

NOTICE: Decisions issued by the Appeals Court pursuant to its Rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, Rule 1:28 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 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.

14-P475

Appeals Court

DEBORAH A. REED vs. WILLIAM E. REED

No. 14-P-475.

April 23, 2015, Entered

JUDGES: Green, Grainger & Massing, JJ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

William Reed (husband) appeals from a judgment of divorce, disputing the findings and rationale of the Probate and Family Court judge. We affirm the judgment in most respects, but order the reduction of the alimony awarded to Deborah Reed (wife) from \$835 per week to \$776.05 per week.

Alimony calculation. "A judge has broad discretion when awarding alimony under the statute." *Zaleski v. Zaleski*, 469 Mass. 230, 235, 13 N.E.3d 967 (2014). On appeal we determine whether the judge considered all of the relevant mandatory factors set forth in G. L. c. 208, § 53(a), and whether he relied on any irrelevant factors. *See Zaleski v. Zaleski, supra at 236; T.E. v. A.O.*, 82 Mass. App. Ct. 586, 592-593, 976 N.E.2d 803 (2012). So long as the judge has made findings consistent with the statutory factors, and the reasons for the judge's conclusions are apparent from the findings and rulings, we will not reverse an alimony award or property division unless "plainly wrong and excessive." *Redding v. Redding*, 398 Mass. 102, 107-108, 495 N.E.2d 297 (1986).

The husband generally challenges the way the judge arrived at the alimony figure. He contends that the judge failed to consult the § 53(a) factors, and instead, based the alimony award solely on G. L. c. 208, § 53(b), inserted by St. 2011, c. 124, § 3, which states that "the amount of alimony should generally not exceed the recipient's need or 30 to 35 percent of the difference between the parties' gross incomes established at the time of the order being issued." Having reviewed the judge's comprehensive findings and rulings, we conclude that the judge correctly applied the law.

As set forth in the judge's amended findings of fact, particularly paragraphs one, four, six, forty-five, forty-eight through sixty-four, sixty-six, seventy-two, and seventy-four, the judge considered the relevant factors set forth § 53(a). Based on these findings, the judge was warranted in selecting the lowest point of the thirty to thirty-five percent income differential formula in § 53(b) to calculate the alimony award.

The husband contends that the judge erred by basing the alimony award on the statutory formula rather than on the wife's "need," which he equates with the difference between her net weekly income and her weekly living expenses. We reject this argument for two reasons. First, the concept of "need" under § 53(b) is not based on the minimum life necessities of the spouse, but rather is measured by "the amount necessary to support a spouse in a manner consistent with the marital life-style." *Zaleski v. Zaleski, supra at 242-243*. Second, the statute plainly allows a judge to base the alimony award on need or the income differential formula. *Hassey v. Hassey, 85 Mass. App. Ct. 518, 525, 11 N.E.3d 661 (2014)*. An alimony award within the statutory range generally "will be deemed reasonable and lawful." *Ibid.*

The husband further argues that the alimony award was excessive because the parties' marital lifestyle was based on spending beyond their means. However, the judge carefully accounted for the parties' current finances in determining alimony; moreover, he specifically rejected a thirty-five percent income differential and instead based the alimony on a thirty percent differential. A judge has discretion to exceed the thirty-five per-cent benchmark on the basis of the parties' marital spending patterns. *See Zaleski v. Zaleski, supra at 242-243.*

In calculating the husband's income, the judge took into account the periodic distributions, or "draws," the husband receives from his landscaping and construction business, subtracting the husband's contractual payment obligations necessary to complete his purchase of a fifty percent ownership share of the business. On appeal, the husband argues that the judge erred by failing to note that his draws from this business, an "S" corporation, are taxable to him individually, so that his income from the draws should have been reduced by an amount sufficient to pay income tax liabilities. The husband did not make this argument in the court below. To the contrary, he argued that the draws were not taxable income at all and thus should have been excluded completely from the calculation of his income. As the husband failed to make this argument below, "the probate judge [was] not bound to grapple with the tax issues." *Fechtor v. Fechter, 26 Mass. App. Ct. 859, 866, 534 N.E.2d 1 (1989).*

Finally, the husband argues that the judge's findings regarding the amounts of his draws and payment obligations were clearly erroneous, and that using the judge's thirty percent benchmark, the weekly alimony award, correctly calculated, should have been \$776.05 rather than \$835. The wife, commendably, concedes the computational error, and we direct that the award be adjusted accordingly.

Equitable asset distribution. The husband similarly argues that the judge did not base the equitable distribution of marital assets on the mandatory factors set forth in G. L. c. 208, § 34, and that the judge did not sufficiently articulate his rationale. Specifically, the husband questions the allocation of two debts -- a Federal tax settlement liability and a second mortgage debt -- entirely to him.

Largely for the reasons set forth at pages twenty-eight through twenty-nine and thirty-one through thirty-four of the wife's brief, we find that the judge properly considered the relevant § 34 factors and "recognize[ed] and equitably recompense[d] the parties' respective contributions to the marital partnership." *Kittredge v. Kittredge*, 441 Mass. 28, 44, 803 N.E.2d 306 (2004), quoting from *Heacock v. Heacock*, 402 Mass. 21, 24, 520 N.E.2d 151 (1988). We add our observation that the judge's rationale for assigning the Federal tax and second mortgage liabilities to the husband is clearly implied by his findings of fact in paragraphs eighteen through twenty-eight, and especially paragraphs twenty-two and twenty-five, which explain that the husband was the responsible party in negotiating with the Internal Revenue Service and the mortgage bank. See *Redding v. Redding*, 398 Mass. at 107-108. Furthermore, acting on the husband's motion to alter or amend the judgment of divorce nisi, the judge allocated to the wife the American Express credit card debt, which originally was allocated to the husband. The property division was not "plainly wrong or excessive." *Adams v. Adams*, 459 Mass. 361, 371, 945 N.E.2d 844 (2011), quoting from *Redding v. Redding*, 398 Mass. at 107.

Conclusion. For the reasons discussed above, paragraph three of the amended judgment of divorce shall be modified to provide that the husband shall make weekly alimony

payments to the wife in the amount of \$776.05. As so modified, the amended judgment is affirmed.¹

So ordered.

By the Court (Green, Grainger & Massing, JJ.²),

Entered: April 23, 2015.

¹ The wife's request for appellate attorney's fees is denied.

² The panelists are listed in order of seniority.