

IN THE COURT OF APPEALS OF IOWA

No. 7-464 / 96-1640

000157

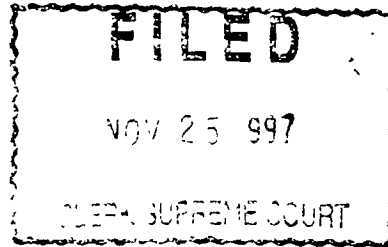
**IN RE THE MARRIAGE OF FRANK F. GRAZIANO
AND JESSIE M. GRAZIANO**

**Upon the Petition of
FRANK F. GRAZIANO,**

Petitioner-Appellant,

**And Concerning
JESSIE M. GRAZIANO,**

Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Robert D. Wilson,
Judge.

Petitioner appeals various economic provisions of the parties' dissolution
decree. **AFFIRMED AS MODIFIED.**

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for
appellant.

Roger L. Hudson, Ronald L. Mountsier, and Stacey N. Warren of Smith,
Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler, Des Moines, for appellee.

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

MAHAN, J.

Frank Graziano appeals the terms of the decree dissolving his marriage to Jessie Graziano. Frank challenges: (1) the property division; (2) the alimony award; (3) the requirement that he maintain health insurance for Jessie; and (4) the district court's award of attorney fees.

Frank and Jessie married on October 25, 1960. The parties had been married thirty-four years at the time Frank filed the petition for dissolution. Frank and Jessie have no children from their marriage, but Jessie has two adult children from a previous marriage.

Frank was fifty-nine years old at the time of the divorce proceedings and president of Graziano Brothers, Inc. Jessie was seventy years old and recuperating from a stroke that has left her unable to speak. After her stroke, Jessie moved to be with her daughter in Florida who could spend more time helping Jessie recover. Shortly after Jessie left, Frank moved in with Cindy Cox.

In its decree of dissolution, the district court found Frank's financial disclosures had been dishonest and a failure to comply with the Iowa Code. The district court awarded Jessie twenty of the forty shares in Graziano Brothers, one-half of the 1995 subchapter S distribution relating to that stock, one-half of a Norwest Bank account, \$1500 per month in permanent alimony, and \$7500 in attorney fees. The court concluded Frank and Jessie were equally responsible for a \$15,000 loan made to them by Frank's father. Last, the court required Frank to maintain health

insurance for Jessie and to assume responsibility for her unreimbursed medical and dental expenses. We affirm as modified.

I. SCOPE OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. PROPERTY DIVISION. The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997). The courts are not bound to achieve a precisely equal division in awards of marital property. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa App. 1997). The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1995). *Id.*

Frank contends his father gave him forty shares of stock in Graziano Brothers, Inc. as gifts throughout the marriage, with nearly one-half gifted in the last six months of the marriage. Frank believes these shares should not be counted as marital assets when making the property settlement. *See In re Marriage of Steele*, 502 N.W.2d 18, 20 (Iowa App. 1993) (generally, gifts or inheritances received by a party during the

marriage are not subject to a property division unless failure to do so would be inequitable to the other party). In the alternative, Frank argues we should not give Jessie the shares; instead we should award her the monetary value of the shares which he sets at \$925 per share for a total of \$18,500.

We find these shares were not gifted property; they were earned by Frank for his years of service to the company. Thus, the shares are marital property and are to be divided between the parties as any other marital property. *See In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa App. 1996) (no true intent of the gift donor can be ascertained from the evidence presented). Even if we were to find Frank's father gifted the shares to him, we would find Jessie is entitled to the shares given the length of the marriage, Jessie's contribution to the marriage and the business, and Frank's conduct. *See* Iowa Code § 598.21(2) (1995); *see also In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa App. 1996).

We find Jessie is entitled to the value of one-half of the Graziano Brothers stock. The trial court's decision to award the stock to Jessie would superimpose a business relationship over the obviously troublesome relationship of these former spouses. *In re Marriage of Lundtvedt*, 484 N.W.2d 613, 615 (Iowa App. 1992). The district court did not place a value on the shares when it split them between the parties; thus we must do so now.

The general rule is that stock should be valued at market value if it can be reasonably ascertained. *Steele*, 502 N.W.2d at 21. However, the valuation of a

closely-held corporation is difficult, and the market value of stock in a closely-held corporation can rarely be ascertained. *Id.* Because of the difficulty of the task of valuation, the law provides much leeway. *Id.* The district court found the value of the business to be between \$90,000 and \$606,158.35. Alan Tarbell, Graziano Brothers' certified public accountant, testified the value of the company was approximately \$370,000. One sixth of this amount equals \$61,667. When multiplied by 1.25 to represent the 125% referred to in the shareholder agreement, the shares are worth \$77,084. Thus, we award Jessie \$38,542. This amount shall be paid in two installments. The first shall be due six months from the date of this decision and the second shall be due one year later. Interest shall accrue from the date of the first payment at a rate of ten percent.

Frank next argues the court improperly awarded Jessie one-half of the 1995 subchapter S distribution from Graziano Brothers. Frank contends *In re Marriage of Lalone*, 469 N.W.2d 695 (Iowa 1991), and *In re Marriage of O'Rourke*, 547 N.W.2d 864 (Iowa App. 1996), stands for the proposition it is not appropriate to divide the distribution because it has already been accounted for in setting alimony. Frank has apparently chosen to ignore the glaring factual differences distinguishing those cases from the case currently before us.

In *Lalone*, the court found the husband's \$55,000 bonus to be his current income and it had been used in calculating his child support and alimony. *Lalone*, 469 N.W.2d at 698. The court then ruled it would be inequitable to take a portion of

this money used to figure his income and give it to his wife in the property settlement. *Id.* In *O'Rourke*, the court found a bonus earned more than one year after the parties separated would not be considered marital property, in part because the wife contributed nothing to its acquisition. *O'Rourke*, 547 N.W.2d at 866. Again, as in *Lalone*, the court found the bonus should be used to calculate child support and alimony. *Id.*

In this instance, the district court determined Frank's income to be approximately \$60,000. This amount only includes one-half of the subchapter S distribution. Frank's actual income, including all of the subchapter S distributions, averaged approximately \$85,429. This is obviously well over the \$60,000 figure used by the court to calculate alimony. Also, Graziano Brothers paid the distribution in question shortly after Jessie went to be with her daughter to attempt to recuperate from her recent medical problems. The distribution would reflect earnings of the company during 1994, when the parties were still married and living together. Unlike *Lalone*, the district court did not use the portion of the distribution awarded to Jessie to determine income for the purposes of alimony. Further, unlike *O'Rourke*, Jessie clearly contributed to the acquisition of the distribution. Despite Frank's contentions, the distribution is clearly marital property and we support the division by the district court.

Last, to further separate the parties, we assign to Frank all of the \$15,000 obligation for the loan made by Frank's father. We find this will help to end the

unnecessary entanglement of the parties in one another's lives. *See In re Marriage of Webb*, 426 N.W.2d 402, 407 (Iowa 1988).

IV. ATTORNEY FEES. Frank challenges the district court's award of attorney fees to Jessie. On appeal, Jessie requests appellate attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *Gonzalez*, 561 N.W.2d at 99. To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* We find Frank has not proven an abuse of discretion by the trial court and affirm the award of attorney fees.

In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We award Jessie \$3000 as appellate attorney fees.

We have carefully considered all of Frank's remaining contentions on appeal, whether discussed herein or not, and find them to be without merit. For the reasons stated, we hereby affirm the decree of dissolution as modified.

AFFIRMED AS MODIFIED.