

IN THE COURT OF APPEALS OF IOWA

No. 0-354 / 09-1268
Filed June 30, 2010

**IN RE THE MARRIAGE OF JOANN LOIS BARTEN AND SHAWN ROBERT
COLE**

Upon the Petition of

JOANN LOIS BARTEN,
Petitioner-Appellant/Cross-Appellee,

And Concerning

SHAWN ROBERT COLE,
Respondent-Appellee/Cross-Appellant.

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

The parties appeal from the economic provisions of the decree dissolving
their marriage. **AFFIRMED AS MODIFIED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West
Des Moines, for appellant.

Donald G. Juhl, Nevada, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

TABOR, J.

JoAnn Barten appeals and Shawn Cole cross-appeals from the property division provisions of the decree dissolving their marriage. JoAnn challenges the district court's valuation of her law practice and the award of \$20,000 to Shawn for his labor in remodeling their joint properties. Shawn disputes the value assigned to JoAnn's law office building and the credit granted JoAnn for \$18,000 in equity in the Marshalltown house she purchased before the marriage. We modify the decree in one respect: by increasing the assigned value of the office building from \$120,000 as calculated by the district court to \$150,000 as acknowledged by JoAnn in a sworn affidavit before trial. On all of the other challenges, we affirm the district court's conclusions.

I. Background Facts and Proceedings

JoAnn and Shawn were married on August 17, 2002. They have no children. The parties separated on December 26, 2007. JoAnn filed her petition for dissolution on March 27, 2008. The district court held trial in April 2009 to determine how to dispose of their property and debts. Only JoAnn and Shawn testified.

JoAnn was born in 1970. She has an undergraduate degree from Iowa State University and graduated from St. Louis University law school in 1997. She financed her tuition with student loans, which she is still repaying.¹ After clerking one year with the Missouri Court of Appeals, JoAnn worked at a law firm in Marshalltown. In October of 2005, JoAnn started a solo practice in Ames,

¹ JoAnn paid approximately \$900 per month on these loans during the marriage, which was more than the minimum amount due.

concentrating in immigration law. She testified that she earns approximately \$44,000 per year. In 2007, her law practice took in gross receipts of \$200,328 and she took home \$43,003. JoAnn testified she operates her business at a loss and financed the firm's debts with credit cards. She anticipated a \$15,000 loss for 2008. She enjoys good health.

Shawn was born in 1968. He attended Iowa State University for a few years but did not graduate. He is a licensed journeyman plumber. He has been taking classes in engineering technology through Des Moines Area Community College in pursuit of an associate arts degree in civil engineering. The six credit hours he took per semester were paid for from joint funds. Shawn has worked as the zoning administrator for the City of Nevada since December 2000. He is also the building inspector and chief utility inspector. He earned \$48,000 in 2008. He also is in good health.

In May 2000, JoAnn bought a home in Marshalltown. An appraisal conducted in October 2000 found the home's market value was \$77,000. She refinanced her mortgage at that time for the principal amount of \$59,000. Shawn moved into the home in the summer of 2001. The home was placed in joint tenancy in April 2002 in anticipation of the parties' pending nuptials.

From the time it was purchased, extensive remodeling was performed on the home. JoAnn testified that before Shawn moved in she had completed the remodeling of the first floor of the home. After Shawn moved in, the roof was replaced and the second story was completed. The second story project included adding two bedrooms, a bathroom, and a walk-in closet. The property

was sold in June 2004 for \$94,000. The sale of the home netted \$23,400 in net proceeds, which were used to purchase a duplex in Ames.

The Ames duplex, like JoAnn's Marshalltown home, required work. JoAnn and Shawn lived in the upper level of the duplex while they remodeled the lower level. When the lower level was finished, they moved down into it and remodeled the upper level. The duplex is now used as a rental property, which garners \$550 per month in rent from one unit and \$600 per month from the other unit. In 2008, the property was appraised for \$107,000. In 2009, its assessed value was \$100,300. As of April 2009, the parties owed \$70,611.93 on the mortgage. They also owed a second mortgage in the amount of \$4023.82 at the time of trial.

In June 2006, the parties purchased a residence in Nevada for \$65,000. Again, the parties performed work on the home. At the time of trial, the assessed value of the home was \$71,800. An appraisal by the mortgage lender gave the home a market value of \$77,000. As of April 2009, the parties owed approximately \$59,828 on the mortgage for this property. Shawn had the home appraised for \$68,000.

In April 2007, JoAnn and Shawn bought a building for JoAnn's law practice. JoAnn's parents loaned the parties the money for the \$30,000 down payment. The loan is being repaid periodically at six percent interest. As of April 2009, \$21,855.19 was owed on the loan. The rest of the building was financed by a mortgage for \$117,000, on which the parties owed \$107,975.86 as of April 2009.

Like their other properties, the office building required remodeling. This time the remodeling was not structural, but cosmetic in nature to suit the building for a law practice. The parties opened a \$30,000 line of credit with the bank to pay for remodeling expenses. The principal balance on this line of credit as of April 2009 was \$22,173.02.

A 2007 appraisal of the business building assessed its market value as \$150,000. In 2008, the City of Ames assessed the property at \$112,700. The building contains two suites; one is occupied by JoAnn's law practice, which pays \$1501 per month in rent,² and the other is leased to Story County for \$900 per month. JoAnn pays the \$900 she receives from Story County directly to her father to repay the loan her parents made.

Shawn testified at length about the work he did on the Marshalltown home and the three properties the parties owned in Story County. With regard to the Marshalltown home, Shawn tiled floors, installed countertops, insulated the basement, and added a second story. With regard to the Ames duplex, Shawn installed flooring, added wainscoting, and replaced the roof. He performed this work during evening hours and took some vacation days to complete the remodeling. As for the business building, Shawn testified he took seven or eight days off work in 2007 and spent every weekend in April and every holiday working on it until it was finished just before Christmas of 2007. The work included repainting, hanging doors, and framing work. Shawn also installed a

² The district court found the rent to be \$1501 per month. JoAnn testified the rent was \$1355 and that she had recently realized she was overpaying the rent by approximately \$135 per month. Her pretrial statement lists the rent as \$1501.61. The rental included the taxes and insurance for the entire building.

kitchenette. Shawn estimated he logged approximately 370 hours getting the building ready.

The district court entered its decree dissolving the marriage on June 18, 2009. It awarded JoAnn the rental duplex (valued at \$105,000) and the office building (valued at \$120,000), and awarded Shawn the Nevada home (valued at \$70,000). It valued JoAnn's law practice at \$50,000, plus \$6000 more for equipment and furniture. In making the property division, the court also credited JoAnn \$18,000 for assets brought into the marriage, but noted she benefited substantially from Shawn's contributions to the remodeling projects. Estimating that Shawn expended 1000 hours in the remodeling efforts and valuing his work at twenty dollars per hour, the court credited Shawn \$20,000 for this work. After dividing the remaining assets, the court found a \$30,000 disparity and ordered JoAnn to make an equalization payment to Shawn in the amount of \$15,631.

Both parties filed motions under Iowa Rule of Civil Procedure 1.904(2). Shawn argued there was no evidence that JoAnn should be credited for \$18,000 brought into the marriage, that the office building should have been valued at \$150,000, and that he should be reimbursed for one-half of the funds he expended for the parties' joint obligations while the action was pending. JoAnn's motion addressed funds in a joint bank account and an account in which the parties kept rental security deposits. In its July 7, 2009 order, the district court enlarged its findings and conclusions slightly, but did not significantly alter the decree. JoAnn filed a notice of appeal and Shawn cross-appealed.

II. Standard of Review

We review dissolution of marriage proceedings de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.904(3)(g). We review the district court's decision regarding attorney fees for an abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

III. Analysis

Iowa law requires that marital property be divided equitably between the parties. Iowa Code § 598.21(5) (2007). This is not to say that Iowa courts require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996).

A. Valuation of JoAnn's law practice.

JoAnn first contends the district court erred in placing a value of \$50,000 on her law practice. Courts confront difficulties in assigning a value to professional practices because their incomes flow almost exclusively from the efforts of the professional and their worth depends on continual professional performance. *In re Marriage of Hogeland*, 448 N.W.2d 678, 681-682 (Iowa Ct. App. 1989).

JoAnn testified her practice had no value, reasoning: “It’s essentially like a job for me.” On the other extreme, Shawn valued the practice at \$200,000, based on an estimation of his wife’s gross receipts and his own Internet research regarding how to calculate the value of law firms. Only the parties testified, so the record includes no expert opinion regarding the value of the law practice.

In 2006, JoAnn’s practice took in gross receipts of \$165,002 and reported business income for that year of \$7804. In 2007, the practice had gross receipts of \$200,328 and reported business income of \$8102. Although she had not yet filed her 2008 taxes at the time of trial, the practice likely generated gross receipts in excess of \$200,000 that year as well.

From the practice’s gross earnings, JoAnn paid rent for the office of \$1501 per month and drew \$1730.28 every two weeks for her salary. JoAnn received a three percent matching contribution to her retirement plan, disability, and life insurance. She also employs a staff of three part-time translators, two bookkeepers, two case managers, and a legal secretary. She testified her typical payroll is around \$6000 every two weeks. Her tax returns also list approximately \$20,000 in depreciable assets.

The district court valued JoAnn’s law practice at a total of \$56,000 by identifying two assets: the fixtures in the law office and JoAnn’s earnings. The court acknowledged: “[T]here is no magic formula to determine the valuation of this business. It is very dependent upon the dedication and the hard work of the petitioner.” The court recognized that JoAnn’s clients might be transitory and “would not represent consistent repeat business,” but noted a scarcity of lawyers

practicing immigration law and the likelihood the demand for such services would grow given the “direction of our ethnic composition.”

JoAnn takes issue with the district court’s consideration of her future earning capacity and the “good will” of her professional practice in reaching its valuation of the business, minus fixtures, at \$50,000. The Iowa Supreme Court considered whether good will could be calculated into the value of a law practice in *Bump v. Stewart, Wimer & Bump, P.C.*, 336 N.W.2d 731, 736-37 (Iowa 1983). While finding that the good will of a law practice was not an asset which could be sold or transferred for consideration, the court acknowledged “instances may exist in which good will of a law practice may be properly valued” and cited divorce cases from other jurisdictions involving property settlements. *Bump*, 336 N.W.2d at 737. Contrary to JoAnn’s position on appeal, Iowa courts are not prohibited from considering good will or future earning capacity when determining the value of a professional practice.

In *Hogeland*, we disagreed with the trial court’s decision to treat good will as an asset in determining the value of a dental practice. *Hogeland*, 448 N.W.2d at 681. In that case, however, the dentist’s future earning capacity—which is a factor to be considered in distributing property (Iowa Code § 598.21(5)(f))—was calculated into the award of alimony. *Id.* Similarly, in *In re Marriage of Bethke*, 484 N.W.2d 604, 607-08 (Iowa Ct. App. 1992), we rejected a husband’s valuation of his wife’s medical practice which attributed considerable value to good will. Instead, we considered the wife’s projected future earnings in addressing the husband’s claim for alimony. *Bethke*, 484

N.W.2d at 608. Because no alimony was at issue here, the district court properly considered JoAnn's earning capacity as an immigration attorney in setting a value for the law practice.

Other jurisdictions have determined the value of a law practice by considering the existence and value of the following: (1) fixed assets, including cash, furniture, equipment, supplies, and law library; (2) other assets, including accounts receivable, costs advanced with due regard to collectability, work in progress partially completed but not billed as receivable, and work completed but not billed; (3) goodwill of the practitioner in his or her business as a going concern; and (4) liabilities of the practitioner related to his or her business. *In re Marriage of Davis*, 476 N.E.2d 1137, 1140 (Ill. Ct. App. 1985) (citing *In re Marriage of Lopez*, 113 Cal. Rptr 58 (Cal. Ct. App. 1974)).

Like the district court, we are not persuaded by JoAnn's argument that her practice is without value. JoAnn reported gross receipts in excess of \$200,000 and drew an annual income of \$44,000. She maintained a significant payroll for the law firm. The record indicates the law practice was returning a small corporate profit. The district court pointed to a trial exhibit that identified furniture, fixtures, machinery and equipment with a total depreciable value of approximately \$20,000. Although inexact, the district court's decision to assign a value of \$56,000 to JoAnn's law practice is within the permissible range of evidence. See *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) ("A trial court's valuation of an asset will not be disturbed when it is within the permissible range of evidence.").

B. Credit for Shawn's remodeling work.

JoAnn next contends the court erred in crediting Shawn \$20,000 for the remodeling work he performed on the parties' joint properties.

On the issue of Shawn's efforts in remodeling, the court concluded:

[T]he Court cannot overlook the fact that JoAnn is the beneficiary of very significant contributions made by Shawn in the restoration and remodeling of all the projects, including her present law office. It is the Court's opinion that the properties would never have yielded profits, would not have led to the series of investments, and it is likely that JoAnn would not be in her present business location absent Shawn's labors. Shawn stated that he had expended at least 370 hours on the law office project alone. Taking into consideration the significant work done on the Marshalltown property and the duplex property, the Court has estimated that it is likely that 1,000 hours were expended by Shawn. The Court has modestly assigned the amount of \$20 per hour, giving him a credit of \$20,000.

JoAnn argues that neither the number of hours the court assigned to the work Shawn performed nor the hourly rate was supported by the evidence. JoAnn focuses on Shawn's testimony he took "seven or eight days total" during 2007 to work on the duplex as evidence that he failed to prove he worked 370 hours on the project. When viewed in context, Shawn's reference to taking seven or eight days off work to renovate the office building was in addition to other evenings, weekends and vacation days he spent remodeling. Moreover, Shawn performed even more extensive work on the duplex and the Marshalltown home. As the district court noted in its order on the parties' rule 1.904(2) motions, "[I]f the Court were to reassess the respective contributions made by the parties, it would likely find that its previous conclusion regarding the respondent's efforts may have been conservative." Shawn was not required to give an

accounting of the hours he spent remodeling the properties. See *In re Marriage of Miller*, 552 N.W.2d 460, 464 (Iowa Ct. App. 1996) (“We reject the notion a spouse must provide detailed documentation to support testimony concerning any household duties or other work.”).

JoAnn argues that even if this court finds the \$20,000 credit is supported by the evidence, it was inequitable for the district court to credit Shawn for his labor. She claims the district court double counted Shawn’s contributions because JoAnn was awarded the net equity in the duplex and then \$20,000 in “sweat equity” was deducted from Shawn’s overall property value. She believes the court should have *either* lowered the net value of the duplex to \$10,364 (\$30,364 minus \$20,000) while setting off \$20,000 to Shawn *or* kept the \$30,364 figure and not set off \$20,000 to Shawn, but not both. We disagree.

The district court wished to recognize Shawn’s extraordinary contribution of skilled labor to three of the couple’s real estate endeavors. It did so by treating his \$20,000 worth of “sweat equity” as a setoff against the property awarded to him. Although JoAnn challenges the sufficiency of evidence to support the \$20,000 figure and the fairness of awarding the credit to Shawn, she does not argue that the district court lacked a legal basis to recognize Shawn’s labor as a freestanding setoff. Accordingly, we do not need to reach that issue. Crediting Shawn for the work he did on the parties’ property, which enabled them to accumulate additional properties, was not inequitable. See *In re Marriage of Steenhoek*, 305 N.W.2d 448, 453-454 (Iowa 1981) (holding a party’s contribution to net worth by labor is one factor to consider when dividing marital property).

C. Value of the law office building.

Shawn contends the court erred in valuing the office building at \$120,000.

He asserts the building has a value of at least \$150,000.

In the decree, the district court made the following conclusion:

Barten Law Office's valuation is subject to some speculation. The parties purchased the property for over \$150,000. It is assessed for \$100,300 and appraised for \$107,000. The Court concludes that while the property market is down, the valuation lies somewhere in the middle. The Court also factors in the improvements from the date of the purchase. The property draws a rental income and appears to be cash flowing at this time. The Court values it at \$120,000.

Shawn argues the district court erred in its calculations because it looked at the assessment and appraisal for the duplex instead of the office building in calculating the value of the office building. It does appear the district court mistakenly referenced the assessment and appraisal for the Nevada duplex rather than the Ames office building in the decree. The office building was appraised in 2007 at \$150,000. The City of Ames assessed the building at \$112,700 in 2006, 2007, 2008, and 2009. The parties purchased the building for \$148,000 in 2007 and then made more than \$20,000 in improvements to the property. The property was generating rental income at the time of trial.

Shawn contends the improvements to the property were not considered in the city's assessments. JoAnn counters that despite the improvements, the value of the property has decreased because the parties purchased it at the height of the real estate market, which has since declined. JoAnn did not present any evidence at trial concerning the trend in Ames property values since 2007.

The district court undervalued this commercial property. In JoAnn's affidavit of financial status completed on March 17, 2009, she recited the value of the law office as \$150,000. Her new reliance on the assessed value at the April 23, 2009 trial was self-serving. We believe the bank appraisal of \$150,000 most accurately reflects the value of the office building. Our \$30,000 change in the valuation of the office building from the district court's decree requires JoAnn to make an additional equalization payment of \$15,000 to Shawn.

D. JoAnn's credit for equity brought into the marriage.

Shawn next contends the court erred in crediting JoAnn \$18,000 for equity in the Marshalltown home that she allegedly brought into the marriage.

A premarital asset is not otherwise set aside like gifted and inherited property. Instead, it is a factor to consider, together with all the other circumstances, in making an overall division. Its impact on the ultimate distribution will vary with the particular circumstance of each case. Furthermore, in considering accumulations to premarital assets, we do not limit our focus to the parties' direct contributions to the increase. Instead, we broadly consider the contributions of each party to the overall marriage, as well as all other factors. Financial matters make up but a portion of a marriage, and must not be emphasized over the other contributions made to a marriage in determining an equitable distribution.

Miller, 552 N.W.2d at 465 (citation omitted).

JoAnn testified that when she refinanced the Marshalltown residence in October 2001, her mortgage was \$59,000 and the house was appraised at \$77,000. On this basis, the district court found she had \$18,000 in equity as of that time. The district court called this amount "seed money," though the evidence does not establish that JoAnn invested \$18,000 of her own money as a down payment on the house prior to the parties' marriage. Nevertheless, a

reasonable basis exists in the record to credit JoAnn for the improvements made to the Marshalltown home prior to her relationship with Shawn.

E. Appellate Attorney Fees.

Finally, both parties request an award of their appellate attorney fees.

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (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. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

Here, the parties earn approximately the same amount, the property distribution was equitable, and both parties appealed. We decline to award either party appellate attorney fees. Costs should be assessed equally to both parties.

IV. Conclusion.

We affirm the district court's valuation of JoAnn's law practice, the credit awarded Shawn for his labor, and the \$18,000 credit given to JoAnn for equity in the Marshalltown home. We modify the district court's valuation of the office building from \$120,000 to \$150,000. Accordingly, JoAnn's equalization payment is increased by \$15,000 for a total payment of \$30,631.

AFFIRMED AS MODIFIED.