

**IN THE COURT OF APPEALS OF IOWA**

No. 6-375 / 05-1257

Filed June 28, 2006

**IN RE THE MARRIAGE OF JODY L. KEENER  
AND CONNIE H. KEENER**

**Upon the Petition of**

**Jody L. Keener,**

Petitioner-Appellant/Cross-Appellee,

**And Concerning**

**Connie H. Keener,**

Respondent-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Linn County, Marsha Beckelman,  
Judge.

The parties appeal and cross-appeal the district court's order dissolving  
their marriage. **AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.**

Robert F. Wilson, Cedar Rapids, for appellant.

Daniel L. Bray and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City,  
for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

**VOGEL, P.J.**

Jody Keener appeals and Connie Keener cross-appeals from the district court's order dissolving their marriage and dividing their marital property. We affirm the district court's order in part, modify it in part, and remand for further proceedings.

**I. Background Facts and Proceedings.**

Jody and Connie married in 1992, one day after incorporating Alpha International Inc., a company dealing in the manufacture and sale of toys. Over the course of the marriage, Alpha acquired many assets and several subsidiary companies. While it appears from the record that Jody was the primary management force behind Alpha, Connie was the sole-shareholder of the corporation, and all financial decisions required her consent. Included in Alpha's acquisitions over the course of the marriage were the manufacturing equipment and sale rights to several notable toy brand names, such as Buddy L, Power Drivers, Crocodile Mile water slides, Coleco, Grand Champions, and Big Wheel. Jody and Connie were also able to acquire many parcels of real estate over the years.

Jody filed the petition for dissolution in July 2002, and trial was held in March and April 2004 on the contested issues of property valuation and division. The district court issued its dissolution decree and order dividing the marital property in March 2005. The court distributed three closely-held corporations, numerous parcels of real estate, vehicles, bank accounts, and personal property. The distribution left Jody and Connie each with approximately \$11 million dollars worth of assets, with over \$6 million of Jody's allocation to be paid by Connie in

\$600,000 annual installments until satisfied. The parties each filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2) motions to enlarge on several issues, most of which were denied, and now Jody appeals and Connie cross-appeals from the district court's property valuation and distribution.

## **II. Scope and Standards of Review.**

We review dissolution cases de novo. *In re Marriage of Sullins*, \_\_\_ N.W.2d \_\_\_, \_\_\_ (Iowa 2006). "Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses." *Id.* (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003)). We will not disturb the district court's valuation of assets if it is within the permissible range of the evidence. *Id.* (citing *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973)).

## **III. Property Distribution.**

Parties to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Rebouche*, 587 N.W.2d 795, 801 (Iowa Ct. App. 1998). Both Jody and Connie have asserted errors by the district court in distribution of the marital property, detailed as follows.

### **A. Valuation of Alpha International and its Subsidiary Companies.**

Connie argues that the district court erred when it followed the testimony of Jody's expert, Wayne Brown, and valued the net worth of Alpha at \$15,169,791.00. Like many cases involving the valuation of a corporation, this was a classic battle of the expert witnesses. Each party retained financial experts to value the assets of Alpha to issue reports and testify at trial.

Connie's expert, Shannon Shaw, C.P.A., issued an initial report and opinion in April 2003 that the net worth of Alpha was \$9,035,000.00, which was based on an assets approach and included a fifteen percent discount for lack of marketability as a closely-held corporation. He assessed Alpha's worth as a going concern considering it would stay in operation as opposed to being ordered to dissolve and liquidate. Shaw's initial opinion gave no value to Alpha's intangible assets (e.g. intellectual property rights, etc.) because they produced no positive cash flow for the company in its current operations. Shaw later amended his opinion in October 2003 to a net worth of \$4,750,000.00. He reduced the value in light of litigation involving Alpha. From the original \$9.035 million figure, Shaw testified that he deducted \$937,000.00 for the Grand Champion line of products because a competitor of Alpha's was producing the same product and may require Alpha to defend its intellectual property rights by litigation. He also testified that he further deducted a sum of \$2.89 million to "book" as a contingent liability, a settlement offer by the plaintiff in a suit against Alpha, although no agreement had been reached. This dropped Alpha's value to \$6,819,922.00 that Shaw further reduced by increasing the "lack of marketability" percentage deduction from his original fifteen to thirty percent, which he testified he believed was appropriate due to the high level of litigation Alpha was currently engaged in or facing in the near future. Shaw's final valuation of Alpha's net worth was \$4,773,945.00.

Jody's expert witness, accredited senior appraiser Wayne Brown, also evaluated the net worth of Alpha using the assets approach. Brown testified at trial that he valued Alpha's net assets at \$10,169,791.00 without a deduction for

lack of marketability. Brown testified that he believed Shaw's thirty percent deduction was excessive in light of using an orderly liquidation premise that takes into account a favorable market environment, whereas he would not take any initial marketability discount. He also did not consider any contingent liabilities in his valuation based upon Alpha's litigation due to a footnote in Shaw's initial full audit report stating that the

proceedings are, in the opinion of management, ordinary routine matters incidental to the normal business conducted by the Company. In the opinion of management, such proceedings are not expected to have a material adverse effect on the Company's consolidated financial position, results of operations, or cash flows.

Brown stated that he believed a more appropriate reduction for lack of marketability to take into account the litigation considerations may be to reduce the overall worth by five to ten percent instead of Shaw's thirty percent and booking such speculative contingent liabilities. Brown also disagreed with Shaw's opinion that Alpha's intangible assets have no value, based upon the open-market sale of two brands owned by Alpha's subsidiary company, Empire Hong Kong. The brands, "Buddy L" and "Power Drivers," sold for \$7.7 million prior to trial, and Jody also testified that Connie negotiated to sell the Grand Champion brand and inventory for \$7 million after the dissolution. Although he could not issue a firm opinion on the matter because he had not received Empire's financial documentation to review, Brown estimated that the "hundreds" of other brand names and their associated intellectual property rights would add \$20 million to \$30 million worth of intangible asset value to Alpha's overall net worth. This would increase Alpha's net worth to the \$30 million to \$40 million range.

The district court evaluated the credibility of each party's expert and found Shaw's testimony utterly lacking in credibility due to his deductions for such speculative matters as the contingent liabilities and lack of marketability, as well as his total disregard for the worth of intangible assets. The court found Brown's testimony and calculations more reliable and credible than Shaw's. The dissolution order set the net worth of Alpha's tangible assets at \$10,169,171.00 and intangible assets at \$5,000,000.00, for a total net worth of \$15,169,171.00. These figures are supported by the evidence adduced at trial and within the permissible range of the experts' testimony. We defer to the district court's credibility determinations, in finding Brown's appraisal more convincing. The value assigned by the court for the intangible assets was also within the range of the evidence, due to the undisputed record regarding sale of two brands for \$7.7 million and Brown's testimony regarding the possible worth of Alpha's many other intellectual properties. While Connie asserts the district court's valuation should be reduced by nearly one million dollars for Jody's pre-marital judgment and child-support debts that were paid during the marriage, these debts were paid by income from Alpha generated as a result of both parties' efforts and not Connie's own personal funds. We affirm the district court's valuation of Alpha's net worth.

**B. J. Lloyd International and Subsidiaries Valuation.**

Connie also contends that the district court erred by valuing J. Lloyd at \$1 million, arguing that Jody's alleged manipulation of discovery on this company should have so negatively impacted his credibility that her expert's opinion should be adopted wholesale. We find no support in our case law for this proposition, nor does Connie direct us to such. While Connie's expert, Shannon

Shaw, testified that he valued J. Lloyd using an income approach at \$3,567,000.00, this was based upon a rumored \$93 million in sales to the company, the company's ability to earn money from intangibles, and other apparently mistaken assumptions in Shaw's information. He testified that a revised value calculation based upon a December 2003 balance sheet determined a worth of \$1.3 million. Jody's appraiser, Ronald Nielsen valued the company using a net asset approach at \$112,000.00 with a ten percent discount for lack of marketability. The district court set the valuation at \$1 million. We find no reason to disagree with this figure, which is within the permissible range of the evidence provided by both experts.

**C. Alpha Int'l Division and Distribution to Jody.**

Jody's issues on appeal center on the district court's distribution of over \$6 million in annual installments to equalize the allocation of Alpha. The district court ordered annual \$600,000.00 installment payments by Connie to Jody annually until the distribution of \$6,780,650.00 is satisfied. Connie's rule 1.904(2) motion was granted in part so that "judgments for the periodic payments, as ordered by the court, will become judgments of record as the periodic payments (or installments) are due. Petitioner shall be paid judgment interest on due and unpaid installments." Jody's rule 1.904(2) motion to enlarge requesting interest and an equitable lien to secure the distribution was summarily denied by the district court.

We agree with the district court's stated intentions in the decree to "equalize the property division," but conclude that not allowing interest from the date of the decree on such a large distribution spread over ten or more years is

not equitable to Jody. We agree with Jody's argument that not allowing interest on this distribution would deprive him of the equitable value of the property division because future dollars are not worth as much as present dollar values. While our appellate courts have upheld denial of interest on property-division payments in the past, we conclude this case is distinguishable due to the enormity of the award and length of repayment period, as the "determinative factor is what is fair and equitable in each particular circumstance." *In re Marriage of Hoak*, 364 N.W.2d 185, 194 (Iowa 1985). See also *In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979) (stating "in evaluating the method chosen by the court to accomplish its objective, we recognize that equality need not be achieved with 'mathematical exactness.' However, while we agree the trial court's objective was equitable in the present case, we are convinced the means of achieving it was not." (citations omitted)). Compare *Hunt v. Kinney*, 478 N.W.2d 624, 625-26 (Iowa 1991) (holding that Iowa Code section 535.3 requiring interest on judgments does not require interest from date of decree to maturity of judgment fourteen years later on \$4000 property division on marital home, equalizing distribution because the original decree was silent as to interest; and further not awarding interest as marital home was a non-income producing asset awarded to the party with custodial care of the minor children); *In re Marriage of Pittman*, 346 N.W.2d 33, 37 (Iowa 1984) (rejecting inequity of interest on \$3000 payment as the overall property division was equitable even with no interest); *In re Marriage of Briggs*, 225 N.W.2d 911, 913 (Iowa 1975) (holding that failure to allow interest on deferred annual payments was considered by the trial court and was a factor in fixing the \$50,000 amount

awarded); *In re Marriage of Richards*, 439 N.W.2d 876, 883 (Iowa Ct. App. 1989) (approving a long duration non-interest bearing property division payment).

In this case, we are dealing with a property distribution of an income producing asset, indeed, the company has proven very successful until the breakdown of the marital relationship. The future success of the company rests entirely in the management hands of Connie. Jody should not have to wait for years to enjoy his share of the success of the company which grew in large part to his business acuity. Therefore, we conclude that the equalizing cash payments to Jody from Connie should bear annual interest from the date of the decree at a rate set by Iowa Code sections 535.3(1) and 668.13(3) (2005), because Jody will otherwise be inequitably deprived of the use of his payments equalizing the property division. See *Hunt*, 478 N.W.2d at 625 (citing 45 Am.Jur.2d *Interest and Usury* § 58 at 57 (1969) (stating a claimant has no right to interest unless he has been deprived of the use of the money)).

We also conclude that it is inequitable to deny Jody's security in the property division by not granting an equitable lien against Alpha and its corporate assets. We may award an equitable lien when warranted by general equity considerations. *Nachazel v. Mira Co.*, 466 N.W.2d 248, 253 (Iowa 1991). A statutory lien requires a final judgment in amount certain, and in the absence of these conditions, the judgment does not constitute an automatic lien on property. *In re Marriage of Hettinga*, 574 N.W.2d 920, 923 (Iowa Ct. App. 1997). A judicial or equitable lien, however, is an automatic lien on property even if the predicate conditions for a judgment lien do not exist. *Id.* (citing *Federal Land Bank of Omaha v. Boese*, 373 N.W.2d 118, 121 (Iowa 1985)). A lien to secure Jody's

distribution of Alpha is even more appropriate in this situation in the face of Connie's statements on appeal that Alpha is "financially troubled." As stated, the future direction of Alpha rests entirely in the hands of Connie, and Jody should not be required to let his share of marital assets be at risk by being at the mercy of Connie's future business decisions. Therefore, we reverse the district court's denial of Jody's request for interest on the property distribution payments and an equitable lien against Alpha International, Inc. and its corporate assets. We remand to the district court for entry of an order consistent with the holdings of this opinion.

Costs of this appeal are assessed to Connie.

**AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.**