

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-143

COLBY L. SCHULZ

vs.

KRISTOPHER W. SCHULZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After approximately fifteen years of marriage, Colby L. Schulz (wife) filed a complaint for divorce from Kristopher W. Schulz (husband). Following a five-day trial that concluded in late 2019, a judge of the Probate and Family Court issued a judgment of divorce nisi (divorce judgment) and findings of fact on April 17, 2020. The husband appeals, challenging the portions of the divorce judgment pertaining to physical custody of the parties' two children and the division of the marital estate. The husband also appeals from a related "supplemental" judgment, dated June 1, 2020, that awarded the wife's attorney's fees of \$900 in connection with her complaint for contempt. We affirm.

Discussion. 1. Transcripts. As an initial matter, we note that the husband has failed to provide complete transcripts

of the trial below. The husband has provided transcripts of only the third and fourth days of the five-day trial, omitting, among other things, the entirety of the wife's direct testimony (and most of her cross-examination testimony) and all testimony from the contempt hearings. It is the husband's responsibility, as the appellant, to provide complete transcripts necessary to decide the issues raised in his brief. See Mass. R. A. P. 18 (a), (b) (4), as appearing in 481 Mass. 1637 (2019); Cameron v. Carelli, 39 Mass. App. Ct. 81, 84 (1995). The husband's failure to provide complete transcripts has materially hampered our review of the custody award, property division, and fee award that he challenges on appeal and, as a result, the husband cannot sustain his appellate burden. Mass. R. A. P. 18 (b) (4) (failure to provide transcripts necessary to decide issue on appeal "result[s] in waiver of the issue"); Cameron, supra. We nevertheless touch upon certain issues concerning the custody award, property division, and fee award, based on the incomplete record before us.

2. Custody. We review custody determinations for an abuse of discretion. Schechter v. Schechter, 88 Mass. App. Ct. 239, 245 (2015). "In custody matters, the touchstone inquiry [is] . . . what is 'best for the child.'" Hunter v. Rose, 463 Mass. 488, 494 (2012), quoting Custody of Kali, 439 Mass. 834, 840 (2003). See G. L. c. 208, § 28. "The determination of which

parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" Hunter, supra, quoting Custody of Kali, supra at 845.

The husband contends that the judge abused her discretion in awarding the wife primary physical custody of the parties' two children, asserting that the judge ignored evidence of his increased involvement with the children in the later years of the marriage and essentially penalized him for being the family's primary income earner. Based on the incomplete record before us, we discern no abuse of discretion. The judge's findings provide ample support for the custody determination. The judge found, among other things, that (1) the wife had been the children's primary caretaker throughout the marriage; (2) the wife acquired a job that accommodated the children's schedules, allowing her to manage their daily routines and be consistently available to them; (3) the husband was historically less involved in the children's day-to-day care; and (4) it was in the children's best interests for the wife to remain the children's primary caregiver.. These findings form an appropriate basis for granting primary physical custody to the wife. See Charara v. Yatim, 78 Mass. App. Ct. 325, 334-335 (2010), quoting Custody of Kali, 439 Mass. at 842 ("it is in [the] best interests of [the] child to preserve [the] 'current

placement with a parent, if it is a satisfactory one'; 'stability and continuity with the child's primary caregiver is itself an important factor in a child's successful upbringing').

3. 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 [her] findings and rulings.'" Adams, supra, quoting Redding v. Redding, 398 Mass. 102, 108 (1986). "A division of marital property which is supported by findings as to the required factors will not be disturbed on appeal unless plainly wrong and excessive" (quotation and citation omitted). Passemato v. Passemato, 427 Mass. 52, 57 (1998).

Here, the judge made findings reflecting consideration of all required factors under § 34. The judge found the following property to be includable in the marital estate, the combined value of which was approximately \$785,176: (1) the husband's inheritance from his late mother's estate, valued at approximately \$301,818; (2) the husband's personal injury

settlement proceeds received in March 2019, for an injury he sustained in 2015, valued at \$78,000; (3) retirement assets dissipated by the husband during the pendency of the divorce proceedings, in the amount of \$72,943; (4) the "vested shares" of the husband's restricted stock units (RSUs), valued at \$5,934; and (5) the parties' remaining assets, consisting of the marital home equity and their retirement accounts, having an approximate combined value of \$326,472.

With respect to the husband's inheritance, although the judge found it to be a vested property interest and thus includable in the marital estate, the judge assigned one hundred percent of it to the husband, given that he received it "at the very end of the marriage." As for the husband's personal injury settlement, the judge found that the husband sustained the injury during the marriage and that the wife was entitled to thirty-three percent (\$25,740) of the net proceeds. The judge also ordered the husband to reimburse the wife for one-half of the dissipated retirement assets (\$36,471), and one-half of the mortgage payments made by the wife during the pendency of the divorce proceedings (\$4,398), which increased the marital home's equity. With respect to remaining property, the judge ordered the husband to pay the wife \$5,934 (representing the July 2019 value of his vested RSUs) and assigned the wife sixty-five percent of the remaining assets (i.e., the parties' retirement

accounts and the net proceeds from the future sale of the marital home). As a result of the foregoing property division, the husband was left with assets totaling approximately \$500,000, and the wife was left with assets totaling approximately \$285,000.

Despite that he received approximately sixty-three percent of the total marital estate, the husband contends that the property division was "grossly disparate" in favor of the wife because she received one hundred percent of the value of the RSUs and sixty-five percent of the marital home proceeds and retirement accounts. We disagree. In assigning the wife a larger share of those assets, the judge appropriately weighed the husband's superior earning capacity,¹ greater opportunity for the future acquisition of retirement assets, and retention of his entire inheritance. See Ross v. Ross, 385 Mass. 30, 37 (1982) ("The weight to be accorded to each of the § 34 factors in a particular case is committed to the judge" [citation omitted]). We cannot say that the wife's receipt of a greater share of some marital assets was "plainly wrong and excessive," Passemato, 427 Mass. at 57, where the overall property division favored the husband, the husband earns substantially more income

¹ At the time of trial, the husband was earning approximately \$153,000 per year and the wife was earning approximately \$30,000 per year.

than the wife (but was not ordered to pay alimony), and the judge found the parties to have made relatively equal contributions to the marital enterprise. See Cabot v. Cabot, 18 Mass. App. Ct. 903, 905 (1984) ("There is no requirement in G. L. c. 208, § 34, or cases under it, of precise parity in equitable division of marital assets").

The husband also claims error in the judge's decision to include his RSUs in the marital estate, asserting that they were unvested and that the judge failed to make findings justifying their inclusion. Here, the judge found there to be "scant" evidence regarding the RSUs, she declined to credit the husband's claim that the RSUs were unvested, and she ultimately relied on the value of the RSUs reported by the husband on his own financial statement. We see nothing in this incomplete record that would warrant disturbing the judge's credibility determination regarding the vested nature of the husband's RSUs. See Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (1995). Moreover, even assuming that the evidence established that the RSUs were unvested (which we do not suggest), the judge was not prohibited from including them in the marital estate. See Baccanti v. Morton, 434 Mass. 787, 796-797 (2001) ("unvested stock options are assets that may be included in a party's assignable estate"). "[T]he determinative factor is whether the options, or a portion of the options, are attributable to the

marital partnership, not whether they will vest after dissolution of the marriage." Id. at 803. The husband had the burden of establishing that the RSUs were not attributable to the marital partnership. Id. at 800-801. We see nothing in the incomplete record before us showing that the husband properly raised, let alone met his burden of proving, that the RSUs in question were not the product of the marital enterprise.² Id. at 803-804. Accordingly, we discern no error in the inclusion of the RSUs in the marital estate. Id. at 804.

We are likewise unpersuaded by the husband's contention that it was error to award the wife a portion of his personal injury settlement proceeds. "In making an equitable division of the parties' property, the judge had available for distribution 'all or any part of the estate of the other,'" Heins v. Ledis, 422 Mass. 477, 483-484 (1996), quoting G. L. c. 208, § 34, including personal injury settlement proceeds. See Hanify v. Hanify, 403 Mass. 184, 186-190 (1988). Insofar as the husband argues that the judge should have excluded the settlement because he received it after the parties separated (but before the divorce trial), "the marital estate is typically determined

² In addition to omitting three days of trial testimony, the husband failed to provide a transcript of the pretrial conference or a copy of his pretrial memorandum identifying the issues to be tried. Also omitted from the record appendix are copies of the parties' financial statements submitted during the divorce trial.

as of the date of the divorce trial," rather than at the time of separation. Moriarty v. Stone, 41 Mass. App. Ct. 151, 154 (1996). Cf. Savides v. Savides, 400 Mass. 250, 252-253 (1987) (affirming valuation at time of separation where parties were separated for nine years before husband filed complaint for divorce, and postseparation appreciation of husband's assets was not attributable to wife's efforts). Based on the incomplete record before us, we discern no error in the judge's decision to include the personal injury settlement proceeds in the marital estate.

4. Fee award. Finally, the husband argues that the judge improperly awarded attorney's fees to the wife in the supplemental judgment on her complaint for contempt, because that judgment did not actually adjudicate him guilty of contempt. Under G. L. c. 215, § 34A, there is "a presumption in favor of an award of reasonable fees and costs for a successful plaintiff in a contempt action," Coppinger v. Coppinger, 57 Mass. App. Ct. 709, 714 (2003); here, however, the supplemental judgment did not contain an express finding of contempt. That said, it is apparent from the judge's findings that the fee award related to the husband's failure to provide an accounting of the dissipated retirement funds as ordered by the judge prior to trial, thus causing the wife to unnecessarily incur additional attorney's fees. Accordingly, notwithstanding the

lack of an express contempt finding, "[t]here was . . . ample basis for the judge to exercise her discretion under G. L. c. 208, § 38, to order an award of attorney's fees payable to the wife's counsel in order to mitigate expenses incurred as a result of the husband's obstructionist conduct" (quotation and citation omitted). Cooper v. Cooper, 62 Mass. App. Ct. 130, 143-144 (2004). We discern no abuse of discretion in the fee award. See Moriarty, 41 Mass. App. Ct. at 159 (judges have "considerable discretion" to award fees in domestic relations cases, and "[s]uch an award is 'presumed to be right and ordinarily ought not to be disturbed'" [citation omitted]).

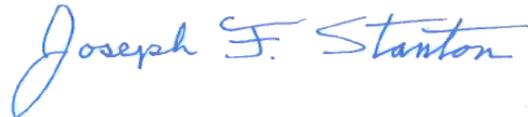
5. Appellate fees and costs. The wife seeks an award of appellate fees and costs, citing the husband's failure to adhere to the rules of appellate procedure and the frivolousness of his appeal. In light of the husband's failure to provide us with complete transcripts necessary to decide the issues raised in his brief, we agree that his appeal is frivolous and allow the wife's request for appellate fees and costs. See Mass. R. A. P. 25, as appearing in 481 Mass. 1654 (2019); Avery v. Steele, 414 Mass. 450, 455 (1993) ("An appeal is frivolous [w]hen the law is well settled, when there can be no reasonable expectation of a reversal The determination whether an appeal is frivolous is left to the sound discretion of the appellate court" [quotations and citations omitted]). In accordance with

the procedure specified in Fabre v. Walton, 441 Mass. 9, 10-11 (2004), the wife may, within fourteen days of the issuance of this memorandum and order, submit an application for attorney's fees with the appropriate supporting materials. The husband shall have fourteen days thereafter to file a response to that application.

Judgment of divorce nisi
dated April 17, 2020,
affirmed.

Supplemental judgment dated
June 1, 2020, affirmed.

By the Court (Wolohojian,
Massing & Singh, JJ.³),



Clerk

Entered: September 1, 2022.

³ The panelists are listed in order of seniority.