Opinion issued December 9, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00232-CV

BRAD T. IRICK, Appellant

V.

ANNE LINEBERRY, Appellee

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Case No. 2018-48701

MEMORANDUM OPINION

Anne Lineberry and Brad Irick divorced. During the bench trial to divide their community estate, Lineberry argued that she had a community-property interest in retention bonuses Irick was in line to receive on specific post-divorce

dates. The trial court did not award her any interest in the as-yet-unpaid bonuses.[1] She appealed the judgment but later moved to dismiss her appeal. A few months after her direct appeal was voluntarily dismissed, Lineberry sued Irick for a portion of the bonuses received since the divorce.

Irick argued res judicata and obtained a summary judgment. Lineberry successfully argued for a new trial, and the issue of whether Irick's post-divorce bonuses qualified for a post-divorce division was tried to the bench. Various pleadings, evidence, and trial transcripts from the divorce proceeding were admitted as evidence in the second suit. The parties litigated whether the lengthy discussions about the bonuses during the divorce proceeding demonstrated that the bonuses were considered and disposed of and therefore not subject to a post-divorce division. Ultimately, the trial court held that the bonuses—or at least some portion of each—qualified as community property that existed at the time of divorce but was not divided in the divorce. Lineberry was awarded over $1 million of the bonuses.

Irick has two main arguments on appeal: (1) res judicata bars the relitigation of the characterization of the bonuses, meaning whether they are separate or

[1] The divorce decree referred to only one bonus. That bonus was structured to pay out in three installments. The first installment was paid before the divorce became final. That first payment was categorized as community property and divided in the divorce decree. The decree did not reference the two future payouts or any other bonus discussed during the divorce proceeding.

community property and (2) if the trial court did not err in characterizing the bonuses as community property in the post-divorce suit, whether it erred in determining the amount of the bonuses she was due. Through a cross-appeal, Lineberry challenges whether she was entitled to more of the bonuses than she was awarded.

Because we conclude that res judicata barred Lineberry's suit for a post-divorce division of the bonus payments, we reverse and vacate the trial court's judgment and remand for additional proceedings consistent with this opinion.

Background

Anne Lineberry and Brad Irick married in 2014. Lineberry filed for divorce the year after, citing, among other things, Irick's infidelity. At a January 2017 bench trial, the parties presented evidence of their separate and community property and sought a division of the community assets. Irick submitted an inventory that listed the balances for various financial accounts and identified various bonuses. He listed one bonus that he would receive before the divorce could be finalized, provided a projected amount for that bonus, and suggested a division of the bonus as a community asset. He listed additional bonuses that would become payable in the future if Irick were employed on the designated, post-divorce bonus date. Irick's inventory listed each of these future bonuses as having a value of zero dollars. Irick testified that the bonuses had no value because

they depended on future events, including his appearance at work on the specified bonus date. If he stopped working at the company before each bonus's payout date, there would be no bonus.

Lineberry challenged Irick's description of the future bonuses. She argued they were deferred compensation for work performed during the marriage, making at least a portion of them community property subject to division. She listed his future bonuses on her inventory and estimated a total value of over $4 million. Both parties were questioned about the bonuses during their trial testimony.

At the end of the divorce trial, the trial court stated that a letter ruling would follow to outline the court's division of property. After the letter ruling, a detailed decree would be prepared and a judgment issued.

The letter ruling issued in March 2017. It explicitly stated that the court used Irick's inventory—referred to in the divorce proceeding as Exhibit R-53—as its starting point and, from there, the court made adjustments to obtain a just and right division. Only one bonus was listed in the letter ruling—the bonus that Irick said would be paid before the divorce was final. The court divided the bonus in half, giving each party equal shares of the paid compensation. No other bonuses discussed during the trial were listed in the letter ruling.

The court held a hearing before entry of judgment. At the April 2017 hearing, Irick's attorney asked the court to explain its treatment of the bonuses.

The trial court assured the parties that it "spent a lot of time on this case, and [ ] meant what [the court] said in the rendition as far as everything just as it was stated in [Irick's inventory], except for what [the court] changed."

Lineberry's attorney argued against the "zero value" Irick had placed on the future bonuses in his inventory. The trial court clarified its treatment of the post-divorce bonuses:

> Counsel, . . . the way the Court interpreted [the bonuses] is that they're contingent assets . . . *I don't think it's been earned* . . . . In my view, it's a contingent asset . . . . and it has no value.
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> * * *
>
> Or "speculative" might be a better word for it, Counsel, but I'm not going to award something that, in this Court's mind, *does not exist until it's earned.*
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> * * *
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> [A]s of the date of this decree, they have no value. They're speculative; and therefore, *anything that is earned on those will be earned post divorce*.

(Emphasis added.)

The divorce decree issued the following month. Like the rendition letter, the decree divided the single bonus paid during the marriage but did not refer to any future bonuses scheduled to be paid post-divorce. Lineberry received no portion of the future bonuses.

Lineberry requested findings of fact and conclusions of law, specifically addressed to the characterization of assets and the value of the community estate's assets. No findings of fact issued.

Lineberry moved to modify, correct, or reform the judgment, specifically arguing that the decree "fails to dispose of the entire Community Estate" in that it "fails to allocate employee benefits, wages, bonus allocations, suggested compensation."

Finally, Lineberry moved for a new trial, arguing that the decree "does not dispose of the community interest in certain employee compensation agreements to husband and the amounts in question seriously skews the property division greatly in favor of Brad Irick." In other words, Lineberry moved for an alternative disposition of the bonuses as community property subject to division. The trial court did not respond: Lineberry's efforts were overruled by operation of law.

Lineberry appealed the trial court's judgment to this Court. Before submitting an appellate brief, she moved to dismiss her appeal. Her motion was granted, and her appeal was dismissed. *Irick v. Irick*, No. 01-17-00369-CV, 2018 WL 1003544 (Tex. App.—Houston [1st Dist.] Feb. 22, 2018, no pet.) (mem. op.).

Five months later, Lineberry filed this second suit. She sued Irick to obtain a post-divorce division of community property not divided in the divorce.

Specifically, she sued for a portion of various employment bonuses that Irick's employer paid him within the first few months after the divorce.

Lineberry asserted that the bonuses were "described and identified" during the divorce trial but not awarded in the divorce decree. She described the bonuses as "deferred compensation, for efforts expended during the marriage" and, as such, argued that they "were Community Property." She pleaded that the bonuses were "clearly identified and disclosed" during the divorce proceeding "as at least in some portion a Community Asset."

Irick moved for summary judgment. He included as evidence a transcript of the hearing where all parties discussed the absence of the bonuses from the rendition and the correct drafting of the divorce decree's terms, his inventory the trial court used in its property division, the final decree of divorce, transcripts of divorce trial testimony where the parties discussed the bonuses, a copy of the trial court's March 2017 rendition letter, and Lineberry's petition for post-divorce division of property in which she admits that the bonuses were "described and identified" during the divorce.

Irick argued that res judicata barred Lineberry's suit to obtain an award of Irick's bonus payments that had been litigated in the divorce but not awarded to her. The trial court granted Irick summary judgment in December 2018 and awarded him attorney's fees.

The next month, in January 2019, Lineberry moved for a new trial. The new year brought a newly elected judge to the trial court. Until then, the divorce, the post-divorce suit, and the summary judgment were all ruled on by the same trial judge. The new judge would consider Lineberry's motion for new trial.

At the hearing on the motion for new trial, Lineberry argued she did not yet know the full amount of the bonuses that were paid post-divorce. Irick argued that the amount was irrelevant: the characterization of the bonuses as not being community property was made as part of the divorce, excluding them from a post-divorce division:

> The final decree of divorce was entered May 11, 2017. If they had an argument about whether [the trial court] was wrong or right on [its] ruling as to the characterization of those certain incentive plans, they could have taken that to the court of appeals. They filed a notice of appeal, they perfected the appeal, they dismissed the appeal. They had their opportunity to argue about factual sufficiency and legal sufficiency and abuse of discretion.
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> These particular plans are the exact same ones that were offered into trial, testified to, and [the trial court] made a ruling on it. If they had a problem with the ruling, they could have taken it to appeal. This is not the right forum to do it by saying something is an undivided asset when the court has already ruled it's not a marital asset and not subject to division. . . . This is why we have the principle of res judicata is to prevent people from coming back time and time again, taking more bites of the apple. . . .
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> The judge made the ruling on it, they had the opportunity to take it up to the court of appeals, they chose not to do it for whatever reason, and here we are arguing about the same thing we argued about two years ago.

The trial court asked whether Irick received any benefits after the divorce. Irick's counsel stated that he had. The trial court granted Lineberry a new trial and later denied Irick's motion to reconsider.

A bench trial on Lineberry's claim to a portion of Irick's post-divorce bonuses was held in May 2019. The parties preadmitted evidence without objection. The evidence included the final decree of divorce, Irick's various employment contracts that discussed future bonus payments, Irick's inventory on which Irick had listed these bonuses and provided a zero value for each, and trial transcripts from the 2017 divorce bench trial.

Lineberry testified that five months after her divorce, Irick received his first post-divorce bonus of just over $400,000. Other bonus payments followed. Lineberry agreed that Irick's bonus plans had been admitted into evidence at the divorce trial, that the parties had testified about the plans during the trial, and that both she and Irick had listed the plans on their inventories and assigned them values. She also agreed that her position during the divorce had been that the plans were community property subject to division and that her position at the post-divorce partition trial was the same.

Irick testified about the bonuses. He confirmed that the bonus plans were in evidence during the divorce trial. He recalled testifying that the bonuses were retention bonuses, which would only be paid if he were working at the company on

the specified, post-divorce bonus date. He also recalled that he had testified about the range of pay-outs that might occur if he were to receive the bonuses and that Lineberry had challenged the accuracy of his estimates.

According to Irick, the trial court found that the bonuses would be earned post-divorce because they were contingent on his appearance at work on the specified post-divorce pay-out date. Under that analysis, Lineberry was not entitled to a division of the post-divorce income.

According to Lineberry, the trial court failed to award the bonuses to anyone in the divorce decree even though the employment agreements were entered into during the marriage and, according to her, the bonuses were a community asset.

The month after receiving this evidence, the trial court rendered a judgment to affect a post-divorce division of community property. The key holdings of that May 2019 judgment are that

- the parties divorced on March 31, 2017;
- community property existed but was not divided in the divorce;
- bonuses were paid to Irick between October 2017 and October 2018—after the divorce;
- the bonuses totaled $5,412,782; and
- Lineberry's share, as awarded by the trial court, equaled $1,044,176.88.

The court purported to calculate Lineberry's share by determining what percentage of the applicable bonus period the couple was married, multiplying that percentage by the total bonus paid, and then awarding Lineberry one-half as community property.[2] Lineberry was awarded over $1 million of Irick's post-divorce bonuses. The trial court later acknowledged that it had not adjusted its division for tax liability. As a result, Irick bore the entire tax burden on the bonus payments.

Irick appealed.

Applicable Law on Post-Divorce Suits

The Family Code allows a trial court to order a post-divorce division of community property that was not divided or awarded to a spouse in the final decree of divorce. TEX. FAM. CODE § 9.201(a); *see Brown v. Brown*, 236 S.W.3d 343, 348

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[2] Regarding the retention bonus to be paid in three installments, the trial court divided it as follows:

- The Retention Performance Award was for $1.1 million to be paid in one-third annual installments beginning in October 2016 if Irick continued to work for the company.
- The first installment was paid pre-divorce in October 2016, specifically listed in the divorce decree, and divided between Irick and Lineberry equally in the decree.
- Even though the parties divorced in March 2017, the trial court determined that 100% of the October 2017 bonus period was during the marriage, making the entire bonus payment community property. The court awarded Lineberry one-half of that bonus.
- The court determined that the bonus paid in October 2018 (19 months post-divorce) was one-fourth community property and awarded Lineberry one-half of the one-fourth.

In sum, $774,488 of a $1.1 million retention bonus plan was paid out after the divorce. Lineberry was awarded $241,875 of that $774,488, which is 31.2% of the post-divorce bonus payments.

(Tex. App.—Houston [1st Dist.] 2007, no pet.) (noting that post-divorce property division actions are appropriate for "overlooked" assets not partitioned in the divorce).

If the property was divided in the divorce, then the trial court may not order a post-divorce division; instead, the court is limited to issuing further orders to enforce the division or clarify the earlier decree and may not alter or change the substantive division of property in a final divorce decree. *Id.* §§9.006(a), 9.007(a). Even if a trial court incorrectly divides marital property in a decree, a party may not use a post-divorce suit to relitigate the correct division. *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011); *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003). Thus, for example, a post-divorce suit may not be used to seek a ruling that recategorizes an asset from separate property to community property. *See id.* Nor may a party use the procedure to contend that the trial court improperly divided the property once categorized. *See Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990). This is because res judicata applies to a final divorce decree just as it does to any other final judgment. *Id.*

If a party is dissatisfied with the treatment of an asset in a judgment of divorce, then the party must pursue a direct appeal. *Id.* If the party does not timely perfect her appeal, res judicata bars a subsequent collateral attack. *Id.*

Only community property is subject to division in a divorce. *Pearson*, 332 S.W.3d at 363. Separate property remains the property of its owner and is not subject to division. *Osborn v. Osborn*, 961 S.W.2d 408, 413–14 (Tex. App.—Houston [1st Dist.] 1997, pet. denied) ("Only community property is subject to the trial court's 'just and right' division. In making its division, the trial court may not divest one party of his separate property."). The determination that an asset is separate property—and thus not subject to division—is a classification of an asset that, once performed, bars post-divorce relitigation of the asset's proper characterization. *Pearson*, 332 S.W.3d at 363–64. Even if the trial court erred in its categorization, res judicata bars relitigation of its characterization. *Id.* (holding that parties may not relitigate proper characterization of mineral deeds post-divorce because the deeds were categorized as community property more than 20 years earlier in the divorce, under the community property presumption that the husband failed to rebut); *Reiss*, 118 S.W.3d at 443 (stating that "a court has jurisdiction to characterize community property—even if it does so incorrectly.").

In a post-divorce suit to divide community property, the burden is on the party seeking the post-divorce division to establish that community property existed when the marriage was being dissolved and that the property was not divided by the court when rendering the final divorce decree. *Brown v. Brown*, 236

S.W.3d 343, 348 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see Land v. Land*, 561 S.W.3d 624, 634 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

A court may consider and divide an asset without specifically referring to the particular asset in the decree. *See Stephens*, 20 S.W.3d at 254. The decree's language can be broad enough to show that the court considered and divided the asset without naming it. *See, e.g., Wilde v. Murchie*, 949 S.W.2d 331, 333 (Tex. 1997) (decree did not specifically award house to either spouse, but it liquidated all of the wife's interest in the home and required the husband to assume the house's existing debts).

Standard of Review

Irick frames his appeal as a challenge to the legal and factual sufficiency of the evidence supporting the trial court's judgment. In an appeal from a bench trial, a trial court's findings of fact have the same weight as a jury's verdict. *Quality Infusion Care, Inc. v. Health Care Serv. Corp.*, 224 S.W.3d 369, 378 (Tex. App.—Houston [1st Dist.] 2006, no pet.). When challenged, findings of fact are not conclusive if, as here, there is a complete reporter's record. *Id.* When there is a reporter's record, the trial court's findings of fact are binding only if supported by the evidence. *Id.* If the findings are challenged, we review the sufficiency of the evidence supporting the findings by applying the same standards that we use in reviewing the sufficiency of the evidence supporting jury findings. *Id.*

The test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Id.* In making this determination, we credit favorable evidence if a reasonable factfinder could, and disregard contrary evidence unless a reasonable factfinder could not. *Id.* So long as the evidence falls within the zone of reasonable disagreement, we may not substitute our judgment for that of the factfinder. *Id.* The trier of fact is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Id.* Although we consider the evidence in the light most favorable to the challenged findings and indulge every reasonable inference that supports them, we may not disregard evidence that allows only one inference. *Id.*

In a bench trial, the trial court, as factfinder, is the sole judge of the credibility of the witnesses. *Id.* We review de novo a trial court's conclusions of law and uphold them on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Id.*

The Appellate Record

The parties disagree over the scope of the appellate record for determining whether res judicata attaches to the decree to prevent relitigation of the bonus payments' classification and division. Lineberry seeks to limit this Court to the terms of the divorce decree, ignoring any statements from the bench during the

entry-of-judgment hearing, including the trial court's statement that, in the court's view, Irick's bonuses had not yet been earned at the time of the divorce.

Irick, on the other hand, points out that the post-divorce-suit trial court (1) admitted as evidence (a) trial transcripts from the divorce, (b) Irick's inventory that the trial court used to craft its division, (c) the trial court's rendition letter, and (d) various pleadings, and (2) took judicial notice of some of those materials as well. He argues that all these materials were evidence before the post-divorce-suit trial court and are part of the appellate record here. *Cf. In re Marriage of Taylor*, 992 S.W.2d 616, 620 (Tex. App.—Texarkana 1999, no pet.) (stating that court in post-divorce suit that is reviewing whether property was disposed of in divorce "may consider the entire record to clarify the decree's provisions.") (citing *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex.1987)). He argues the record establishes that res judicata applies to bar Lineberry from relitigating the bonuses to obtain a division of post-divorce income.

Because the trial court admitted these materials into evidence and, for some, took judicial notice, we conclude that the materials are part of the appellate record before us. *Cf. In Interest of J.J.F.R.*, No. 04-15-00751-CV, 2016 WL 3944823, at *3 (Tex. App.—San Antonio July 20, 2016, no pet.) (mem. op.) (allowing that trial testimony from previous trial may be considered in subsequent proceeding if admitted as evidence); *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—

Houston [14th Dist.] 2011, no pet.) ("In order for testimony from a prior hearing or trial to be considered in a subsequent proceeding, the transcript of that testimony must be properly authenticated and entered into evidence."). The divorce-trial materials in the record are relevant to the determination whether res judicata bars Lineberry's efforts to obtain a post-divorce division of the bonus payments. *See Brown*, 236 S.W.3d at 346 (in determining whether res judicata barred a post-divorce division of an asset, considering the parties' inventories supplied to the trial court and the associate judge's notations in crafting a division).

Res Judicata Bars Lineberry's Second Suit to Litigate the Character of the Bonuses

Irick contends the trial court erred by failing to hold that res judicata bars Lineberry's second suit to divide property post-divorce. As explained in more detail below, we agree. In the divorce proceeding, Lineberry pleaded that the bonuses were community property and sought a division of the assets. The trial court did not grant Lineberry any community interest in the bonuses, having concluded that the bonuses would not be earned until after the divorce. Lineberry failed to pursue appellate review of the trial court's characterization of the bonuses. The characterization is not subject to collateral attack through a post-divorce suit.

A. Characterization of an asset is given preclusive effect

Characterization of an asset as community property or separate property is given preclusive effect. *Id.*; *see Baxter*, 794 S.W.2d at 762. A party who wishes to

challenge the erroneous characterization of an asset must bring a direct appeal of the judgment; otherwise, res judicata bars relitigation of the issue. *Baxter*, 794 S.W.2d at 762–63. This is because a post-divorce property-division suit is unavailable to relitigate the correctness of the trial court's characterization of an asset. *Pearson*, 332 S.W.3d at 363; *see Brown*, 236 S.W.3d at 349–50.

When seeking a post-divorce division, it is not enough for a party to simply point out that property was not divided in their divorce. If the property was not divided because it was characterized as separate property not subject to a division, then the property may not be relitigated in a post-divorce suit, even if its initial characterization were erroneous. *Pearson*, 332 S.W.3d at 363; *see Baxter*, 794 S.W.2d at 762; *see also Brown*, 236 S.W.3d at 348 (noting that post-divorce property division actions are appropriate for "overlooked" assets not partitioned in the divorce).

B. The parties litigated the bonuses' character and division

Based on the appellate record, there is no question that both parties litigated the proper characterization of the bonus payments during the divorce trial. The compensation agreements were admitted into evidence. Irick testified about the bonuses' projected values on their future payout dates. Both parties listed the future bonuses in their asset inventories. And both parties testified extensively about them.

Irick was asked whether he thought Lineberry was entitled to a portion of the future bonuses, and Irick explained that he did not. He was asked if a percentage formula should apply to divide the bonus funds because the couple was married during the time the bonuses were pending, and Irick testified that Lineberry should have no interest in the post-divorce bonuses. The trial court overseeing the divorce litigation received extensive evidence about these future bonuses. Key provisions of the bonus-announcement letters were read into the record. Irick was cross-examined on their meaning and the significance of their terms.

For example, Irick was cross-examined during the divorce about a bonus titled "Longterm-Incentive Plan Number 1." Irick testified that the bonus would be paid, if at all, after the divorce. He estimated a payment amount between $250,000 and $900,000 depending on whether he qualified for the bonus by working at the company on the payout day and other internal factors.

Irick was asked whether he understood that the trial court could divide contingent community property assets using an "if-and-when" model, such that Lineberry "gets X percent" and Irick "gets Y percent . . . if and when" Irick receives the bonuses. Irick stated that he understood the mechanism of division, but he maintained that the bonuses were contingent on his employment on the payout date and were not subject to any division.

Lineberry testified about how much she believed the bonuses might be worth and declared what percentage of each bonus she thought she should be awarded in the divorce.

Thus, it is clear the parties litigated the character and division of the future bonuses.

C. The trial court analyzed the bonuses' character and division

The record establishes that the trial court analyzed whether the bonuses were separate or community property. After the divorce trial court issued its rendition letter, the parties (through counsel) attended an entry-of-judgment hearing where the court's handling of the bonuses was discussed at length. Irick reiterated his position that the bonuses were not community property: "And so, we made the argument, number one, that they were not marital property and not subject to division." The trial court responded, "Right."

Irick referred to the trial court's basing its rendition on his inventory after receiving evidence related to the bonuses' character and division. Irick stated: "I know it was a central issue in the case. I know you certainly didn't ignore it." The trial court responded "No" and explained that the court interpreted the future bonuses as "worth nothing" because "I don't think it's been earned" and "I'm not going to award something that, in this Court's mind, does not exist until it's

earned." Clarifying its treatment of the bonuses, the trial court stated that "anything that is earned on those [bonuses] will be earned post divorce."

The evidence before the post-divorce trial court establishes that the divorce trial court had determined that the bonuses would be earned post-divorce. The divorce decree did not divide the bonuses or award any part of them to Lineberry despite her legal arguments in support of classifying the bonuses as community property subject to division.

The discussion between the trial court and the parties' attorneys established that the bonuses were not included in the property division because the trial court had determined that "anything that is earned on those will be earned post divorce." While the trial court did not use the term "separate property," the analysis reveals that the trial court determined that the bonuses were separate property. This is because income earned post-divorce is separate property. *Mandell v. Mandell*, 310 S.W.3d 531, 539 (Tex. App.—Fort Worth 2010, pet. denied) ("A spouse is not entitled to a percentage of his or her spouse's future earnings. A spouse is only entitled to a division of property that the community owns at the time of divorce.") (internal citation omitted); *see* TEX. FAM. CODE § 3.002 (defining "community property" as "property, other than separate property, acquired by either spouse *during marriage*") (emphasis added).

D. The omission of any reference to the bonuses in the divorce decree does not open the door to relitigation of the bonuses character given this record

During her testimony in the post-divorce suit, Lineberry admitted that she had included the bonuses in her inventory, argued to the divorce court that they should be characterized as community property, and suggested an appropriate division of the assets. In other words, the bonuses were undeniably litigated. Lineberry contends, though, that Irick's evidence of how much the bonuses were litigated is irrelevant because the lack of any reference to the bonuses in the decree opens the door to a post-divorce division of the assets if she can establish, post-divorce, that they are properly characterized as community property. She relies on statements from various cases indicating that res judicata will bar a post-divorce property division "only when the divorce decree has disposed of the asset at issue." We cannot agree that the divorce court's failure to explicitly divide the bonuses allows relitigation of their character, given the record before us. *Cf. Stephens v. Marlow*, 20 S.W.3d 250, 254 (Tex. App.—Texarkana 2000, no pet.) (asset may have been considered and disposed of without specific reference in decree).

The record establishes that the trial court characterized these bonuses as separate property not subject to division. The court discussed the bonuses' absence from the draft divorce decree at the entry-of-judgment hearing. The court explained that it had determined that these bonuses would be earned post-divorce.

An asset earned post-divorce is separate property. *Mandell*, 310 S.W.3d at 539 ("A spouse is not entitled to a percentage of his or her spouse's future earnings. A spouse is only entitled to a division of property that the community owns at the time of divorce.") (internal citation omitted); *see* TEX. FAM. CODE § 3.002 (defining "community property" as "property, other than separate property, acquired by either spouse *during marriage*") (emphasis added). Because separate property is not subject to division in a divorce, the decree did not divide it. *See Kelly v. Kelly*, No. 01-19-00580-CV, 2021 WL 3775646, at *5 (Tex. App.—Houston [1st Dist.] Aug. 26, 2021, no pet. h.).

The trial court's characterization of the future bonuses as separate property was a disposition because separate property remains with its owner and is not subject to division in a divorce. If Lineberry wanted to challenge the characterization that led to the bonuses' absence from the decree, she had to pursue a direct appeal. *Baxter*, 794 S.W.2d at 762. Otherwise, res judicata bars relitigation of the property's correct characterization. *See id.*

Even if the trial court erred in its characterization, res judicata bars further litigation of the issue through a post-divorce division suit. *Pearson*, 332 S.W.3d at 363–64; *see Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003) (declaring that party's "remedy for a substantive error of law by the trial court was by direct appeal, and he cannot now collaterally attack the judgment").

The lack of any reference to the bonuses in the divorce decree does not compel the result Lineberry seeks. The characterization of an asset is given preclusive effect and may not be relitigated. *Pearson*, 332 S.W.3d at 363–64. Although Lineberry at first appealed the trial court's judgment, she obtained a voluntary dismissal of that appeal and allowed the judgment to become final. Res judicata attached. Collaterally attacking the judgment by arguing the property can later be characterized as community property and divided is not permitted.

In sum, the bonuses were found to be separate property, not subject to division under Texas law. That characterization may not be collaterally attacked through a post-divorce suit. *See Pearson*, 332 S.W.3d at 363–64. The characterization of the property may not be relitigated, even if its initial characterization were erroneous. *Pearson*, 332 S.W.3d at 363; *see Baxter*, 794 S.W.2d at 762; *see also Brown*, 236 S.W.3d at 348 (noting that post-divorce property division actions are appropriate for "overlooked" assets not partitioned in the divorce).

Conclusion

We conclude that the divorce court determined that the future bonuses were separate property by holding that they would to be earned, if at all, post-divorce. Res judicata barred relitigation of the appropriate characterization of the bonuses.

And the post-divorce trial court erred in awarding Lineberry a community-property share of bonuses that had been judicially determined to be separate property.

We sustain Irick's issue asserting that the trial court erred by not holding that res judicata barred Lineberry's post-divorce suit. We overrule Lineberry's issues challenging the amount of community interest she was granted in the bonuses as moot.

We reverse and vacate the trial court's judgment and remand for additional proceedings consistent with this judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Kelly, Landau, and Hightower.