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SUMMARY
March 31, 2022

2022COA39

**No. 21CA0663, *Marriage of Turner* — Family Law —
Dissolution — Disposition of Property — Marital Property**

A division of the court of appeals applies the test set forth in *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001), to determine that a spouse's potential year-end bonuses from that spouse's employer are not property, and thus not marital property subject to division, where the right to the bonuses is not contractually enforceable at the time of the permanent orders hearing.

Court of Appeals No. 21CA0663
Jefferson County District Court No. 20DR30410
Honorable Robert Lochary, Judge

In re the Marriage of
Cassandra Marie Turner,
Appellee,
and
Benjamin O. Turner,
Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE TOW
Richman and Grove, JJ., concur

Announced March 31, 2022

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for Appellant

¶ 1 In this dissolution of marriage case between Benjamin O. Turner (husband) and Cassandra Marie Turner (wife), husband appeals the portion of the district court’s permanent orders concluding that year-end bonuses wife may receive after the dissolution were not marital property subject to division. Applying the analysis the supreme court has used for stock options and vacation pay to this context, we conclude that such bonuses are property only when they are contractually enforceable.

¶ 2 Under this test, we conclude that because wife’s potential bonuses were not contractually enforceable as of the date of the permanent orders hearing, they were not property — and thus not marital property subject to division. Accordingly, we affirm the district court’s judgment.

I. Background

¶ 3 Wife and husband were married for approximately twelve years, and they had two children together. During the dissolution proceeding, the parties resolved most financial and parenting issues but disputed whether (1) potential bonuses that wife may receive from her employer after the dissolution constituted marital property and, if so, the court’s division of that property; and (2) wife’s

potential bonuses should be included in her income for purposes of determining child support.

¶ 4 At the January 2021 permanent orders hearing, the following evidence was presented on wife's potential bonuses. Wife earned a base salary and her employer offered incentive plans that could pay her bonuses. Wife testified that, in her position, she was eligible to receive bonuses from an annual incentive plan (referred to by the parties as the AIP) and a supplemental incentive plan (referred to by the parties as the SIP). She said that her employer had not notified her regarding whether she would receive a bonus in 2021 from either plan, but she confirmed that any such bonuses would relate to work performed in 2020. Wife further testified that any bonuses were "highly variable and highly discretionary."

¶ 5 Under the terms of the AIP, most employees were eligible to receive an award as long as they were actively employed at the time of the award. Even if eligible, however, an employee was "not guaranteed" a bonus from the AIP. Any payment was dependent on the company achieving certain operating goals and objectives. The eligible employee also had to achieve certain performance goals, and the employee's supervisor retained discretion to determine any

award. As well, the AIP granted the chief executive officer of wife's employer "full discretion and final authority to adopt, amend, alter, or rescind the [AIP] without advance notice for any reason at his/her sole discretion based upon financial or operating conditions or otherwise."

¶ 6 Participation in the SIP was limited to employees holding certain jobs, including wife's position. Employees could not receive a bonus through the SIP unless they were actively employed at the time of the award. But, as with the AIP, an eligible employee had no claim or right to an award, and, even if the employee was awarded a bonus, the employer could recover or cancel it under certain conditions. A committee of the company's executives governed the SIP and had full authority over its administration. Funding for the SIP was dependent on the amount of certain departments' earnings. If these funding conditions were satisfied, however, the SIP committee still had "sole, complete and absolute discretion" over the funding for the SIP and the total amount of any bonuses awarded. The committee also had sole, complete, and absolute discretion to determine the criteria for awarding a bonus

to eligible employees, including which employees would receive an SIP bonus and the amount distributed to them.

¶ 7 The employer's director of compensation further confirmed the discretionary nature of the SIP. He testified that the committee was not required to use any set criteria to determine the distribution of bonuses from the SIP and that an employee's past bonuses were no indication of a future payment because each year the eligible employees "start[] at zero." He acknowledged that the availability of a distribution from the SIP was initially dependent on the company meeting certain earnings thresholds. And he stated that, even if the necessary conditions were satisfied, the committee, in its discretion, could deny a bonus to an eligible employee. The director also confirmed that the committee had not yet decided whether to award SIP bonuses for 2020, and the meeting to consider such bonuses was scheduled to take place approximately six weeks after the permanent orders hearing.

¶ 8 Wife reported that she had received bonuses in differing amounts from the AIP each year since 2010. Wife also reported that, other than in 2016, she had received a SIP bonus each year

since 2012. The amount she received each year varied substantially.

¶ 9 Based on this evidence, the district court first considered whether wife's potential bonuses constituted marital property. It found that wife was eligible to participate in the AIP and SIP, and that any bonuses she may receive in 2021 would be in consideration for services she completed during the marriage. The court then focused its examination on whether wife had contractually enforceable rights to the bonuses. The court found that she did not. It explained that any bonus from the AIP was dependent on the achievement of certain conditions, including the company's earnings, and, as of the permanent orders hearing, the employer had not notified wife of any decision on a bonus from this plan. The court also found that a bonus from the SIP was completely within the committee's discretion, and that the committee had not yet determined whether to award a bonus to wife. The court thus concluded that wife's potential bonuses did not constitute property subject to its division of the marital estate.

¶ 10 Several weeks after the permanent orders hearing, wife was awarded substantial bonuses, which husband contends should have been considered marital property.

¶ 11 As for child support, the court concluded that wife's bonuses must be included in her income, and it used a five-year average of her earnings to determine her child support obligation. (Neither party challenges the child support ruling on appeal.)

II. Property Interest

¶ 12 Husband contends that the district court misapplied the law by excluding wife's potential bonuses from the marital property because, in his view, wife earned the bonuses in 2020 and a spouse's compensation earned during the marriage is always marital property. We disagree.

A. Governing Legal Standards

¶ 13 When dissolving a marriage, the court must make an equitable division of the parties' marital property. § 14-10-113(1), C.R.S. 2021; *In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001). To determine whether an interest is marital property, the court engages in a two-step analysis. *In re Marriage of Cardona*, 2014 CO 3, ¶ 12. It first must determine whether the interest constitutes

property subject to the court's division. *Id.*; *Balanson*, 25 P.3d at 35. If so, the court then must determine whether that property is marital. *Cardona*, ¶ 12; *Balanson*, 25 P.3d at 35; *see also* § 14-10-113(3) (“[A]ll property acquired by either spouse subsequent to the marriage and prior to a decree . . . is presumed to be marital . . .”).

¶ 14 “[I]n determining whether a spouse's interest constitutes property,” a court “focus[es] on whether the spouse has an enforceable right to receive a benefit.” *Cardona*, ¶ 26; *see Balanson*, 25 P.3d at 35; *see also In re Marriage of Miller*, 915 P.2d 1314, 1318 (Colo. 1996) (focusing its inquiry on whether a spouse's stock options from his employer constituted marital property given the spouse's “enforceable rights under the option agreement”). If there is an enforceable right, property exists for purposes of section 14-10-113. *Cardona*, ¶ 13; *Balanson*, 25 P.3d at 39. But interests that are “speculative” are “mere expectancies” and do not constitute property subject to division in the dissolution proceeding. *Balanson*, 25 P.3d at 35; *accord Cardona*, ¶ 13. Whether a spouse has an enforceable right against an employer for compensation

depends on the terms of any agreement between them. *See Cardona*, ¶ 30; *see also Balanson*, 25 P.3d at 39.

¶ 15 A court’s determination of marital property presents a mixed question of fact and law. *Cardona*, ¶ 9. We defer to a district court’s findings of fact when supported by the record and review de novo its conclusions of law. *Id.* The valuation of marital property — and thus, necessarily, the determination of whether something is property at all — is established on the date of the decree or as of the date of the hearing on disposition of property where, as here, that hearing preceded the date of the decree. *See* § 14-10-113(5).

B. Discussion

¶ 16 Husband’s contention rests on the premise that wife “earned” the AIP and SIP bonuses during the marriage because any potential bonuses she received would relate to the services she performed before the dissolution. But here, to “earn” the potential bonuses, wife needed to obtain an enforceable right to them under the terms of the AIP and SIP. *See Cardona*, ¶¶ 13, 26. And the record supports the court’s conclusion that she had not yet obtained an enforceable right.

¶ 17 Under the terms of the AIP, wife would receive a bonus only if she and her employer achieved established performance goals and objectives and, even then, only if her employer chose to award a bonus. As well, wife would be awarded a bonus under the SIP only if the company elected to pay such a bonus and only if the company satisfied certain earnings benchmarks. But no evidence showed that the employer or wife had satisfied the necessary conditions to trigger the availability of an award under either plan. Thus, even though any award would relate to wife's work during 2020, husband did not establish that the necessary conditions to prompt the availability of a bonus from the employer had been achieved and that the employer would, in fact, award wife any bonuses after entry of the decree. *See In re Parental Responsibilities Concerning N.J.C.*, 2019 COA 153M, ¶ 49 (recognizing that the parties must present the relevant evidence to the court).

¶ 18 Moreover, even if the initial necessary conditions were met and triggered the available funding for the AIP or SIP, wife had no guaranteed bonus under the terms of either plan. It was undisputed that a bonus, if any, from the SIP was within the sole, complete, and absolute discretion of a committee of company

executives. And the AIP terms indicated that an award from this plan was within the discretion of wife's manager, while the chief executive officer could, at any time, rescind the plan. Wife and the employer's director of compensation also confirmed that, at the time of the hearing, they were unaware of any decisions to distribute any bonus from either plan, let alone to grant one or both to wife.¹ Therefore, at the time of the hearing, wife had no enforceable rights concerning these potential bonuses. *See In re Marriage of Jones*, 812 P.2d 1152, 1156 (Colo. 1991) (holding that a spouse had no contractual or enforceable right to income or principal in a discretionary trust). That is, any bonus wife may receive from her employer was a mere expectancy and not property subject to the court's division. *See Cardona*, ¶¶ 13, 26; *Balanson*, 25 P.3d at 35.

¹ Of course, it is within the bailiwick of the district court to determine the credibility of the spouse's and the employer's testimony about whether a right to a bonus is enforceable. If a court were to find such testimony incredible or conclude that the employee spouse and the employer were somehow in cahoots to obstruct the other spouse's claim to the bonus — findings to which we would defer if supported by the record — it may well conclude that the bonus was more than a mere expectancy. Because the district court here found the employer credible, however, we must conclude that the record supports the finding that wife did not yet have an enforceable right to the bonus.

¶ 19 We are not persuaded otherwise by husband’s reliance on *Rieger v. Christensen*, 529 P.2d 1362 (Colo. App. 1974) (not published pursuant to C.A.R. 35(f)), and *In re Marriage of Huston*, 967 P.2d 181 (Colo. App. 1998), *disagreed with by Balanson*, 25 P.3d at 39. In *Rieger*, the division held that the husband’s bonus, which he accrued during the marriage, constituted marital property, even though the bonus was not authorized until after the entry of the dissolution decree. 529 P.2d at 1365. However, unlike the circumstances here, “neither [h]usband’s interest in the bonus nor the amount of the bonus was uncertain or speculative at the time the property division order was entered.” *Id.*

¶ 20 In *Huston*, the division reversed a district court’s ruling that a year-end bonus paid after entry of the decree was the wife’s separate property because the wife earned the bonus during the marriage. 967 P.2d at 186. But there was no indication in that case that the wife did not have an enforceable right to her bonus at the time of the decree. The wife had earned the bonus during the marriage and the only contingency mentioned was the wife’s continued employment. *See id.*; *see also In re Marriage of Grubb*, 745 P.2d 661, 665 (Colo. 1987) (“The mere existence of a future

contingency does not downgrade [a] vested right to nonmarital property.”). But here, in addition to wife’s continued employment, her receipt of any bonus was conditioned on the employer’s and wife’s achievement of certain goals and objectives and on the employer having made the decision to award bonuses that year. Husband did not establish that these conditions had been satisfied.

¶ 21 Husband also points to *In re Marriage of Hunt*, 909 P.2d 525, 528, 541 (Colo. 1995), which upheld a district court’s division of the husband’s unvested and unmatured military pension. In husband’s view, the court’s consideration of this unvested pension demonstrates that a contractually enforceable right is not required to constitute marital property. While the pension in *Hunt* was unvested, nothing in that case indicated that the husband lacked an enforceable right to its benefits. *See id.* at 536 (noting that, “for the most part, the . . . uncertainty of the [spouse’s] receipt of pension benefits[] [is] in the control of the employee spouse”). And “vesting” is not “determinative in ascertaining whether an interest . . . constitutes marital property.” *Balanson*, 25 P.3d at 39; *see also Miller*, 915 P.2d at 1317 (“Characterizing the options as nonvested, though perhaps accurate for purposes of employee

benefits and tax law, may be misleading for purposes of ascertaining what interests are marital property . . .”).

¶ 22 Finally, we reject husband’s attempt to analogize wife’s potential bonus to an unresolved personal injury award, *see In re Marriage of Fields*, 779 P.2d 1371, 1373 (Colo. App. 1989), or to the goodwill in a business, *see In re Marriage of Huff*, 834 P.2d 244, 256 (Colo. 1992). Husband argues that the linchpin to the analysis cannot be the existence of a contractual right, because there is no contractual right to a personal injury award or to goodwill. But husband’s analogy to these two unrelated scenarios is misplaced.

¶ 23 As noted, the threshold question of whether something is marital property is whether it is property at all. *Cardona*, ¶ 12. A chose in action is undeniably a property right. *See Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 57 (Colo. 2001). As is goodwill. *Stone v. Lerner*, 118 Colo. 455, 461, 195 P.2d 964, 966 (1948).

¶ 24 Our supreme court has directed, however, that a court’s determination of whether a spouse’s interest in an employment-related benefit constitutes property focuses on a spouse’s enforceable rights to the interest. *See Cardona*, ¶ 26; *see*

also id. at ¶ 29 (“[W]e hold that *where a spouse has an enforceable right to be paid for accrued vacation or sick leave, such accrued leave earned by a spouse during the marriage is marital property . . .*”) (emphasis added); *Balanson*, 25 P.3d at 39 (“[W]e conclude that an employee stock option constitutes property for purposes of dissolution proceedings *only when the employee has an enforceable right to the options.*”) (emphasis added). Thus, contrary to husband’s claim, contractual enforceability at the time of the permanent orders hearing (or, if earlier, the date of the decree) is essential to the determination of whether this type of benefit is property.

¶ 25 In sum, wife had not been awarded the AIP and SIP bonuses and no evidence demonstrated that she had an enforceable right to them at the time of the permanent orders hearing. Thus, the court did not err by excluding wife’s potential bonuses from the division of marital property. *See Cardona*, ¶¶ 13, 26; *Balanson*, 25 P.3d at 35.

III. Conclusion

¶ 26 The judgment is affirmed.

JUDGE RICHMAN and JUDGE GROVE concur.