COLORADO COURT OF APPEALS

DATE FILED: August 27, 2020
CASE NUMBER: 2019CA637

Court of Appeals No. 19CA0637
Jefferson County District Court No. 16DR31081
Honorable Diego G. Hunt, Judge

In re the Marriage of

Mariko Coplin,

Appellant,

and

William Coplin,

Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE RICHMAN
Dunn and Yun, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 27, 2020

Hinds and Hinds Family Law, P.C., Nathan M.J. Dowell, Greenwood Village, Colorado, for Appellant

Senn Visciano Canges P.C., James S. Bailey, P. Eric Voorheis, Denver, Colorado, for Appellee

¶ 1 In this post-dissolution of marriage proceeding, Mariko Coplin (wife) appeals from the district court's order denying her request to award her a proportional amount of the post-decree increase in value of a marital asset. We reverse and remand for further proceedings.

I. Facts

¶ 2 At the permanent orders hearing, wife and William Coplin (husband) agreed that husband's $800,285.95 Wayne State Deferred Compensation account (Wayne State account) would be used to make any property division equalization payment. The court adopted this agreement in its permanent orders.

¶ 3 After allocating the marital estate, which included an equal division of the Wayne State account, the court determined that a $165,519.62 equalization payment was required. The court found that wife would receive a total of $565,662.60 from the Wayne State account, while husband would receive the balance of $234,623.35. The parties were ordered to cooperate in the preparation of a qualified domestic relations order (QDRO) to effectuate the transfer of the funds. For reasons not appearing in the record, the

distribution of the funds from the Wayne State account was delayed.

¶ 4 Nearly one year later, while the distribution was still pending, wife moved for a separate order that allocated the post-decree increase in value of the Wayne State account. Relying on C.R.C.P. 54(b) and C.R.C.P. 60(b), wife asserted that the court made a "mistake" in not allocating the increase and that she "believe[d] that the parties should be allocated their proportionate share of the increase in value . . . based on their respective percentage of the allocation of the account." Wife claimed that her proportional share of the Wayne State account entitled her to .70677646 of any gain.

¶ 5 The court denied wife's motion. It found that wife received an allocation of the account that reflected the value of the account at the time of permanent orders and that any increase should go to husband as the account holder.

II. Analysis

¶ 6 Wife contends that the district court erred in denying her motion and gave no legal reason for doing so. We agree that denial of wife's motion was erroneous, because it represents a mistaken reading of the permanent orders.

¶ 7 C.R.C.P. 60(b) allows the district court to relieve a party from a final judgment or order, such as where a party establishes mistake. *See Taylor v. HCA-HealthONE LLC*, 2018 COA 29, ¶ 31. We review the court's determination of a C.R.C.P. 60(b) motion for an abuse of discretion. *See Murray v. Bum Soo Kim*, 2019 COA 163, ¶ 8.

¶ 8 Wife's motion averred that the court must have made a "mistake" when it "omi[tted]" orders regarding the allocation of any post-decree increase in value of the Wayne State account. In denying her motion, however, the court emphasized that after equally dividing the marital portions of the Wayne State account, (approximately $400,142 to each partner) it had reallocated $165,519.62 from the husband's portion to wife as an equalization payment. This reallocation left husband's share at $234,623.35, which the district court described as the "balance of the account."

¶ 9 In denying wife's motion, the district court also stated that she "is not entitled to any increase in value of the Wayne State Account, because it was awarded to respondent." But, as explained above, that is not an accurate description of what the district court actually did at permanent orders. It left $234,623.35 of the account to husband; the other part of the account was allocated to

wife. In other words, the "account" was not awarded to the husband.

¶ 10 Assets must be valued and divided as of the date of permanent orders, as required by section 14-10-113(5), C.R.S. 2019, and *In re Marriage of de Koning*, 2016 CO 2 ¶ 21.[1] If a final decree does not divide certain property and does not reserve the question for future consideration, the court loses jurisdiction and may not later divide marital property. *Wilson v. Prentiss*, 140 P.3d 288, 291 (Colo. App. 2006). Thus, we agree with wife that the property allocated at the time of permanent orders "became her sole and separate property" at that time. Had the $565,662.60 been transferred to wife at the time of permanent orders, any change in value would be hers. *See In re Marriage of Weaver*, 39 Colo. App. 523, 527, 571 P.2d 307, 309 (1977) (noting that the court is obligated to enter orders that

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[1] Section 14-10-113(5), C.R.S. 2019, provides that property shall be valued and divided as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree. One division of this court has concluded that a spouse was not entitled to any increase in value of certain assets awarded to her from the October 1991 date of decree to the May 1993 permanent orders date. *See In re Marriage of Graff,* 902 P.2d 402, 407 (Colo. App. 1994). But those are not the facts here.

will allow each spouse to receive his or her share of the property in an orderly manner and within a reasonable time).

¶ 11 Although there does not appear to be any case directly on this point, we find support for this result from *In re Marriage of Hunt*, 909 P.2d 525 (Colo. 1995). In *Hunt*, the supreme court addressed how to treat the division of a deferred pension fund, where the nonemployee spouse must wait to receive his or her share of the pension. In applying what it called the "time rule" formula, the court stated that "[i]f the nonemployee spouse must bear the risks attendant to waiting, then the nonemployee should share in increased benefits that accrue during the delay." *Id.* at 536. Conversely the court also stated, "We find that it is appropriate for the nonemployee spouse to share in the contingency of loss as well as the contingency of gain." *Id.*

¶ 12 Although the circumstances in this case do not involve the mandatory deferral of receipt of a pension fund, the principle of sharing the risk applies to the circumstances. Given that the reason for delaying the distribution of the Wayne State account was not given, and neither party was shown to be at fault for the delay, the principle of sharing the risk should apply.

¶ 13 Finally, we note that husband's response to wife's motion agreed that "a revised [QDRO], as modified to reflect the proportionate increases and decreases in valuation from the date of division, is appropriate." Although we do not take this as a formal concession to wife's position on appeal, it does indicate that husband viewed wife's motion as a reasonable interpretation of the permanent orders.

¶ 14 The order of the court is reversed, and the case remanded with the following directions: (1) if the account has not been distributed, the district court is directed to allocate to wife .70677646 of any increase (or decrease) to the value of the account from the date of permanent orders to the date of distribution, or (2) if the account has been distributed, the district court is directed to order husband to make an adjustment payment to wife equal .70677646 of any increase to the value of the account from the date of permanent orders to date of distribution, or (3) if the account decreased in value from the date of permanent orders to the date of distribution, and at distribution wife received $565,662.60, the court should order that wife refund to husband .70677646 of any decrease to the

value of the account from the date of permanent orders to date of distribution.

III. Attorney Fees

¶ 15 Citing husband's more significant income, wife seeks an award of her appellate attorney fees under section 14-10-119, C.R.S. 2019. Because the district court is better equipped to resolve the factual issues regarding the parties' current financial circumstances, we remand this request to the district court. *See In re Marriage of Alvis*, 2019 COA 97, ¶ 30.

¶ 16 We reject wife's claim that she is entitled to an award of attorney fees per the parties' October 29, 2018, stipulation. The stipulation provided that husband would pay $7500 of wife's attorney fees "in full and final satisfaction of her claims for attorney fees and costs *to date*." (Emphasis added.)

IV. Conclusion

¶ 17 The order of the district court is reversed, and the case is remanded with the directions set forth above and for consideration of wife's request for appellate attorney fees.

JUDGE DUNN and JUDGE YUN concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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