COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1620

NEERU CHAWLA

vs.

BRIJESH CHAWLA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Brijesh Chawla (husband), the former spouse of Neeru Chawla (wife), appeals from a divorce judgment issued by a Probate and Family Court judge after a seven-day trial. The husband challenges the portions of the divorce judgment pertaining to the distribution of the marital estate and the summer parenting schedule for the parties' child. Because of a scrivener's error, we vacate so much of the divorce judgment pertaining to the summer parenting schedule and remand for further proceedings consistent with this memorandum and order. The remainder of the divorce judgment is affirmed.

Discussion. 1. Property division. "Our review of a judgment pursuant to the equitable distribution statute, G. L. c. 208, § 34, proceeds under a two-step analysis. 'First, we examine the judge's findings to determine whether all relevant

factors in § 34 were considered.'" Adams v. Adams, 459 Mass. 361, 371 (2011), quoting Bowring v. Reid, 399 Mass. 265, 267 (1987). "The second tier of our review requires us to determine whether the reasons for the judge's conclusions are 'apparent in his findings and rulings.'" Adams, supra, quoting Redding v. Redding, 398 Mass. 102, 108 (1986). "A judge's determinations as to equitable distribution will not be reversed unless 'plainly wrong and excessive.'" Adams, supra, quoting Redding, supra at 107.

Here, the judge considered all the relevant factors under § 34,[1] the most pertinent of which we summarize. The parties had been married for fourteen years at the commencement of the divorce action in 2014, and they enjoyed a "middle class" lifestyle during the marriage. Both parties made noneconomic and economic contributions to the marriage, including caring for the children and contributing their earnings to the household. The judge found that both parties were "fully employed" during the trial, which commenced in January 2018 and concluded in

[1] The judge is required to consider "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, [and] the opportunity of each for future acquisition of capital assets and income." G. L. c. 208, § 34. The judge "may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit." Id.

November 2018. The wife was employed by the Commonwealth of Massachusetts as a computer programmer from 2008 to May 2016 (when she was laid off), earning an annual salary of $82,000. While employed in that position, the wife contributed to the State retirement system; however, her pension had not yet vested when she was laid off in 2016. Shortly before the commencement of trial, and following an extensive job search, the wife secured a position at Fitchburg State University earning an annual salary of $60,000, which enabled her to resume contributing to the State retirement system. The husband was also laid off during the pendency of the divorce proceedings; however, he managed to secure new employment as a software architect, earning an annual salary of $151,900 at the time of trial.

The judge concluded that a "roughly equal division of the marital estate" was warranted, noting that "an exactly equal division" would be "problematic" in light of the expenditure and movement of funds during the parties' "lengthy" separation. See Ross v. Ross, 50 Mass. App. Ct. 77, 81 (2000) ("Mathematical precision is not required of equitable division of property" [citation omitted]). The judge also concluded that it was equitable to divide the value of the husband's 401(k) as of November 1, 2014, the date upon which the husband began paying

temporary support to the wife.[2] To that end, each party was assigned fifty percent of the net proceeds from the sale of the marital home, and one-half of the balance of their joint savings account. The remaining assets were divided as follows. The wife received fifty percent of the balance of the husband's 401(k) as of November 1, 2014,[3] the entirety of her public employee pension (which the judge found had an "uncertain" value), and other property (including her individual retirement account (IRA), bank accounts, automobile, and home furnishings) having a total value of $67,734.16. The husband received the remainder of his 401(k) (including all appreciation after November 1, 2014), and other property (including his IRA, foreign and domestic bank accounts, and automobile) having a total value of $122,961.92.

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[2] The judge found and reasoned that "the parties have been separated for . . . more than [four] years, and . . . there has been a support order in place covering all the time since November, 2014, it would not be equitable to divide funds contributed by [the] husband to his 401(k) since the date that support was effective. Accordingly, the equitable division of the 401(k) mandates the division of the account as of November 1, 2014."

[3] The November 1, 2014 value of the husband's 401(k) is unclear based on this record. Although the chart in the judge's findings identifying the composition of the marital estate provided a value of $301,198.25 for the husband's 401(k), that figure appears to reflect the value of the 401(k) as of January 2018. The judge noted that the husband reported the value of his 401(k) to be $195,985.29 in December 2015, $200,838.94 in May 2016, and $282,676.22 in July 2017; however, the judge made no findings regarding the value of the 401(k) in 2014.

The husband contends that the judge, in dividing the husband's 401(k) and assigning the wife the entirety of her pension, failed to achieve the "roughly equal" division of assets that he intended. The husband maintains that it was impossible for the judge to conclude that the division of assets was equal without making a finding as to the actual value of the wife's pension. Notably, the husband does not claim that the judge's finding assessing the value of the wife's pension as "uncertain" was clearly erroneous. See Sarrouf v. New England Patriots Football Club, Inc., 397 Mass. 542, 550 (1986) ("Valuation is a question of fact, and we will not disturb a judge's determination unless it is clearly erroneous"). To the contrary, the husband concedes that there was no evidence presented at trial regarding the value of the wife's pension in 2018. Indeed, the only evidence regarding the wife's pension was her testimony that she reported its value to be $24,000 on her November 2014 financial statement. Although the husband had ample opportunity during the seven-day trial to cross-examine the wife, he failed to ask her a single question regarding the value of her pension in 2018. Accordingly, the judge cannot be faulted for failing to make a finding regarding the 2018 value of the wife's pension. See Putnam v. Putnam, 7 Mass. App. Ct. 672, 674 (1979) ("when parties decline to offer evidence on [the

G. L. c. 208, § 34] factors . . . consideration of the factors thereby omitted can properly be deemed waived").

We are likewise unpersuaded by the husband's contention that, in the absence of evidence regarding the 2018 value of the pension, the judge should have used the 2014 value as an offset reducing the wife's share of the husband's 401(k). Assuming arguendo that the judge implicitly credited the wife's testimony that her pension was worth $24,000 in 2014, the assignment of that asset to the wife did not result in an unequal division favoring her. Excluding the assets divided equally between the parties (i.e., the husband's 401(k) as of November 2014, the net sale proceeds from the marital home, and the joint savings account), the husband was left with assets totaling $122,961.92 (not including any 401(k) appreciation after November 2014) and the wife was left with assets totaling $67,734.16 (not including her pension). Thus, even after including the 2014 value of the wife's pension in her share of the marital estate, the husband's assets would still exceed those of the wife by approximately $31,228.[4] Accordingly, on this record, we cannot say the

[4] Although we cannot speculate as to the value of the wife's pension in 2018, we think it reasonable to infer that any appreciation in the wife's pension after 2014 was likely de minimis in comparison to the value of the overall marital estate. See Ross, 50 Mass. App. Ct. at 81-82. The wife's 2015 W-2 reflects retirement contributions of $8,494.06 for that year. Although there is no evidence in the record regarding the wife's retirement contributions during the first five months of

assignment of the wife's entire pension to her was "plainly wrong and excessive." Adams, 459 Mass. at 371, quoting Redding, 398 Mass. at 107.

2. Summer parenting schedule. With respect to the summer parenting schedule, the divorce judgment provided that "each party shall have up to weeks of vacation during the summer school recess." The omission of the number of vacation weeks to which each party is entitled is clearly a scrivener's error. We are unable to discern the judge's intent from the surrounding language in the judgment or the findings and rationale. Accordingly, a remand is necessary to correct the error. Cf. Charara v. Yatim, 78 Mass. App. Ct. 325, 338-339 (2010) (appellate court may modify judgment to correct scrivener's error if trial judge's intention apparent on record). Because the trial judge has retired, the matter will be heard by a different judge and additional evidence may be taken as the judge deems necessary.

Conclusion. Paragraph 8 of the divorce judgment is vacated and the matter is remanded to clarify the number of vacation weeks that each party shall have during the child's summer

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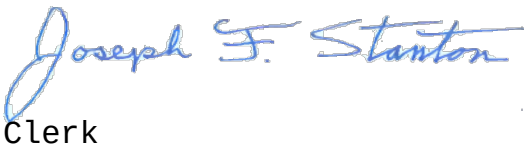
2016, the wife's first paystub from her new job (for the two-week pay period ending on January 6, 2018) shows retirement contributions of $230.77. By comparison, the husband's paystub for the first full pay period of 2018 shows 401(k) contributions of $759.50.

school recess. The judge may take additional evidence in his or her discretion. The divorce judgment is otherwise affirmed.

So ordered.

By the Court (Green, C.J., Neyman & Grant, JJ.[5]),



Clerk

Entered: June 8, 2021.

[5] The panelists are listed in order of seniority.