



Treatment of Bonus Income Under Illinois Dissolution Law

BY ERIC L. SCHULMAN

In today's economy, many executives and upper management employees receive a significant component of their compensation in the form of a bonus paid either at the end of the calendar year in which the work was performed, or in some instances, in the year after the year work was performed. The timing of when bonuses are paid during or after the pendency of a divorce can lead to substantial disagreement, as compelling arguments can be made to characterize the bonus as marital or non-marital property, or income for purposes of child support or maintenance.

Traditionally, Illinois case law has held that that remuneration to a spouse, in whatever form, during the marriage is considered marital property.¹ This is consistent with venerable Illinois law that all property acquired by either spouse during the marriage and before a judgment of dissolution of marriage is presumed to be marital property. 750 ILCS 5/503(b)(1). Further, it is a long-standing premise that all sources of income are to be considered for purposes of determining both child support and maintenance obligations.

However, numerous cases have recently been decided which call

these principles into question, and draw a distinction between bonuses received during the marriage and bonuses earned during the marriage but received after the entry of a Judgment for Dissolution. These recent cases have helped shape and provide direction on these issues, but also have the potential to create tremendous disputes between litigants. This article reviews those cases and attempts to provide some direction on this evolving area of dissolution law.

Historically, in Illinois, bonuses earned during the marriage but received after dissolution were considered marital property. In *Peters*,² the sole issue presented on appeal was whether the husband's potential stock bonus was marital property. After the

Eric L. Schulman is a senior partner at the law firm of Schiller DuCanto & Fleck LLP, practicing exclusively in matrimonial law. He is named one of the leading matrimonial lawyers in the nation in Best Lawyers in America and is a Fellow in the American Academy of Matrimonial Lawyers. He thanks his associate, Jacqueline Stephens Bryce, for assisting with this article.



¹ *In re Marriage of Phillips*, 229 Ill. App. 3d 809, 818 (2nd Dist. 1992).

parties married, the husband entered into a contract with a company, which stated that if the husband represented the company for 10 consecutive years and averaged a certain amount of profits, the company would transfer a percentage of its stock to him. The parties divorced five years into the contract. The trial court ruled that no part of the bonus would be considered marital property. The Second District reversed.

In doing so, the Court noted that other states generally hold that “bonuses are marital property to the extent they were earned during the marriage.”³ The Appellate Court further noted that Illinois classifies as marital property (1) pension benefits acquired after the marriage but before a dissolution of marriage; and (2) non-vested stock options acquired during the marriage. Thus, the Court held that any portion of the bonus earned during the marriage should be considered marital property when received. Accordingly, even though the bonus would have been received after the marriage dissolved, the portion of it that was earned during the marriage was marital property subject

to division. The Court found it irrelevant that the bonus was speculative; the portion of the bonus earned during the marriage, when and if received, was marital property.

The 2013 First District case of *In re Marriage of Wendt*⁴ called into question the reasoning set forth in *Peters*, and found that the wife was not entitled to her husband’s bonus as marital property. In that case, the husband worked for Citadel, LLC, and was eligible to receive a bonus in the calendar year after the year in which he performed the work. The parties were divorced in September of 2012 and the husband would not receive a bonus, if at all, until February of 2013. The wife argued that she was entitled to 75% of the bonus as marital property because they were married for nine of the twelve months of accrual. The husband argued that the bonus was non-marital property as it was speculative and discretionary and would not be received during the marriage. The *Wendt* Court agreed, and found that the bonus was non-vested, discre-

tionary, and speculative until it was awarded, and that if issued, it was non-marital property since the husband did not have a contractual right to the bonus (although it was considered for child support purposes).

Wendt emphasized the importance of determining if the bonus is governed under the terms of a contractual arrangement, such as an employment contract, employee incentive program, or possibly, even a shareholder’s agreement for a corporate owner whose bonus is based upon said contract. A key consideration is what happens to the bonus upon the employee’s termination, because if the employee is entitled to a share of the bonus even if terminated, it can enhance an argument that the bonus is

“In representing parties who earn non-contractual, discretionary bonuses, it is important to advise them that such income will not necessarily be considered marital property (or income for purposes of maintenance or child support) depending on when the bonus is received in relation to the entry of Judgment.”

2 *In re Marriage of Peters*, 326 Ill. App. 3d 364 (2nd Dist. 2001).

3 See, e.g., *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987) (cash bonus primarily earned during marriage but received after divorce was marital property); *Burns v. Burns*, 687 So.2d 933 (Fla. App. 1997) (cash bonus earned during marriage was marital property); *Simpson v. Simpson*, 650 N.E.2d 333 (Ind. App. 1995) (cash bonus earned during marriage was marital property); *Hartog v. Hartog*, 85 N.Y.2d 36, 647 N.E.2d 749, 623 N.Y.S.2d 537 (1995) (cash bonus earned during marriage but paid after commencement of dissolution proceedings was marital property); *Lineberger v. Lineberger*, 303 S.C. 248, 399 S.E.2d 786 (S.C. App. 1990) (cash bonus earned during marriage but paid after divorce action was filed was marital property); *Joynes v. Payne*, 36 Va. App. 401, 551 S.E.2d 10 (2001) (portion of cash bonus was marital property when it was earned during the marriage).

4 *In re Marriage of Wendt*, 2013 IL App. (1st) 123261.

not speculative or a discretionary expectancy, but rather a contractual property right.

The recent 2014 Second District case of *In re Marriage of Micheli*⁵ also dealt with the treatment of a husband's bonus in the parties' twenty-four year marriage. In *Micheli*, the Court ordered the husband to pay \$3,700 per month and 20% of all future bonuses as maintenance. The husband argued the order was an abuse of discretion because the maintenance ordered to be paid from his bonus was uncapped and had no relation to the standard of living enjoyed by the parties during the marriage.⁶

Ultimately, the Court held a trial court may award maintenance as a percentage of one's income. However, in this case, awarding the wife an uncapped amount as a percentage of the husband's future bonuses was an abuse of discretion because it had no evidentiary relation to her

⁵ *In re Marriage of Micheli*, 2014 IL App (2d) 121245.

⁶ Since child support was also at issue, the husband acknowledged that as a matter of law, the parties' child was entitled to a post-divorce standard of living based upon an increase in his income after separation. However, he emphasized the difference between maintenance and child support, in that maintenance is intended to allow the recipient spouse to maintain the standard of living enjoyed during the marriage. The wife cited to no authority for the proposition that maintenance should be an equitable distribution of the supporting spouse's income after marriage, and while the Court mentioned in *dicta* that capping child support may be prohibited, it did not address the issue directly because the wife did not challenge it.

present needs or the parties' standard of living throughout the marriage, and agreed with the husband that such an award could be a potential windfall to the wife.

The most recent case discussing bonuses is the 2014 Second District case of *In re Marriage of Shores*.⁷ That post-decree case addressed the issue of whether the husband's employment performance bonus was income for child support purposes when he earned it, or when he received it. In *Shores*, the husband participated in a Management Incentive Compensation Program ("MICP"). He received his share of the MICP bonus in the year following the year in which he performed services. In 2011, he received \$100,000 for work performed in 2010. Complicating matters was the fact that the parties' child emancipated in July 2010.

The issue before the Court was how much child support the husband should pay from his bonus received in 2011, after the child's emancipation, for the period of January 2010 through July 2010, during the child's minority. The former wife argued that she should receive a prorated amount of the \$100,000 bonus that the husband received in March of 2011, because it related to work he performed in 2010. The husband argued that the bonus was received after emancipation and therefore was not subject to child support because his continued employment after the

⁷ *In re Marriage of Shores*, 2014 IL App (2d) 130151.

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child's emancipation was necessary to receive the bonus.

The wife attempted to analogize the bonus income to Section 503(a) income (which characterizes pensions and stock options as marital property when earned even before receipt), but the Court rejected that argument because the husband had no contractual right to receive the bonus. The Court found *Wendt*⁸ instructive, and stated that although the husband earned his 2011 bonus in 2010, since the payment of his bonus was in his employer's discretion, and outside of husband's control, the bonus was speculative until it was awarded, and as such, he did not have a contractual right to the bonus. Therefore, the Court did not find the bonus received in 2011 to be income from which child support could be paid.

CONCLUSION

These cases represent two different ideologies, both of which will affect litigants and their spouses who receive bonuses as a part of their compensation. The *Micheli* Court acknowledged that allowing a straight percentage-based award on the husband's bonuses without a cap could potentially set up a windfall to the wife with no evidentiary relation to her present needs. The *Shores* Court found in a post-decree setting, that unless there is a contractual right to a bonus, bonuses earned during the

marriage should not be considered as income for purposes of child support if received after a child's emancipation.

This represents a shift from earlier case law, such as the *Peters*⁹ case, where the Court held that bonuses earned during the marriage were marital property. In representing parties who earn non-contractual, discretionary bonuses, it is important to advise them that such income will not necessarily be considered marital property (or income for purposes of maintenance or child support) depending on when the bonus is received in relation to the entry of judgment. Just as important, when representing the non-wage earner spouse, it is critical to advise them that until actually received, the bonus may not be considered property subject to division (although it will be considered income for purposes of child support and/or maintenance).

The characterization of bonus compensation may affect the entire financial picture for both parties and could impact an overall resolution to the case. It remains to be seen how the 2014 amendments to Section 504 of the IMDMA, effective January 1, 2015 and which set percentage guidelines for maintenance awards, with certain income parameters, will treat bonus income.

8 *Id.*, ¶ 33.

9 *Peters*, 326 Ill. App. 3d at 367.



David J. Gordon, CFP®, CIMA®
Senior Portfolio Manager
Executive Director
Financial Advisor

Kirsten H. Gordon, CFP®
Financial Advisor

111 S. Pfingsten Road, Suite 200
Deerfield, IL 60015
855-310-9090
www.TheGordonFinancialGroup.com

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