

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

18-P-1654

CYNTHIA L. RUBIN

vs.

ERIC D. RUBIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The former husband appeals from an amended judgment of divorce nisi, raising arguments related to the Probate and Family Court judge's treatment of the parties' primary marital asset, a business operating as an assisted-living facility. First, the husband argues that the judge erred by ordering the parties to sell the business and divide the proceeds, after finding that any valuation of the business would be speculative based on the evidence presented. Second, the husband argues that the judge erred by including the husband's income from the business in calculating his alimony obligation to the former wife.

Under G. L. c. 208, § 34, a judge has "broad discretion" to divide marital property equitably. Passemato v. Passemato, 427 Mass. 52, 57 (1998). "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.'" Id., quoting Heins v. Ledis, 422 Mass. 477, 481 (1996). Here, on the record before us, we discern no abuse of discretion in the judge's decision to order the sale of the business. Although the husband contends that the judge could have instead valued the business based on the husband's testimony about similarly situated facilities, the judge did not credit that testimony, finding that the other facilities the husband referenced were not "truly comparable." To the extent the husband challenges this finding as clearly erroneous, we cannot review his argument because he has not included a copy of the trial transcript in the appellate record. See Butts v. Freedman, 96 Mass. App. Ct. 827, 832 n.8 (2020). For the same reason, we cannot review the husband's argument that the judge had enough evidence before her to assign a value, even though neither party offered an accounting of the business or expert evidence on valuation.¹

¹ At oral argument the husband represented that he ordered the trial transcript and was prepared to file it with this court. But even were we to grant leave to file the transcript, the husband's brief does not contain citations to it, as would be required to show that the judge's factual findings are clearly erroneous. See Mass. R. A. P. 16 (e), as appearing in 481 Mass. 1628 (2019); Cameron v. Carelli, 39 Mass. App. Ct. 81, 83-85 (1995). We note also that the judge made detailed findings to support her determination that any value assigned to the business would be speculative; the judge identified several variables that could affect the valuation and stated that she could not "adequately quantif[y]" those variables based on the

The husband raises two challenges to the alimony award: that the evidence does not support the judge's imputation of income from the business to the husband, and that the judge engaged in impermissible "double dipping" by ordering the sale of the business while at the same time including the husband's income from the business to determine alimony. Again, the record is not adequate for us to review the first argument. See Butts, 96 Mass. App. Ct. at 832 n.8. As for the second argument, while we do not believe there is any issue of "double dipping,"² we agree with the husband that the matter must be remanded to the judge for further findings. The judge recognized that "the sale [of the business] will result in the loss of [the] [h]usband's second income," but this does not appear to have factored into her calculation of alimony. In particular, the judge did not separately determine what amount of alimony would be appropriate once the business is sold. Although the wife maintained at oral argument that the judge

evidence presented. We would be hard pressed to overturn this determination, even with an adequate record. See Connor v. Benedict, 481 Mass. 567, 578 (2019).

² "Commentators use the phrase 'double dipping' to describe the seeming injustice that occurs when property is awarded to one spouse in an equitable distribution of marital assets and is then also considered as a source of income for purposes of imposing support obligations." Champion v. Champion, 54 Mass. App. Ct. 215, 219 (2002). "Double dipping" is not implicated here because the judge did not award the business to the husband, but ordered its sale.

attributed future income to the husband based on his potential earning capacity, the judge's decision, which does not include any specific findings on attribution, is not susceptible of that reading. We therefore conclude that the alimony order requires additional findings and redetermination. We further conclude that the issue of property division must be remanded along with the issue of alimony because of the intertwined nature of the issues. See D.L. v. G.L., 61 Mass. App. Ct. 488, 508 (2004). Cf. Levitian v. Rosen, 95 Mass. App. Ct. 248, 255 (2019).

Accordingly, so much of the amended judgment of divorce nisi dated August 15, 2018, as it pertains to property division and the husband's alimony obligation, is vacated, and the matter is remanded for further proceedings consistent with this memorandum and order. The judge may take additional evidence on remand, as she deems necessary,³ and the husband's temporary support obligation to the wife, as set forth in the December 5, 2014, temporary order, shall be reinstated and remain in effect

³ The judge also has the authority on remand to craft a global disposition to the extent other aspects of the judgment are intertwined with the issues of alimony and property division.

until entry of judgment on remand, unless the judge orders otherwise. The remainder of the amended judgment is affirmed.

So ordered.

By the Court (Neyman, Shin & Singh, JJ.⁴),


Clerk

Entered: February 19, 2021.

⁴ The panelists are listed in order of seniority.