

**IN THE COURT OF APPEALS OF IOWA**

No. 2-440 / 11-1711

Filed July 11, 2012

**IN RE THE MARRIAGE OF KIMBERLY KAY LAFFERTY  
AND SCOTT MAURICE LAFFERTY**

**Upon the Petition of  
KIMBERLY KAY LAFFERTY,**  
Petitioner-Appellee,

**And Concerning  
SCOTT MAURICE LAFFERTY,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Jasper County, Gregory A. Hulse,  
Judge.

A father appeals the physical care and property provisions in the parties'  
dissolution decree. **AFFIRMED.**

Jane Odland of Walker, Billingsley & Bair, Newton, for appellant.

Jason S. Rieper of Rieper Law Firm, Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

**EISENHAUER, C.J.**

Scott Lafferty appeals the physical care and property provisions in the parties' dissolution decree. Kimberly Lafferty requests appellate attorney fees. We affirm and award Kimberly attorney fees.

**I. Background Facts and Proceedings.**

Scott and Kimberly were married in 1998 and have two children: A.L., born in 2000, and G.L., born in 2002. In 2011, after trial, the district court dissolved their marriage. Scott's yearly income is \$60,000. Kimberly has health issues, and her imputed income is \$9425. The court granted Scott and Kimberly joint legal custody and placed physical care of the children with Kimberly. The court ordered Scott to pay child support and divided the marital assets and debts.

Scott filed a motion to reconsider requesting additional personal property and a modification of the day for mid-week visitation and the visitation starting time. The court denied this motion and Scott now appeals.

**II. Standard of Review.**

We review the trial court's decision de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). We examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). "However, we recognize that the district court was able to listen to and observe the parties and witnesses." *In re Marriage of Gensley*, 777 N.W.2d 705, 713 (Iowa Ct. App. 2009). Consequently, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009).

### III. Physical Care.

Scott argues the district court should have granted the parties joint physical care of the children. Alternatively, he seeks physical care. Scott acknowledges Kimberly was the primary caretaker during the marriage and the parties have communication issues; but argues Kimberly denied him contact with the children, he is more financially stable, and he can foster the children's relationship with their mother.

Physical care is the right and responsibility to maintain a home for the child and provide for the routine care of the child. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007) (recognizing the district court's opportunity to observe the witnesses). The child's best interest is the overriding consideration. *Id.* Our objective is to place the child in an environment likely to promote healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). If the court determines joint physical care is not appropriate, it must choose one parent to be the physical caretaker and award the other parent visitation rights. *Fennelly*, 737 N.W.2d at 101.

The children met with a social worker to help them with the stress they were experiencing as a result of the pending divorce. The social worker noted: "On February 11, 2011, a letter was sent to Scott Lafferty to let him know I was seeing his children and I would welcome a call from him. I did not receive a phone call from Mr. Lafferty."

The district court discussed the social worker's report:

Generally, both children expressed that they could share feelings easily with Kim but that Scott was difficult because he would get angry and yell at them. She noted that while both children

appeared to love both parties, they were not as comfortable around Scott because of his temperament, and both reported getting behind in their school work when they were at Scott's house. [G.L.] reported to [the social worker] that his dad would sometimes get physical with him and that it scared him. Also, he reported that his dad did not do this to [his sister] or when the [paternal] grandparents were present, and he had concerns about what would happen if they moved out of the grandparents' home. It is also significant that both children reported to [the social worker] that Kim would not say bad things about Scott but that Scott would say bad things about Kim, and she concluded that "it caught them in a loyalty bind which is very uncomfortable for the children."

The district court found Kimberly and Scott "are unable to communicate about the needs of the children. For example, [G.L.] was recommended for summer school, but the parties were unable to agree on how to proceed and thus [G.L.] did not attend." The district court concluded:

Both parties urge the [attendance and school-related problems during the pendency of the action] are the fault of the other party. The parties agree on very little with regard to the children, each wanting to have the final determination in all decisions. Kim and Scott have not been able to cooperate and communicate effectively and certainly do not respect each other's parenting and lifestyles. The court does not expect this situation to change following the entry of the decree. The court concludes shared physical care is not a viable long-term option.

In awarding physical care to Kimberly, the district court ruled:

Kim has provided the lion's share of the children's day-to-day care in terms of arranging health care, education, and attending to their daily needs while Scott has been the primary wage earner. Kim has not been good at managing her finances but appears to be the one the children are most comfortable with . . . . The [social worker's] report concerning Scott's temperament around the children causes the court to have concerns about placing the children in his physical care on a full-time basis. The Court also has concerns based on [Scott's] claim that [Kimberly] has a prescription drug addiction, but exhibits offered by [Kimberly] appear to contradict this claim, and the court does not find sufficient basis for such allegation. The court concludes the long-term best interests of the minor children will be best served by being in their mother's primary care.

On our de novo review of the record, we concur in the district court's decision placing the children in Kimberly's physical care. While we review de novo, we defer to the district court's fact findings and credibility assessment.

*Gensley*, 777 N.W.2d at 713. Specifically:

A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

*In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (quoting *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974)). The district court considered the appropriate factors when it made its physical care determination and provided a well-reasoned explanation for its decision. Because the district court had the opportunity to observe the parties and witnesses and concluded it was in the children's best interests to grant physical care to Kimberly, we decline to reverse that judgment. Therefore, we affirm the district court's physical care award.<sup>1</sup>

#### **IV. Property Division.**

Scott asserts he should be awarded additional items of clothing and personal property. Kimberly argues the court made an equitable division of property and further contends Scott did not present testimony or exhibits at trial identifying and requesting the property he now seeks. After our de novo review, we agree with Kimberly and decline to modify the court's decree.

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<sup>1</sup> We decline Scott's alternate request to modify his mid-week visitation to different days of the week depending on whether the midweek visitation followed the weekend visitation.

**V. Appellate Attorney Fees.**

Kimberly requests attorney fees for this appeal. We have discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). “We consider the needs of the party making the request, the ability of the other party to pay,” and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Kimberly successfully defended the decision of the district court. Her imputed yearly income is considerably lower than Scott’s consistent income. We conclude Scott should pay \$3000 toward Kimberly’s attorney fees.

We affirm the decision of the district court. Costs of this appeal are taxed to Scott.

**AFFIRMED.**