COLORADO COURT OF APPEALS

DATE FILED: July 1, 2021
CASE NUMBER: 2020CA613

Court of Appeals No. 20CA0613
Arapahoe County District Court No. 19DR30213
Honorable Cynthia D. Mares, Judge

In re the Marriage of

Renee Michelle Hamm,

Appellee,

and

Jeremy Matthew Hamm,

Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE WELLING
Richman and Berger, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 1, 2021

Aitken Law, LLC, Sharlene J. Aitken, Denver, Colorado, for Appellee

Gill & Ledbetter, LLP, Anne Whalen Gill, H.J. Ledbetter, Castle Rock, Colorado, for Appellant

¶ 1 Jeremy Matthew Hamm (husband) appeals the permanent orders entered on the dissolution of his marriage to Renee Michelle Hamm (wife). We affirm the judgment and remand the case to the district court to determine wife's request for appellate attorney fees under section 14-10-119, C.R.S. 2020.

I. Background

¶ 2 The parties' marriage ended in 2020. Their partial separation agreement and parenting plan were incorporated into the decree. The only dissolution issue that wasn't resolved by the parties was how much, if any, of the stock appreciation rights (SAR) husband had been granted by his employer were marital property. (The parties agreed that the district court could determine this issue based on the parties' written briefs without holding an evidentiary hearing.)

¶ 3 The court found that all of the SAR units granted to husband during the marriage were marital property. It divided the units equally between the parties and ordered that wife would receive her share from husband's employer through a qualified domestic relations order (QDRO).

II. Analysis

¶ 4 As an initial matter, husband contends that the district court erred by finding that all of his SAR units were a replacement for and/or equivalent to stock options — and that such a finding wasn't supported by the record. We, however, disagree with husband's reading of the district court's order and, therefore, reject the premise of his argument.

¶ 5 Once we reject husband's initial argument, we turn to the question of whether the SAR units granted to husband are marital property subject to division. We resolve this issue by applying well-established precedent to the asset at issue.

A. SAR Units as a Replacement for Stock Options

¶ 6 Husband first contends that the district court erred by finding that his SAR units were awarded to replace previously awarded stock options when there is no support in the record for such a finding. We disagree, however, that the court made this finding as husband describes it and, therefore, discern no error.

¶ 7 The district court found that the SAR plan from husband's employer permitted awarding SAR units from time to time to "attract, retain, and reward employees." The court further found

that the plan "also" permitted issuing such units to replace stock options issued under the employer's prior stock option plan. Both of these findings are supported by the record — specifically, the SAR plan documents. With respect to the latter finding, the plan documents do indeed provide that SAR units may be issued to replace cancelled stock options.

¶ 8 The court further found that during the marriage — between 2005 and 2016 — husband signed six different agreements to receive SAR units. The court also found that the 2005 agreement stated that the SAR units awarded under that agreement replaced stock options previously awarded under the company's stock option plan. Again, these findings are supported by the record, including the 2005 agreement that the court referenced.

¶ 9 None of this supports husband's sweeping contention that the court found that all of his SAR units were a replacement for and/or equivalent to stock options. The court was quite specific in referencing only the units awarded under the 2005 agreement as having replaced stock options. The court didn't find that husband's other five SAR unit awards were derived from or connected to cancelled stock options. To the contrary, the court specifically

found that only "*some of*" the units at issue — namely, those from 2005 — derived from stock options. (Emphasis added.)

¶ 10 And, contrary to husband's argument, the court didn't find that the SAR units husband received — either in 2005 or under the later agreements — were "equivalent to enforceable stock options," nor did it use such a finding as a "legal springboard" in analyzing whether the units were marital property. Instead, the court described in detail how the SAR units were awarded, vested, and paid out under the terms of husband's employer's plan, and it analyzed them based on those terms, noting that a stock option "is different than a SAR unit." The court's findings in this regard are, again, supported by the plan documents that the court referenced.

¶ 11 Simply put, we reject the very premise of husband's argument — that the court found that all of his SAR units were a replacement for and/or equivalent to stock options. Because we reject the premise of his contention, we don't need to address whether such a finding is supported by the record. (Wife also argues, in the alternative, that husband invited any supposed error by agreeing that the court could determine the SAR unit issue without taking

evidence; based on our disposition of this issue, we don't need to reach this argument either.)

B. Characterizing SAR Units as Marital Property

¶ 12 Husband next contends that the district court erred by finding that his SAR units were marital property. We disagree.

1. Legal Principles

¶ 13 In a dissolution proceeding, the court sets apart the spouses' separate property to each of them and then divides the marital property. § 14-10-113(1), C.R.S. 2020. A property division requires two steps: first, the court determines whether an interest constitutes "property" and then, if so, whether it is marital or separate property. *In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001). With certain exceptions not applicable here, marital property means all property acquired by either spouse during the marriage. § 14-10-113(2); *Balanson*, 25 P.3d at 35-36.

¶ 14 We review the district court's interpretation of husband's employer's SAR plan documents and its resulting conclusion that husband's units are marital property de novo. *See In re Marriage of Powell*, 220 P.3d 952, 954 (Colo. App. 2009) (reviewing stock option plan de novo in determining whether the options were marital or

separate property); *cf. In re Marriage of Miller*, 915 P.2d 1314, 1319-20 (Colo. 1996) (concluding, based on the terms of the restricted stock agreement, that the shares the husband received from his employer during the marriage were marital property).

2. Analysis

¶ 15 The district court examined the provisions of husband's employer's SAR plan and determined that husband's units constituted a property interest and that the interest was marital. We conclude that the court did not err.

¶ 16 The SAR plan provides that the company may "from time to time" award SAR units — described as bookkeeping entries credited to a grantee's SAR account and valued based on the appreciation of the company's stock over the base value at the time the award is made — to attract, retain, and reward employees who have substantial responsibility with the company. Such awards are evidenced by a signed agreement with the employee. The SAR units then vest and are payable per the terms of the SAR unit agreement. The agreements husband signed provided that the SAR units are payable after fifteen years of consecutive employment from the date

of the award, on reaching age sixty-five while still employed, or on death or disability that occurs while still employed.

¶ 17 If there is a reorganization, merger, or consolidation involving the company, SAR unit grantees may receive appropriate consideration or other equity securities in exchange for their outstanding units. However, the terms of the substitute consideration can't be "materially less favorable to the [g]rantee" than the terms of the grantee's unit agreement without the grantee's prior written consent. And in the event the company dissolves or liquidates, grantees may immediately exercise or receive consideration for their outstanding SAR units.

¶ 18 Although, as husband argues, the committee administering the SAR plan may amend or modify outstanding units, what husband doesn't mention is that the plan explicitly provides that "no modification may be made that would materially adversely affect any award previously made under the [p]lan without the approval of the [g]rantee." So, contrary to husband's argument, he does have control over the modification of the units awarded to him. And if the company's board of directors terminates the SAR plan, the company's obligation to make payments under outstanding SAR

unit agreements survives. Further, SAR units are transferable by will, under the laws of descent and distribution, or "under a domestic relations order."

¶ 19 As the district court noted, *Balanson* states that the legislature intended for "property" in the dissolution context "to be broadly inclusive," and to include everything that has an exchangeable value or that makes up wealth or an estate. 25 P.3d at 35. Further, a property interest is an interest that can be transferred or conveyed and that does not terminate on the owner's death. *Id.* "[W]hile enforceable contractual rights constitute property, interests that are merely speculative are mere expectancies" and aren't treated as property. *Id.*; *see also In re Marriage of Cardona*, 2014 CO 3, ¶ 24.

¶ 20 Although *Balanson* involved stock options, *see* 25 P.3d at 35-36, which, as the district court recognized, the SAR units aren't, *Miller* involved not only stock options but also a separate grant of restricted stock shares — with similar attributes to husband's SAR unit awards — which the supreme court concluded was entirely marital property. *See* 915 P.2d at 1315, 1319-20. Thus, *Miller* is instructive here.

¶ 21 In *Miller*, the husband actually received the restricted stock shares at issue. He didn't simply receive a conditional right to receive them later. And, although the shares in *Miller* were subject to forfeiture for five years after they were granted if the husband left his employment during that time, his employer couldn't otherwise unilaterally repudiate his right to receive them. *Id.* at 1319. As such, because the husband had already earned the right to receive the shares, they represented a form of deferred compensation and were, therefore, marital property for purposes of the dissolution. *Id.* at 1319-20. "That the husband's full enjoyment of the benefit is conditioned on his remaining an employee affects the present value of the restricted stock shares, not their marital nature." *Id.* at 1320.

¶ 22 Similarly, here, husband received actual SAR units with a specified value under the agreements with his employer. When each agreement was signed, the units were credited to husband's SAR account. By these terms, husband "acquired" the units when they were awarded to him. *See* § 14-10-113(2); *Miller*, 915 P.2d 1319-20. At that point, the units were not modifiable to husband's

detriment without his consent and were transferable, including by a QDRO as was done here.

¶ 23 Like in *Miller*, that husband won't realize the value of the units until and unless he remains employed for a set period of time after each award doesn't make the units a mere expectancy. *See* 915 P.2d at 1319-20. Rather, husband had an enforceable contractual right to a benefit when he acquired the SAR units and only had to remain employed for the required term to receive that benefit. *See Powell*, 220 P.3d at 957 (noting that a spouse had an enforceable right to stock options as of the date they were granted when her right to exercise the options could not terminate absent the termination of her employment). As such, his SAR units, like the restricted stock shares in *Miller*, are a form of deferred compensation and therefore marital property. *See* 915 P.2d at 1315, 1319-20.

¶ 24 Husband repeatedly refers to the payout of the SAR units as "contingent." But according to the plan documents, the only contingency that husband can't control is his continued employment, which *Miller* holds does *not* make the units a mere expectancy.

¶ 25 Husband's argument that his employer isn't required to award units to any employee is misplaced as to the units at issue, which it is undisputed *were* awarded during the marriage.

¶ 26 Further, contrary to husband's argument, vesting is *not* determinative of whether a stock option, or similar interest, is a divisible property interest. *Balanson*, 25 P.3d at 39. Instead, the determinative issue is whether the spouse has an enforceable right to the interest *regardless of whether that right is presently exercisable*. *Id.*; *see also Miller*, 915 P.2d at 1317-20; *Powell*, 220 P.3d at 957.

¶ 27 Because husband is entitled to exercise or be paid for his outstanding units if the SAR plan is terminated by his employer and because the plan can't be modified to adversely affect units already awarded to him without his consent, husband's units aren't akin to a revocable trust or an interest under a will of a living person, which are not "property" under section 14-10-113(7)(b). *See Balanson*, 25 P.3d at 41 (spouse's interest in a revocable or discretionary trust is not a property interest, but an interest in an irrevocable trust is a property interest); *see also Cardona*, ¶ 25.

¶ 28 Last, we don't address husband's argument that is raised for the first time in his reply brief, which gives wife no opportunity to respond to it, concerning "IRS code Section 409A." *See In re Marriage of Dean*, 2017 COA 51, ¶ 31.

¶ 29 In sum, the district court didn't err in concluding that husband's SAR units awarded during the parties' marriage were a marital asset subject to division, and it didn't abuse its discretion when it ordered them to be divided equally with wife by QDRO.

C. Appellate Attorney Fees

¶ 30 Both parties request appellate attorney fees pursuant to section 13-17-102, C.R.S. 2020, the groundless and frivolous statute. Wife argues that husband's arguments are contrary to *Balanson*, he has misstated the record, and he is attempting to delay her award of the SAR units. Husband requests fees for the reply brief based on wife's argument that he invited any error concerning the court's factual findings.

¶ 31 We do not agree that either party's arguments lack substantial justification as is required to award fees under the statute, and therefore deny both parties' requests. *See* § 13-17-102(4); *see also In re Estate of Shimizu*, 2016 COA 163, ¶ 34 (fees are appropriate

only in clear and unequivocal cases where no rational argument is presented).

¶ 32 Wife also requests an award of her appellate attorney fees pursuant to section 14-10-119, which requires the consideration of the financial resources of both parties. Because the district court is better positioned to evaluate the parties' current financial circumstances, we remand wife's request for appellate fees under section 14-10-119 to the district court. *See* C.A.R. 39.1; *In re Marriage of Alvis*, 2019 COA 97, ¶ 30.

III. Conclusion

¶ 33 The judgment is affirmed, and the case is remanded to the district court to determine wife's request for appellate attorney fees under section 14-10-119.

JUDGE RICHMAN and JUDGE BERGER concur.

Court of Appeals

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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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