but had opinions and theories which she was going to express regardless of what was asked and whether supported by objective fact. Her answers jumped around and often digressed from the point.

It appears to this Court that Sally is attempting to manipulate the situation and twist the facts to support her position and gain her desired result of custody of Aviva and controlling Gabriel's involvement in her life She has seen various therapists/counselors, and when they do not seem to reinforce her perceptions, she desires to look for another. She has become obsessed that her daughter is the victim of sexual abuse, without physical findings to support it.

The district court found that Sally had knowingly, intentionally, and willfully violated the temporary order by denying Gabriel visitation from July 11 to

September 12, 2006, without justification. Thus, Sally was found guilty of contempt and sentenced to twenty-one days in jail, with fourteen days suspended provided Sally complied with future court orders. Additionally, the district court transferred temporary physical care of Aviva to Gabriel, with Sally having visitation Tuesday evenings and alternating weekends. The district court denied Sally's request to modify the temporary order to require supervised visitation with Gabriel. Finally, a child custody evaluation was ordered.

Notwithstanding all the evidence to the contrary, Sally remained concerned that Aviva was being abused. On November 10, 2006, during Sally's first visitation since the transfer of physical custody, Sally subjected Aviva to testing for sexually transmitted diseases; the results were negative. On November 11, 2006, Sally initiated yet another DHS investigation alleging that Aviva had been sexually abused by her father, which resulted in Aviva undergoing a forensic examination to investigate the allegation. The DHS investigator concluded "there was no credible information to indicate that Aviva is not safe in her father's primary care" and "that Sally is trying to prevent Aviva from having a healthy and positive relationship with her father."

In addition to her unfounded concerns, Sally did not provide an atmosphere conducive to co-parenting. On one instance, Sally refused to return Aviva to Gabriel's care following her visitation. Police officers were called to assist Gabriel in securing Aviva's return.

In April and May 2007, a ten-day hearing was held to primarily determine physical care and support of Aviva, which included testimony from Aviva's

pediatrician, two psychologists, a clinical social worker, and three DHS social workers. On October 17, 2007, the district court issued an order, stating:

Ultimately, none of Sally's suspicions regarding Aviva being subjected to physical abuse and/or sexual abuse and/or denial of care were founded. None of the social workers who have investigated Sally's allegations have been able to finally conclude that any of those allegations were founded. Similarly, neither Aviva's pediatrician nor either of the consulting psychologists have concluded that Aviva has been subjected to any kind of abuse or denied care. In fact, Dr. Pottebaum, the psychologist who performed the custody evaluation, recommends that primary physical care should remain with Gabriel because he has the superior parenting ability in that he appears to be able to set aside his differences with Sally, whereas Sally does not.

The district court granted the parties joint legal custody, with Gabriel having physical care and Sally having visitation Thursday evenings and alternating weekends. The district court also set forth a holiday and summer visitation schedule. Finally, the district court ordered Sally to pay child support. Sally appeals asserting that (1) she should have been awarded physical care of Aviva, and (2) her child support obligation was incorrectly calculated.

II. Scope of Review

We review child custody and support orders de novo. Iowa R. App. P. 6.4. However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give considerable weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(o).

III. Physical Care

Sally first contends that the district court should have granted her physical care of Aviva as the district court improperly weighed relevant factors. In determining physical care of a child, the courts are guided by the factors enumerated in Iowa Code section 598.41(3) (Supp. 2005), as well as other nonexclusive factors enumerated in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995).

This is a case where both Gabriel and Sally are capable parents and love their daughter. As both have been active parents, Aviva is bonded to each of them. However, as the district court concluded, under the circumstances, it is in Aviva's best interests that Gabriel be granted physical care. Sally appears to have a genuine, but clearly unfounded, concern that Aviva is being abused. The professionals involved in this case have explained that many of the behaviors Sally believes are indicative of abuse are actually normal behaviors for a child of Aviva's age and circumstances. Yet Sally maintains her belief that Aviva is being abused, which has resulted in Aviva unnecessarily being subjected to examinations and investigations by numerous professionals to explore Sally's unfounded concerns.

Furthermore, the custody evaluation by Dr. Sheila Pottebaum, a licensed psychologist, recommended that physical care of Aviva be placed with Gabriel.

The custody evaluation stated:

Sally's accusations about Gabriel's lack of positive care for Aviva simply do not come with any clear foundation.

...

At this point, multiple professionals have been involved with this family and a solid argument could be made that the repeated evaluations and examinations by professionals are unfair to Aviva.

...

The results of this evaluation support Gabriel maintaining the role of primary caregiver to Aviva. With her father as the primary caregiver, Aviva is much more likely to be given the on-going ability to love each parent freely. It is true that Sally has a substantial number of positive parenting traits, yet her desire to prove Aviva to have been abused has interfered with Aviva's right to have unqualified love for each parent.

Dr. Pottebaum also expressed concerns about inappropriate remarks Sally had made to Aviva. She testified at trial that Gabriel had a superior ability to take care of Aviva's educational, emotional, and physical needs.

Additionally, we note that the district court, on two separate occasions, specifically found Gabriel was more credible than Sally. See *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007) (discussing that both parents were suitable but the district court had the opportunity to observe the witnesses); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (stating that a district court is assisted in making a "wise decision about the parties by listening to them and watching them in person," where an appellate court is "denied the impression created by the demeanor for each and every witness as the testimony is presented"). We defer to the credibility assessments made by the district court and conclude the district court's factual findings were fully supported by the

record. Further, the district court's ruling reflects it considered and weighed the appropriate factors in awarding Gabriel physical care of Aviva. See Iowa Code § 598.41(3). Thus, we affirm the district court's grant of physical care to Gabriel.

IV. Child Support

Sally next contends that her child support obligation was incorrectly calculated. The district court found, and Sally does not dispute, that Sally's earning capacity rather than her actual earnings should be used to calculate her child support obligation. See *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997) (“[W]hen a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying child support guidelines.”); *In re Marriage of Salmon*, 519 N.W.2d 94, 97 (Iowa Ct. App. 1994) (stating that earning capacity rather than actual earnings may be used to calculate a parent's child support obligation if the district court finds that the use of actual earnings would create a substantial injustice or that adjustments would be necessary to provide for the needs of the children or do justice between the parties). However, Sally argues that an earning capacity of \$36,000 is too high.

The relevant factors to consider in assessing earning capacity include employment history, present earnings, and reasons for failing to work a regular week. *Salmon*, 519 N.W.2d at 97. Sally has a bachelor's degree and has taken classes towards a master's degree in public administration. She is now married and stays home with her son and has no intentions on returning to work until her son begins school. The only evidence at trial regarding Sally's earning capacity was that the last time she was employed full time in 2004, she had an annual

income of \$36,000. Upon our review of the record, we conclude that the district court correctly calculated Sally's child support obligation based upon her earning capacity of \$36,000.

V. Attorney Fees

Gabriel and Sally both request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Having considered all of the appropriate factors, we deny the parties' requests for attorney fees. Costs on appeal are assessed to Sally.

AFFIRMED.