

**IN THE COURT OF APPEALS OF IOWA**

No. 2-558 / 12-0384  
Filed August 22, 2012

**IN RE THE MARRIAGE OF CHRISTINE J. CHERNE  
AND PATRICK T. CHERNE**

**Upon the Petition of  
CHRISTINE J. CHERNE,**  
Petitioner-Appellant,

**And Concerning  
PATRICK T. CHERNE,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Clayton County, Thomas A. Bitter,  
Judge.

Wife appeals the provisions of the decree dissolving her marriage.

**AFFIRMED AS MODIFIED.**

Jenny L. Weiss of Fuerste, Carew, Jeurgens & Sudmeier, P.C., Dubuque,  
for appellant.

Cory R. Thein of Kintzinger Law Firm, Dubuque, for appellee.

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

**EISENHAUER, C.J.**

Christine Cherne appeals the dissolution decree's physical care and rehabilitative alimony provisions. Christine also argues the court's failure to divide the "river bottom" property is inequitable. Both parties seek appellate attorney fees. We modify the "river bottom" property distribution, award Christine appellate attorney fees, and affirm.

**I. Background Facts and Proceedings.**

At the time of the January 2012 dissolution decree, Patrick (fifty-three years) and Christine (forty-five years) had been married fourteen years. They are the parents of three minor children ages ten, nine, and seven.

Patrick lives in the family home near Guttenberg. Patrick's long-term employment for a road construction company involves long hours out of town from approximately April 1 to mid-November. During the construction months, Patrick arrives home on either Friday night or on Saturday. On Sunday evening he drives back to the jobsite. Patrick collects unemployment benefits when he is laid off during the winter months. From 2007 to 2010, Patrick's average annual gross income is \$63,825. Patrick provided the family's health insurance benefits.

Christine graduated from high school and, in 1988, attended a course for accounting/bookkeeping. Immediately prior to the marriage, from 1995 to 1998, Christine worked for a casino as revenue auditor-accounts payable clerk. During the marriage, Christine worked for a few weeks in the 2007 and 2008 winters. Primarily, Christine stayed home to raise the children. Although Christine had numerous abdominal surgeries between September 1996 and January 2008, she acknowledges she is physically capable of working. Christine is currently

unemployed and looking for work in the Guttenberg area. Christine contends she is only qualified to perform a minimum-wage job.

The parties agreed to joint legal custody, but disputed physical care. Both parties have abused alcohol during the marriage. Patrick testified he quit drinking around Thanksgiving 2010. Christine testified she has had periods of abstinence and now only drinks occasionally. The district court found: "It is clear both parties love the children, and the children love both parties. The Court would not hesitate to place the children in the [physical] care of either party—with the only area of concern being alcohol abuse."

The court addressed the absences from the home necessitated by Patrick's employment in its physical care award. Generally, during the time Patrick is working, Christine has physical care during the week and Patrick has visitation every weekend from 9:00 a.m. Saturday to 7:00 p.m. Sunday. Starting the Sunday following Thanksgiving and continuing through March (Patrick's seasonal layoff), joint physical care alternates weekly at 7:00 p.m. Sunday.

The court ordered Patrick to pay \$1293 monthly child support and to continue providing health insurance for the children. The court also ordered rehabilitative alimony, stating:

**ALIMONY:** [Patrick] is hereby ordered to pay spousal support to [Christine] in the amount of \$400 per month for [one year] commencing in February, 2012 . . . . [T]he alimony award herein is considered to be rehabilitative in nature. [Christine] will need time to find employment, and it may take some time for her to work into a job earning a significant wage. However, the Court is confident [she] will do so. [Christine] has held good employment positions in the past, and she is intelligent. [Christine's] mother testified [she] has a "good head on her shoulders," particularly when working with numbers.

The parties stipulated to a division of property, except for a sixteen-acre parcel of agricultural land, the “river bottom.” Christine’s expert, a real estate agent, valued the property at \$171,331. Patrick’s expert, a certified appraiser, valued the property at \$80,000. The court did not set a valuation and awarded the land to Patrick as a non-marital asset, stating:

The only asset in dispute is a sixteen-acre parcel of land which the parties call the “river-bottom” property. Patrick was in the process of [purchasing] this property prior to the marriage, but he completed the purchase shortly after the parties married. He purchased the property with non-marital funds. The property has undoubtedly increased in value during the term of the marriage. However, there was no testimony or evidence suggesting the parties did anything to improve the value of the property. If it appreciated in value, it only appreciated because land values increased.

Christine 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.**

Christine requests she have physical care throughout the year with alternating weekend visitation for Patrick. She contends the district court’s

schedule is unduly disruptive and joint physical care is not appropriate for part of the year due to the parties' inability to communicate and her role as the historical caregiver.

“When considering the issue of physical care, the child’s best interest is the overriding consideration.” *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The ultimate objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 697-99 (Iowa 2007).

Christine is correct in asserting we give consideration to placing children with the historical caregiver. *See In re Marriage of Decker*, 666 N.W.2d 175, 178-80 (Iowa Ct. App. 2003). However, “no one criterion is determinative” and our courts apply a multi-factored test. *Hansen*, 733 N.W.2d at 697. The “fact a parent was the primary caretaker prior to separation does not assure [she] will be the custodial parent.” *Decker*, 666 N.W.2d at 178.

As the district court recognized, Christine and Patrick are both competent and loving parents who are sincere in their desire to care for their children. After our de novo review, we conclude any communication issues do not preclude shared physical care. *See Gensley*, 777 N.W.2d at 715.

In determining physical care, we give careful consideration to the district court’s findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995). We defer to the district court’s impressions of the parties gleaned from observing their testimony because it “had the parties before it and was able to observe and evaluate the parties as custodians.” *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996).

The district court observed the parties and crafted a custody and visitation schedule to accommodate Patrick's out-of-town work schedule. It concluded joint physical care would be in the children's best interests during Patrick's in-town months. The court's provision for "every weekend" visitation during the construction season recognizes the impossibility of Patrick exercising mid-week and Friday evening visitation during those months. Additionally, during the past construction season, Patrick was required to work on eight Saturdays and could return home only after the Saturday work was completed. Accordingly, Patrick's work schedule will require Christine to continue to care for the children on future Saturdays. After our de novo review, we decline to modify the district court's physical care award.

#### **IV. "River Bottom" Property.**

Christine seeks an equitable distribution of this acreage. She argues it is undisputed the purchase of this property was made during the marriage.<sup>1</sup> During the marriage a building was constructed on the property, and Christine asserts the building added value to the land. Further, the parties' joint tax returns show the depreciation of the building and the receipt of rental income from the property during the marriage. Christine notes Patrick's testimony; "I borrowed money off my [premarital] life insurance policy, and I paid it off when I got my inheritance from my aunt," is inconsistent with his own interrogatory answers.

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<sup>1</sup> The parties married in January 1998. The March 1998 sales contract between Patrick and the "river bottom" seller provides for a \$27,000 purchase price, \$4000 down, and the \$23,000 balance paid by February 1, 1999. The contract gives Patrick possession on November 1, 1998, "or after the corn is removed from field." The April 1999 "Closing Statement" lists a \$27,000 purchase price, a \$500 reduction in price due to a title problem, a \$2318 reduction in price for seller's costs, and \$20,182 "Balance Paid to Seller." It further provides: "1099-S Closing Date is November 1, 1998."

At trial, Patrick testified the “river bottom” purchase was “in process” before the marriage, but the purchase occurred during the marriage and the property was deeded to both parties. Patrick did not provide any documentation of an inheritance from his aunt or documentation an inheritance was used to pay for the property or pay off prior life insurance loans for the property. Patrick testified the inheritance checks “got deposited into our joint checking account.” Patrick’s answers to interrogatories, while inconsistent on whether or not loans against the life insurance policies for purchase of the property are current encumbrances, unequivocally state the loans were taken out after the parties were married.<sup>2</sup>

In allocating the parties’ assets and debts, Iowa law does not require an equal division or percentage distribution; rather, the decisive factor is what is fair and equitable in each particular case. *In re Marriage of Russell*, 473 N.W.2d

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<sup>2</sup> Patrick’s December 2011 answers to interrogatories are inconsistent regarding the amounts borrowed for the “river bottom” property and regarding whether life insurance loans for the property’s purchase are current encumbrances or have been repaid. Patrick’s answer to Interrogatory No. 5 lists three life insurance policies as premarital assets. The NY Life policy is valued at \$100,000 and does not reference the “river bottom” property in any manner. The J65 1967 KC Life policy is noted: “11/20/1998 borrowed \$1,000 off this policy to purchase river bottom.” The N86 1976 KC Life policy is noted: “11/20/1998 – borrowed \$2,000 – borrowed off this policy to purchase river bottom.” No current encumbrance is listed on any of these three assets.

In contrast, Patrick’s answer to Interrogatory No. 8, asking for a list of liabilities and any asset the liability encumbers lists the purchase of the “river bottom” property as an *unpaid liability* on the three life insurance policies. The NY Life policy is noted \$23,275 (including interest and premium) “for purchase of river bottom land” and “no payments have been made.” The J65 1967 KC Life policy is noted: “Initial loan was for down payment on river bottom land \$1,028” and further states “no payments have been made.” The N86 1976 KC Life policy is noted: “Initial loan was for down payment on river bottom land \$6,160.28” and further states “no payments have been made.” Patrick’s answer to Interrogatory No. 7 is consistent with his answer to Interrogatory No. 8.

Finally, Patrick’s answer to Interrogatory No. 10 discusses his inheritance from an aunt, stating he received two payments, “approximately \$30,000 over the years 2003-2004. This inheritance was used to pay off the majority of the balance remaining on the loan for the river bottom.”

244, 246 (Iowa Ct. App. 1991). While the cash value on Patrick's life insurance policies accrued prior to the marriage, "[o]ur law . . . does not give credit to a party for the value of property owned prior to the marriage." *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994). Rather, the property Patrick brought into the marriage "is only a factor to consider together with the other relevant factors in determining an equitable property division." *Id.* Our supreme court has instructed: "Nor do we find it appropriate when dividing property to emphasize *how* each asset appreciated—fortuitously versus laboriously—when the parties have been married for nearly fifteen years. Property may be 'marital' or 'premarital,' but it is all subject to division except for gifts and inherited property." *Fennelly*, 737 N.W.2d at 104. Further, inherited property is set aside from the distribution scheme "only if it would not be inequitable." *Brainard*, 523 N.W.2d at 616; see Iowa Code § 598.21(6).

Patrick did not inherit the "river bottom" property; he purchased the property *after* the parties were married and before receiving any inheritance. At the time of purchase, the land was deeded in the names of both parties. Further, Patrick deposited any later-inherited funds into the parties' joint checking account. Finally, Patrick and Christine were married for fourteen years. When dividing property, "the length of the marriage may be an important factor in determining" an equitable property distribution. *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). After our *de novo* review, we conclude an equal division of the "river bottom" property is warranted.

We turn to a valuation of this property and conclude the \$80,000 valuation by Patrick's certified appraiser is a more credible valuation. Christine's expert is



not a certified real estate appraiser, and the comparable properties he utilized are not comparable in either acreage or location. As stipulated by the parties, we find there is no current debt on this property. Accordingly, we conclude Christine is entitled to \$40,000 for her share of the value of the “river bottom” property.

However, when we consider the overall property distribution, the \$40,000 must be further reduced. The only other significant property owned by the parties is the marital residence. The parties agreed Patrick would keep the marital home; however, they disagreed on the home’s valuation. The district court did not make a valuation. We value the property at \$155,000 and accept the parties’ stipulation of \$185,000 in mortgage debt. Christine’s share of the debt exceeding the house’s value is \$15,000 (one-half of \$30,000 debt in excess of house value). Equity requires a reduction of Christine’s \$40,000 share of the “river bottom” property by \$15,000, resulting in a modified property award of an additional \$25,000 to Christine. The decree is modified to order Patrick to pay Christine this amount.

#### **V. Rehabilitative Alimony.**

Christine argues the alimony award is inequitable and requests we extend the \$400/month rehabilitative alimony award from one year to five years. Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). We consider property division and spousal support together in evaluating their individual sufficiency. *Russell*, 473 N.W.2d at 246.

Rehabilitative spousal support is a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. The

goal of rehabilitative spousal support is self-sufficiency and for that reason such an award may be limited or extended depending on the realistic needs of the economically dependent spouse.

*In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). We have modified the property division to have Patrick pay Christine an additional \$25,000. We decline to modify the rehabilitative alimony award.

#### **VI. Attorney Fees.**

Christine requests \$5000 in appellate attorney fees. Patrick also requests attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id.* While Christine was not successful on every issue, she was successful in obtaining a more equitable division of property. Upon consideration of the foregoing factors, we award Christine \$2000 in appellate attorney fees.

Costs are taxed one-half to each party.

**AFFIRMED AS MODIFIED.**