2019 IL App (2d) 180427-U
No. 2-18-0427
Order filed August 14, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF SHERRY JABLONSKI, Petitioner-Appellee, and THEODORE JABLONSKI, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 17-D-0869 Honorable Linda E. Davenport, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in (1) not imputing income to ex-wife; (2) deviating from statutory guidelines in awarding ex-wife maintenance; (3) calculating maintenance using a 9-year look back of ex-husband's bonuses; (4) awarding ex-wife greater of 50% annual bonus or 8.23% of marital company's gross receipts; (5) awarding maintenance from 50% of marital company's retained earnings over a certain amount; (6) ordering ex-husband to provide financial documents to ex-wife annually; (7) classifying tax returns as marital; (8) classifying the marital company's loan to shareholders as marital; and (9) in awarding ex-wife attorneys' fees. However, the trial court did err in (1) not capping the amount of money ex-wife could receive from ex-husband's future bonuses; (2) not following terms of an agreed order; and (3) granting ex-wife 50% of gross proceeds from any future sale of marital company.

¶ 2 Respondent, Theodore Jablonski (Theodore), appeals the trial court's judgment for dissolution of marriage from petitioner, Sherry Jablonski (Sherry). Theodore contends that the trial court erred in determining maintenance, distributing marital assets, and awarding attorney's fees. He raises twelve distinct issues, each discussed in turn. For the reasons set forth below, the trial court's order is affirmed in part, reversed in part, and remanded with instructions.

¶ 3 I. BACKGROUND

¶ 4 Sherry and Theodore were married on July 10, 1981, and established a marital home in Clarendon Hills. The marriage produced two children, one who is emancipated and the other deceased. During the marriage, Theodore adopted Sherry's child from a previous relationship, who is also emancipated. On April 25, 2017, Sherry filed a petition for dissolution of marriage. Because the parties were not able to come to a settlement regarding the issues of maintenance, the tax implications of temporary maintenance paid by Theodore, the classification of certain assets and liabilities, and attorneys' fees, the case proceeded to trial.

¶ 5 Before the trial began, the trial court issued several orders regarding temporary maintenance, the sale of marital real estate, and funds to be used for the parties' moving expenses. On June 13, 2017, the court entered two agreed orders. The first allowed for the sale of the Clarendon Hills property and allocated $50,000 from the net proceeds of the sale to each party for his or her moving expenses. The second provided that Theodore was to pay $5200 monthly, as well as 43% of "any gross bonus or additional distributed funds," in temporary maintenance to Sherry. On June 27, 2017, the court entered an agreed ordered that assigned the parties' vacation property to Theodore, free and clear from any claim Sherry may have on it, subject to him paying her $16,563—then half of the property's equity. The order further stated that the agreed terms shall be incorporated into any future judgment.

¶ 6 Before any further discussion of the facts of this case, we note that the record before us is incomplete. According to the letter opinion of the trial court, which was incorporated into the judgment for dissolution of marriage, the trial took place over the course of three days: May 15, 16, and 17, 2018. However, the transcripts provided to this court include only the first day of trial, May 15, 2018, and two different copies of the final day of trial, May 17, 2018. Neither party addressed the record's shortcomings in their respective briefs. However, any doubts that arise from the incompleteness of the record will be construed against Theodore. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant"). The parties did, however, stipulate to certain facts and to the value of certain marital property. The following facts are derived from the available record and evidence introduced at trial. We limit our recitation of the facts to those that are relevant to the issues raised on appeal.

¶ 7 For the duration of the parties' marriage, Sherry acted primarily as a homemaker, rearing the parties' children and taking care of the domestic responsibilities. However, she occasionally worked outside the home in clerical roles or in scheduling departments for various companies, mostly part-time. According to an explanation of benefits of social security income admitted into evidence, the most money Sherry ever earned annually was $20,551 in 1996. The last time she drew a paycheck was in 2005, when she earned $6237. During the trial, Sherry explained that she does not work because she "helps with [her] grandson because [her] daughter is a single mom."

¶ 8 On cross-examination, Sherry testified that her grandson goes to school during the day, and she picks him up at least two days a week. He also occasionally spends the night with her, but she does not care for him at least 20 "waking" hours a week. Sherry also testified that she has "basic" computer skills and can transfer funds between her bank accounts. When directly asked if she wanted to work by Theodore's counsel, Sherry responded, "No."

¶ 9 Since 1987 Theodore has been employed by and has been the sole shareholder of a tool-and-dye shop, T.D.S. Machining, Inc. At the trial court's request, the company's tax returns from 2009 through 2017 were introduced into evidence. Since at least 2009, Theodore has earned an annual salary of $144,000, or $12,000 monthly, and has taken a six-figure bonus at the end of each calendar year. In its letter opinion, the court included the following chart that explained Theodore's yearly income from 2009-2017:

Year	Gross Receipts of the Business	Theodore's Salary	Theodore's Bonus	% of Theodore's bonus vs. gross receipts
2009	$1,243,035.00	$144,000.00	$229,906.00	18.50%
2010	$1,547,838.00	$144,000.00	$329,129.00	21.26%
2011	$1,433,996.00	$144,000.00	$228,700.00	15.95%
2012	$1,396,878.00	$144,000.00	$330,438.00	23.66%
2013	$1,239,055.00	$144,000.00	$176,729.00	14.26%
2014	$1,468,394.00	$144,000.00	$246,645.00	16.80%
2015	$1,321,141.00	$144,000.00	$206,871.00	15.66%
2016	$1,502,738.00	$144,000.00	$207,328.00	13.80%
2017	$1,825,589.00	$144,000.00	$150,000.00	8.22%

The parties stipulated that the company, a C-corporation, was marital. In December 2015, an independent evaluator valued it at $401,900, which included the value of a 2011 Ford F-150 truck. In addition to the above information, the company's 2017 tax returns showed a loan to shareholders of $32,506, which Theodore testified he used to pay life insurance premiums.

¶ 10 At trial, Theodore's counsel called the company's Certified Public Accountant (CPA) to discuss the loan to shareholders, the company's retained earnings, Theodore's gross and net incomes, the calculation of his bonuses, and the parties' 2017 tax liabilities. The trial court noted:

> "THE COURT: The issue about the income of the corporation and the like, you are opening up the stipulation on the value of the corporation at that point. So I am not sure from what you said that you really want to do that.
>
> [Counsel for Theodore]: No, I do not, Judge."

The court promised to give "a heads up" if counsel "start[ed] to get into the issue where [it] would have to throw out the stipulation" of the company's value. Clarifying what exactly the CPA would testify to, the court continued:

> "THE COURT: Okay. So then the issue comes down to the determination of his bonus. *** We have the corporate tax returns are in evidence, all of them, and I asked for all the ones back to '09. *** So I am trying to figure out the deductibility [of maintenance for tax purposes], the cost of his Social Security benefits and the like.
>
> And the case law is quite clear I am not permitted to consider Social Security benefits in allocating maintenance of property settlements. You are aware of that.
>
> So tell me then other than the issue of the maintenance and its deductibility and the like, what else do you need this witness to testify to?"

Theodore's counsel acknowledged that the only additional thing that the CPA would testify to was the company's loan to shareholders.

¶ 11 The CPA testified that "[I]n the past year or two we realized that [the loan to shareholders] were not even deductible on the corporate [taxes] because we found out they are not even owned by the corporation." He continued, "going forward *** [Theodore] has to pay

these personally, as well as repaying back the officer loan." The CPA also testified that the loan to shareholders consisted of "10 to 15,000" dollars that the parties used to purchase "one of the vehicles from the business for their personal use." No payment schedule has been established for Theodore to repay the outstanding loans to the company. The CPA also testified that Theodore's annual bonuses were determined not from the gross revenue to the corporation but rather the net income "because that is what is technically available."

¶ 12 Finally, the CPA testified that he filed an extension for Theodore's 2017 taxes because there were questions with whether the maintenance payments Theodore was paying to Sherry were deductible. Sherry filed a motion to compel the parties to file a joint 2017 tax returns, which Theodore objected to because he felt he would receive more tax benefits if the parties filed separately. The CPA reviewed the trial court's June 13, 2017, order granting temporary maintenance to Sherry. He stated that, due to the language of the order and the state and federal statutes as they existed when the order was entered, any maintenance paid to Sherry by Theodore should be deducted from his tax liability. He prepared pro forma tax returns to that effect, which were admitted into evidence.

¶ 13 While discussing the parties' vacation property, the following exchange occurred:

> "THE COURT: Okay. Valuation of property was done as of when though?
>
> [Theodore's Counsel]: It was done prior to [June 27, 2017].
>
> THE COURT: Okay. Problem I have is the statute says I'm suppose to value the property as of today. So, I need to know what the value of the property is today? Does anybody know?

> [Sherry's Counsel]: Judge, I don't know off the top of my head. All I can tell you is we had an agreement to be bound by [the June 27, 2017] order, both parties to give Mr. Jablonski that property at that price.
>
> THE COURT: But everybody understand that all bets are off when you go to trial. So, if I decide to order the property sold which is what I've indicated for the last year plus that I had the right to do then that's what I do. So I need to know the current value of the property because the statute says I have to have it as of today.
>
> [Sherry's Counsel]: There is an appraisal that was done that I believe I included as an exhibit in my trial exhibit. We would stipulate to the appraised value of the house that was done as the current appraised value of the house today, and then I guess at that point would just need to get a current mortgage statement ***."

The current mortgage statement entered into evidence was $144,326.59, leaving $36,673.41 in equity.

¶ 14 During closing arguments, Sherry's counsel argued that due to the length of the parties' marriage and in light of the relevant statutory factors, Sherry should receive permanent maintenance from Theodore. In support thereof, counsel noted that Sherry had not worked outside the home in over 12 years, only earned nominal money when she was employed, and was advanced in age (at 62 years during the trial). Counsel also noted that Theodore had not presented any evidence by any vocational expert establishing what, if any, job Sherry could hold outside the home. Counsel argued that the court should deviate from the prescribed statutory maintenance amount of 30% and award Sherry 50% of Theodore's gross income and bonuses because the parties always had equal access to the income from the company. Counsel also argued that a cap be placed on the amount of money T.D.S. Machining could keep in its

"retained earnings," to ensure that Theodore continue to take a substantial bonus. Counsel noted that Theodore should be granted T.D.S. Machinery, as "[h]e is the only person that knows how to run the corporation and it's the sole source of the income and assets for the parties." Finally, counsel asked that the parties be ordered to file a joint tax return for 2017.

¶ 15 Theodore's counsel argued that Sherry has the ability to and should work outside the home, positing that she could work as a nanny, as evidenced by her taking care of her grandson, or "something in the computer area," as "[s]he know[s] how to use computers to a certain extent." Counsel argued that if the court did not impute any income to Sherry, then she should be capped at receiving 30% of Theodore's gross income and bonuses, as the statute provided. Counsel addressed the agreed June 2017 order regarding the parties' vacation property, arguing that because the court entered the order granting Sherry only $16,563 for her share of the property, it should be the law of the case. Theodore's counsel also addressed the distribution of property, arguing that Sherry should have more cash assets and Theodore should receive the business and the vacation property. Finally, counsel argued that Theodore and Sherry file separate 2017 tax returns.

¶ 16 On May 31, 2018, the trial court issued a judgment for dissolution of marriage and a letter opinion explaining its decision, which was incorporated into the judgment. The judgment awarded Sherry $6000 a month in permanent maintenance and did not impute any income onto her. Further, the court ordered that if Theodore increases his base salary over $144,000 annually, he shall tender to Sherry his pay stubs and provide Sherry 50% of his higher income, monthly. Regarding his annual bonuses, Theodore was ordered to pay Sherry the greater of either 50% of his gross bonus or 8.23% of the company's gross receipts. Theodore was also ordered to tender to Sherry the corporate tax returns and his annual W-2 forms. If the company kept more than

$50,522 in its retained earnings after 2018, Theodore was ordered to pay to Sherry 50% of the retained earnings.

¶ 17 The trial court ordered the parties' $1.9 million estate divided with $970,787.83 in assets to Sherry and $970,782.47 in assets to Theodore. As a part of the distribution of marital assets, the trial court awarded the company, valued at $401,900, the company's $32,506 loan to shareholders, and the $36,673.41 equity in the vacation home to Theodore. The order continued that if Theodore sells the company for an amount higher than $401,900, then he is to pay Sherry 50% of the gross additional proceeds. The court also ordered that the parties file separate taxes for 2017 and awarded Theodore the 2017 tax refunds.

¶ 18 Finally, the trial court ordered Theodore to pay $5660 towards Sherry's attorney's fees, finding that the fees incurred by Sherry were reasonable and necessary. The court continued,

> "The disproportionate amount of attorney's fees, $34,181.51 (petitioner [Sherry]) vs. $107,000.00 (Respondent [Theodore]) is indicative of the positions espoused by Respondent. The actions of Respondent increased the costs of litigation. Respondent refused to waive his claim for maintenance from his wife of 37 years despite the fact that she is not employed and has not been employed for over 13 years. Additionally, he asked this Court to impute income to her because she watches their grandson. This argument was specious. The Court will equalize the fees paid by each party."

¶ 19 Theodore appeals from the May 31, 2018 judgment for dissolution and letter opinion.

¶ 20 II. ANALYSIS

¶ 21 A. Jurisdiction

¶ 22 Before we proceed to the merits of this appeal, we have an independent duty to examine our appellate jurisdiction. *In re Marriage of Knoerr*, 377 Ill. App. 3d 1042, 1043 (2007). The day

after the trial court entered its judgment for dissolution and letter opinion, Theodore filed a series of exhibits in the trial court, and Sherry filed an emergency motion to strike them. Sherry's emergency motion also asked for sanctions. On June 5, 2018, while Sherry's postjudgment motion remained pending, Theodore filed a notice of appeal identifying the judgment for dissolution and letter opinion.

¶ 23 Because each postjudgment motion is a new claim within the same underlying dissolution action, an order that disposes of fewer than all pending claims is not appealable without a finding that there is no just reason to delay enforcement or appeal under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016); *In re Marriage of Duggan*, 376 Ill. App. 3d 725, 744 (2007); *In re Marriage of Gaudio*, 368 Ill. App. 3d 153, 157-58 (2006). Here, the judgment for dissolution includes no Rule 304(a) finding. Therefore, the judgment for dissolution was not yet appealable when Theodore filed his notice of appeal, because Sherry's post-dissolution motion for sanctions remained pending.

¶ 24 Sherry later filed a motion in this court to supplement the record on appeal with a trial court order dated August 14, 2018. She explained that the trial court had granted her postjudgment motion and sanctioned Theodore $1,500. She asserted that, because she would be requesting additional sanctions in this appeal, the order was necessary to present a "full and fair record relative to these issues." We initially denied Sherry's motion, but we later vacated our initial ruling and granted Sherry's motion.

¶ 25 Under Illinois Supreme Court Rule 303(a)(2) (eff. July 1, 2017), "[w]hen a timely postjudgment motion has been filed by any party *** a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes effective when the order disposing of said motion or claim is

entered." Applying Rule 303(a)(2) here, Theodore's notice of appeal seemingly became effective on August 14, 2018, when the trial court entered the order resolving Sherry's postjudgment motion for sanctions.

¶ 26 Upon further inspection, however, the order dated August 14, 2018, did more than just sanction Theodore $1,500. The order also states that Theodore was "granted 28 days to respond to contempt petition, status on [September 25, 2018]." Although it is unclear exactly which "contempt petition" was being referenced, it was clear from the record that a contempt petition remained pending on August 14, 2018. This meant that, although Sherry's postjudgment motion was resolved, we nonetheless continued to lack jurisdiction over this appeal. *In re Marriage of Gutman*, 232 Ill. 2d 145, 153 (2008) (contempt petitions are not considered "separate proceedings" for purposes of appeal when there has been no ruling or sanction imposed). For these reasons, we entered an order of dismissal. *In re Marriage of Jablonski*, 2019 IL App (2d) 180427-U (summary order).

¶ 27 Despite our dismissal of the appeal, we noted that Theodore could establish our jurisdiction pursuant to the procedures set forth in *In re Marriage of Knoerr*. See *In re Marriage of Jablonski*, 2019 IL App (2d) 180427-U, ¶ 12. We explained that, if the trial court's jurisdiction had lapsed since the final judgment was entered on the last pending claim, then Theodore could invoke the saving provisions of Rule 303(a)(2). As discussed above, under Rule 303(a)(2), we may give effect to Theodore's premature notice of appeal upon the resolution of the last pending claim. Thus, we advised Theodore that he could move within 21 days to establish our jurisdiction by supplementing the record to show both (1) the rulings on any pending claims and (2) the absence of any claims still pending.

¶ 28 Theodore filed a timely motion for leave to supplement the record and establish our

jurisdiction. Although he made a series of misguided arguments that we were incorrect to hold that jurisdiction was lacking in the first instance, he also explained that Sherry had renewed the issue of sanctions on July 9, 2018, when she filed a petition in the trial court for interim attorney fees related to this appeal. This was the outstanding contempt petition that was referenced in the August 14, 2018 order. Theodore also provided an order dated September 25, 2018, stating that Sherry had withdrawn the petition. Because Theodore's exhibits established that 30 days passed after the entry of the September 25 order without any new claims, his premature notice of appeal became effective under Rule 303(a)(2), and our jurisdiction was perfected. We therefore vacated our earlier summary order and we now proceed to consider the merits of this appeal.

¶ 29 B. Maintenance

¶ 30 Theodore raises seven issues with respect to his contention that the trial court erred in awarding maintenance to Sherry. Theodore's first argument in support of his contention is that the court should have imputed income to Sherry. He argues that based on Sherry's testimony of her "basic" computer skills, she could work as a cashier or in a clerical position and that, at a minimum, we should impute a full-time, minimum-wage salary to her.

¶ 31 For the purposes of imputing income, the court must have found that Sherry: (1) had become voluntarily unemployed, (2) was attempting to evade a support obligation, or (3) had unreasonably failed to take advantage of an employment opportunity. *In re Marriage of Blume*, 2016 IL App (3d) 140276, ¶30. A trial court's decision to impute income is reviewed for an abuse of discretion. *In re Marriage of Van Hoveln*, 2018 IL App (4th) 180112, ¶ 43. An abuse of discretion occurs which only where no reasonable person could take the view adopted by the trial court. *In re Marriage of Patel and Sines-Patel*, 2013 IL App (1st) 112571, ¶ 67.

¶ 32 Here, the record shows that the trial court considered Theodore's argument to impute income to Sherry "specious," we agree. There is no evidence to show that she became voluntarily unemployed during the proceedings, as she had not been employed outside the home since 2005. Moreover, the record establishes that when she was employed, she made minimal money, as she mostly worked part-time. Because the children were emancipated, Sherry had no support obligation that she was evading. Finally, despite trial counsel's assertion that Sherry could work as a nanny or do "something in the computer area," the record before us is devoid of any evidence that she was provided with an employment opportunity, but unreasonably refused to take advantage of it. Rather, the record establishes that she continued to live the life she had been accustomed to while married, which included not working outside the home.

¶ 33 Theodore's reliance on case law, specifically *In re Marriage of Evanoff and Tomasek*, 2016 IL App (1st) 150017, and *In re Marriage of Ruvola*, 2012 IL App (2d) 160737, is misplaced. In *Evanoff and Tomasek*, the trial court imputed an additional $11,500 to a spouse who, despite having an advanced communications degree and a ten-year career as a professional musician, "openly admitted that he was waiting to see what happens in the divorce proceedings before expending anymore effort in seeking better employment." *Evanoff and Tomasek*, 2016 IL App (1st) 150017, ¶ 26. In *Ruvola*, the ex-husband, a 56-year old chemist, who once earned $125,000 a year, was periodically employed throughout the divorce proceedings in part-time, minimum-wage positions. *Ruvola*, 2012 IL App (2d) 160737 at ¶35. The trial court imputed $25,000 yearly to him as part of his request for maintenance from his ex-wife, after finding that he was voluntarily underemployed and was not following its order for him to seek employment. *Id.* at ¶ 41.

¶ 34 Here, unlike the ex-spouses in *Evanoff and Tomasek* and *Ruvola*, who were employed throughout the proceedings, Sherry had not been employed outside the home in over 13 years. When she was last employed outside the home in 2005, she made a mere $6,237. She does not have an advanced degree like the spouses in *Evanoff and Tomasek* or *Ruvola*, and thus not the same earning capacity. Furthermore, she did not change anything in her life and was not avoiding any employment opportunity. Although she responded "no" when asked if she wanted to work, there was no testimony provided in the record before us that she actively avoided any job opportunity that was presented to her and was awaiting the trial court's award before seeking employment, like the spouse in *Evanoff and Tomasek*. As such, we cannot say that the court abused its discretion in not imputing income to Sherry.

¶ 35 We also reject Theodore's argument that, at a minimum, we should impute income to Sherry based on a full-time, minimum-wage job. Although one of the policies underlying the Act's maintenance provisions is to enable dependant former spouses to become financially independent, that "goal is often not achievable in light of the dependant former spouse's entitlement to maintain the standard of living established during the marriage." *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 618 (2004). Given the wide disparity in the parties' earning capacities, their standard of living during the marriage, Sherry's time away from the workforce, and her advanced age, the court reasonably concluded that the goal of financial independence for Sherry was not achievable. We will not disturb that finding on review, nor impute any income, be it part-time or full-time, to her.

¶ 36 Second, Theodore argues that the trial court erred by not following statutory guidelines in the Illinois Marriage and Dissolution of Marriage Act (Act) in determining the maintenance award. 750 ILCS 5/504 (West 2016). Subsection 504(b-1)(1) of the Act provides that for parties

making less than $500,000 annually with no child support obligations, maintenance payments shall be made in accordance with a specific formula, maxing out at 40% of the parties' combined salaries, "unless the court makes a finding that the application of the guidelines would be inappropriate." *Id.* § 5/504(b-1)(1). The benchmark for determining maintenance is the reasonable needs of the spouse seeking maintenance in view of the standard of living established during the marriage, the duration of the marriage, the ability to become self-supporting, the income-producing property of a spouse, if any, and the value of nonmarital property. *In re Marriage of Selinger*, 351 Ill. App. 3d 611, 615 (2004). As a general rule, a trial court's determination as to the awarding of maintenance is presumed to be correct. *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 118. Because maintenance awards are within the sound discretion of the trial court, we will not disturb a trial court's award of maintenance absent an abuse of discretion. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 46.

¶ 37 Theodore's argument rests on the trial court not applying the prescribed formula for parties whose combined income is less than $500,000 annually in subsection 504(b-1)(1)(A) of the Act in awarding Sherry 50% of Theodore's base salary. However, his argument ignores the latter half of subsection 504(b-1)(1), allowing the court to deviate from the statutory guidelines when the court "makes a finding that the application of the guidelines would be inappropriate." 750 ILCS 5/504(b-1)(1) (West 23016). Here, the court did just that. In the letter opinion, the court noted that it considered all the relevant statutory factors in determining Sherry's maintenance award, and that "deviation from the statute regarding the amount of maintenance" was appropriate. It also provided its reasoning as to why.

> "This marriage was a true partnership. Theodore and Sherry raised three children ***. They built a business, moved from their smaller home in Cook County to a spacious

> home in DuPage [*sic*] County and bought a vacation home in Galena. Sherry worked part-time but never after 2005. She is now 62 with a GED and no way to support herself in any manner close to that of her lifestyle for the last three decades.
>
> ***
>
> The court finds the expenses [Sherry] actually incurred were based on her rental of a townhouse and not the ownership of a home she intends to have when she receives her share of the marital estate. It also did not reflect the lifestyle she and her husband enjoyed, despite counsel's repeated assertion they lived a "blue-collar" lifestyle.
>
> ***
>
> [Sherry] is merely living in the same manner that she and her husband adopted in 1981 and maintained throughout the marriage. Theodore pays himself a base salary of $144,000.00 per year but the majority of his income comes from his annual bonus.
>
> The court finds the equalization of the parties' income is appropriate in light of all the factors set forth in 750 ILCS 5/504. Therefore, the Court finds that permanent maintenance of $6,000.00 per month is appropriate."

Because the propriety, amount, and duration of maintenance are all matters within the sound discretion of the trial court, and the court provided its reasoning for deviating from the statutory guidelines, we will not disrupt the award of $6000 a month in maintenance. *Cf. In re Marriage of Harms and Parker*, 218 IL App (5th) 160472, ¶ 24-28.

¶ 38 Theodore further argues that the trial court failed to make required specific findings in its judgment based on all of the factors enumerated in section 403(a) of the Act, which necessitates a reversal on appeal with instructions to recalculate maintenance in accordance with the "mandated" guidelines. When deviating from the statutory guidelines in determining

maintenance, a trial court "shall state its reasoning *** and shall include references to each relevant factor set forth in subsection (a) of this Section." 750 ILCS 5/504(b-2)(1) (West 2016). Theodore specifically takes issue with two of the 15 enumerated factors: "the needs of each party;" and "the standard of living established during the marriage;" asserting that the court did not make adequate findings in either regard. *Id.* § 504(a)(2), (7).

¶ 39 This argument is meritless, as the trial court clearly identified the parties' needs and the lifestyle established during the marriage in its letter opinion, as quoted above.[1] Further, even if we were to determine that the trial court did not address all of the section 403(a) factors, maintenance orders will not be reversed solely because specific findings are not made, *Shen v. Shen*, 2015 IL App (1st) 130733, ¶ 136, particularly when the basis for an award of maintenance is established in the record. See *Blum v. Koster*, 235 Ill. 2d 21, 38 (2009).

¶ 40 Third, Theodore argues that trial court erred in determining his income by looking back at his annual bonuses for nine years and that the amount of maintenance was "abusive and unreasonable." In response, Sherry argues that only averaging three years of Theodore's bonuses, as he suggests, would give too much weight to his "manipulated" 2017 bonus, and the court's award of maintenance was reasonable.

¶ 41 Income, for purposes of determining maintenance, has been defined as an increase in the recipient's wealth that comes in as an increment or addition, usually measured in money, which

[1] We are troubled by appellate counsel's misconstruing quotes from the trial court's judgment and letter opinion as well as improper citations to both statutes and case law in making this argument. We caution counsel from making unsupported broad accusations and overstatements in any future appellate briefs.

includes any form of payment to an individual regardless of its source or whether it is nonrecurring. *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 92.

¶ 42 Theodore raises no issue in the trial court providing maintenance to Sherry based on his annual bonus from T.D.S. Machining, only with how many previous bonuses the court should have examined in making the award. Theodore asserts that the trial court should have only looked to the past three years in determining his annual bonus income, as a nine year look back had "no relevance" to the parties' current and future financial situation. He relies on *In re Marriage of Elies*, 248 Ill. App. 3d 1052 (1993), for the proposition that a three-year income average was an appropriate method for determining available income for maintenance. *Id.* at 1060-61. While a trial court may find that a three-year average of annual bonuses a sufficient means of determining income for maintenance, the trial court here believed that Theodore manipulated his 2017 bonus to an unusually low amount for the purpose of denying Sherry maintenance.

> "In 2017, the year the dissolution action started, despite the gross receipts of the company being higher than ever before, Theodore took his lowest bonus in 10 years, made no contribution to his retirement plan, and increased his retained earnings to a figure higher than in any previous year. Since Theodore is the sole shareholder of the corporation, this was his sole decision and severely impacted the marital estate."

Here, given its inkling that Theodore manipulated his 2017 bonus to deny Sherry her share in the marital estate, the court would have been remiss if it limited itself to a three-year average in determining maintenance based on Theodore's annual bonus.

¶ 43 Instead, the court specifically asked for "every [corporate] tax return" counsel had, and used those tax returns in determining Theodore's maintenance payments, as evidenced by the

charts included in the letter opinion. Theodore argues that the result from the court using this information is abusive and unreasonable. We disagree. This information was useful for determining maintenance and could help influence the court in determining several of the 503(a) factors for determining maintenance, such as: the parties' income and property, realistic present and future earning capacity, standard of living established during marriage, amount and sources of income, and tax consequences. 750 ILCS 5/503(a)(1), (3), (7), (9), (11) (West 2016). The court also did not have to come up with a set number from his annual bonuses, as an award of maintenance may be in the form of a percentage of income in lieu of a fixed amount. *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 120. We find no fault in the trial court's reasoning and do not believe the court abused its discretion in looking nine years back and in providing a percentage in lieu of an average for determining maintenance based on Theodore's annual bonuses.

¶ 44 Theodore's next three arguments can be taken together, as they each attack the trial court's award of "additional maintenance" to Sherry. In essence, Theodore argues that the trial court erred in including in the maintenance due to Sherry (1) the greater of 50% of his annual bonus or 8.23% of gross receipts of T.D.S. Machining and (2) 50% of T.D.S. Machining's retained earnings over $50,522. Theodore also argues that the trial court erred by not instilling a cap on the additional maintenance he is to pay. As noted above, we review the trial court's order of maintenance for an abuse of discretion. *In re Marriage of Brill*, 2017 IL App (2d) 160604, ¶ 26.

¶ 45 Turning first to the "additional maintenance" in the form of the greater of 50% of his annual bonus or 8.23% of T.D.S. Machining's gross receipts, Theodore argues that the gross receipts for the company cannot count as his income. We note initially that Theodore does not

dispute that he has consistently received an annual six-figure bonus and that that money was used by Sherry and him throughout the marriage. This expected annual bonus falls within definition of income, as noted above, and is therefore subject to maintenance. Because we have already analyzed the trial court's deviation in awarding Sherry 50% of Theodore's base salary, there is no need to address this aspect of the trial court's award. See also *In re Marriage of Brankin*, 2012 IL App (2d) 110203, ¶ 28 (holding there is no requirement under the Act or case law that requires or prohibits the equalization of incomes).

¶ 46 Theodore seemingly argues that because T.D.S. Machining's gross receipts are not his "income," they cannot be used to determine the maintenance payments to Sherry. This flies in the face of the Act, which states that "maintenance may be paid from the income *or property* of the other spouse." (Emphasis added.) 750 ILCS 5/504(a) (West 2016). See, *e.g.*, *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 122. The trial court here analyzed the gross receipts compared to the bonus payments Theodore allowed himself to take from 2009 through 2017. From 2009 to 2016, the average percentage of Theodore's bonus versus the gross receipts for T.D.S. Machining was 15.54%. "In 2017, he paid himself a bonus of only 8.22% of the gross receipts of the business" "despite the gross receipts of the company being higher than ever before." The court determined that Theodore had done this purposefully. From this, the court wanted to ensure Sherry was awarded an amount commensurate with her standard of living through the marriage, and assigned her the greater of 50% of his annual bonus or 8.23% of the gross receipts from the company, half of the average from 2009 to 2016. We cannot say that no reasonable person could take the view adopted by the trial court, and thus it was not an abuse of the court's discretion.

¶ 47 Likewise, Theodore argues that the retained earnings of T.D.S. Machining are not his income. Under certain circumstances, a corporation's retained earnings may be considered marital property, depending on two factors. *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 63 (citing *In re Marriage of Joynt*, 375 Ill. App. 3d 817, 821 (2007)). The first factor is the extent of the spouse's ability to distribute the retained earnings to himself. *Steel*, 2011 IL App (2d) 080974, ¶ 63. "[W]hen a shareholder spouse has a majority of stock or otherwise substantial influence over the decision to retain the net earning or to distribute them in the form of cash dividends, courts have held that retained earnings are marital property." *Joynt*, 375 Ill. App. 3d. at 820. The second factor is the extent to which retained earnings are considered in the value of the corporation and utilized to fund the corporation's business. *Steel*, 2011 IL App (2d) 080974, ¶ 63.

¶ 48 Here, it is undisputed that Theodore is the sole shareholder of T.D.S. Machining, and he alone has the ability to determine his salary, bonuses, contribution to retirement plan, and any retained earnings in the business. The trial court found that retaining $50,522 in the business in 2017 "was [Theodore's] sole decision and severely impacted the marital estate." The court's letter opinion demonstrated that the retained earnings from 2009 to 2016 were generally between $20,000 and $30,000, which contrasts greatly with the $50,522 in retained earnings in 2017.

¶ 49 From the record provided to us on appeal, there is no evidence of retained earnings being considered in the value of the corporation, which was stipulated to, or whether the retained earnings were used to fund the corporation's business. The only testimony regarding retained earnings was when the CPA defined retained earnings as "the net income that is carried over to the following year that is not deducted *** the income that is carried over." A CPA's definition

of retained earnings is insufficient to determine whether such funds were used to fund the corporation's business.

¶ 50 Finally, as referenced above, the trial court was "concerned that Theodore will, as evidence by his conduct over the last year, manipulate his income so as to deny Sherry additional maintenance." The court noted that it awarded these additional sources of maintenance to "avoid" Theodore's future manipulation of his income to reduce Sherry's maintenance award. The court here made its determination of maintenance based, in part, on Theodore's credibility. We will not disturb such a finding on appeal. See *In re Marriage of Anderson*, 409 Ill. App. 3d 194, 199 (2011) ("[I]t is well established that the credibility of the witnesses and weight to be given to their testimony is for the trier of fact to decide, and a reviewing court may not substitute its judgment for that of the fact finder."). Given that the two factors lend themselves to retained earnings being marital property and Theodore's ability to manipulate his income, the trial court did not err in ordering him to pay 50% of the company's future retained earnings over $50,522.

¶ 51 However, we do agree with Theodore that the maintenance award is an abuse of discretion in that it includes an uncapped amount based on a percentage of his future bonuses. We rely on our reasoning in *In re Marriage of Micheli*, 2014 IL App (2d) 121245, where we noted that, "maintenance is designed to allow the recipient spouse to maintain the standard of living enjoyed *during* the marriage." (Emphasis in original.) *Id.* at ¶ 24. In *Micheli*, we held the trial court abused its discretion when the ex-wife was awarded an uncapped award of 20% of the ex-husband's future bonuses for maintenance, as the award set up a potential windfall for her that had no evidentiary relation to her present needs or the parties' standard of living during the marriage. *Id.* at ¶ 25. The same analysis applies here.

¶ 52 Sherry argues that there are factual difference between the parties here and the parties in *Micheli*, such as her age and lack of employment, and that an uncapped award of 50% of Theodore's future bonuses is "the only way to maintain the lifestyle established during the marriage[.]" We disagree. If T.D.S. Machining suddenly takes on a new client and greatly increases its profitability, Theodore may rightfully take a significantly higher bonus than in the past ten years. Sherry would then receive a greater amount of money than what she had been accustomed to during the marriage. While Sherry is entitled to maintain the standard of living she enjoyed during the marriage, she is not entitled to enjoy a higher standard of living after the marriage had ended. *Micheli*, 2014 IL App (2d) 121245, ¶ 26. On remand, the trial court should cap the amount of future bonuses due to Sherry at a specific amount based on the evidence that was presented at trial, including the corporate tax returns from 2009 through 2017. There is no need to re-litigate the issue.

¶ 53 The final issue Theodore raises in respect to maintenance is that the trial court erred in ordering him to tender to Sherry the company's tax returns and his W-2s annually, and, if he increases his annual salary over $144,000, his pay stubs. Theodore argues that because the Act does not provide a mandatory requirement for a payor to provide his tax returns to a payee, the trial court did not have the authority to order Theodore to tender to Sherry said financial documents. Although trial courts do receive their power to dissolve marriages through the Act, their powers do not end there. Appellate Courts have routinely upheld a trial court's order for one party to provide another with financial statements. See, *e.g.*, *In re Marriage of Anderson & Murphy*, 405 Ill. App. 3d 1129, 1138 (2004) (finding that no substantial change in circumstances occurred and reinstating the trial court's order directing ex-husband to provide tax returns, supporting schedules, W-2 forms, and 1099 forms to ex-wife); and *In re Marriage of Marriott*,

264 Ill. App. 3d 23 (1994) (affirming trial court's order for ex-husband to report his annual income and gifts of $1,000 or more to ex-wife).

¶ 54 Here, the trial court identified that it was "concerned that Theodore will, as evidenced by his conduct over the last year, manipulate his income so as to deny Sherry additional maintenance." Because Theodore was awarded the company, the only income-generating asset of the parties' marriage, it logically follows that he should provide her with documentation of its earnings to ensure that he is complying with the court's judgment.

¶ 55 C. Distribution of Property

¶ 56 Theodore contends that the trial court erred in its distribution of marital property in three ways. First, the court did not follow the agreed order of June 23, 2017 in using an updated mortgage balance in valuing the parties' vacation property; second, the court ordered Theodore to pay Sherry 50% of the gross proceedings in excess of $401,900 from any future sale of T.D.S. Machining; and third, the court classified the 2017 tax refunds and loan to shareholders as marital assets. We review decisions concerning the distribution of marital property for an abuse of discretion. *In re Marriage of Heroy*, 385 Ill. App. 3d 640 (2008).

¶ 57 Theodore first argues that the agreed June 2017 order was based on a stipulation, which the trial court was required to follow, and that, by updating the mortgage balance, Sherry received a "windfall" of $3547.41 for her share of the parties' vacation property. In response, Sherry argues that the agreed June 2017 order was not a final order and that the court was well within its discretion to modify it to a more up-to-date valuation, keeping in line with the Act. Although we question how much of a "windfall" $3500 is given the marital estate was nearly $2 million, because the court did not find the agreed June 2017 order unconscionable, the court was bound by its the terms.

¶ 58 Section 502 of the Act provides that parties may enter into an agreement containing provisions for disposition of any property, the terms of which are binding on the court unless it finds that the agreement is unconscionable. 750 ILCS 5/502(a), (b) (West 2016); *In re Marriage of Tworek*, 2017 IL App (3d) 160188, ¶ 14. Unconscionability requires a two-prong analysis, in which the trial court must consider: (1) the conditions under which the agreement was made and (2) the parties' economic circumstances resulting from the agreement. *In re Marriage of McNeil*, 367 Ill. App. 3d 676, 684 (2006).

¶ 59 Here, the court did not engage in the two-prong analysis, but rather requested an updated mortgage statement for the vacation property, "because the statute says I have to have it as of today." While the court was correct that the Act allows a trial court the discretion to determine a marital property's fair market value as the date of the trial, see 750 ILCS 5/503(k), it must have also found that the agreed June 2017 order was unconscionable in order to disregard its terms.[2] Upon request from the trial court, Theodore's counsel submitted the new mortgage statement of $144,326.59 into evidence, and the court determined that the vacation property's equity to be $36,673.41, which was awarded to Theodore in the dissolution judgment. This award was in contrast to the equity of the June 2017 agreed order of $33,126. Therefore, we reverse this portion of the division of assets and award Theodore $3547.41.

¶ 60 Theodore next argues that the trial court abused its discretion in awarding Sherry 50% of the gross value over $401,900 of any future sale of T.D.S. Machining. We agree. The Act provides for equitable distribution of all marital property upon dissolution of marriage. 750 ILCS

[2] On both the trial and appellate level, Theodore's counsel argued that the entry of the agreed order was the "law-of-the-case." It is not. See *In re Marriage of Carstens*, 2018 IL App (2d) 170183, ¶ 23.

5/503 (West 2016). A business interest acquired during the marriage is marital property, subject to equitable distribution upon the entry of a dissolution judgment. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1019 (2009).

¶ 61 In dividing marital property, our supreme court has held that spouses should be

> "granted an interest in property which is acquired during the marriage or increases in value by the infusion of marital funds or efforts, without receiving an interest in assets of the other spouse which are acquired or appreciate after dissolution. [Citation.] Marital property rights cannot inure in property acquired after a judgment of dissolution of marriage [citation], and *the same is true of the appreciation of marital property occurring after* [the date of dissolution of the marriage]." (Emphasis added.) *In re Marriage of Mathis*, 2012 IL 113496, ¶ 26 (citing *In re Marriage of Frazier*, 125 Ill. App. 3d 473, 476 (1984)).

Here, neither Sherry nor Theodore debated the company's marital property status, and both agreed to the stipulated value of T.D.S. Machining as $401,900. Sherry was awarded that amount in marital assets, and Theodore was awarded the company. After the dissolution judgment was entered, any increase in the company's value will be as a result of Theodore's own funds and efforts, not as a result of marital funds or efforts, and thus should be his property. We therefore reverse the trial court's order mandating Sherry receive 50% of any gross sale price over $401,900 of any future sale of T.D.S. Machining.

¶ 62 Theodore's final argument in regards to the distribution of marital assets is that the trial court erred in determining that the 2017 tax refund and T.D.S.' Machining's loan to shareholders were marital assets and assigning the balance of each to him. In both instances, Theodore argues that in assigning the balances to him in dividing marital assets, the court impermissibly allowed

Sherry a "double dip" in the marital assets and that the assets should be reallocated to rectify this injustice.

¶ 63 Where the right to an income tax refund accrued during the parties' marriage, the refund is treated as marital property, regardless of the fact that one spouse generated all the income upon which the tax refund is based. *In re Marriage of Ormiston*, 168 Ill. App. 3d 1016, 1018 (1988). Here, it is undisputed that the 2017 tax refunds were based on income earned during the time the parties were married. The refunds were thus marital property and subject to division by the trial court. 750 ILCS 5/503 (West 2016). Theodore seemingly asserts that the marital nature of his taxable income changed because he paid temporary maintenance to Sherry with it. He makes this assertion without any supporting authority, and after a thorough review of statutory and case law, we have not found any authority to support his argument. The trial court acted within its discretion in assigning the 2017 refunds to Theodore as a marital asset.

¶ 64 Likewise, the trial court did not err in finding that T.D.S. Machining's loan to shareholders was a marital asset and assigning it to Theodore. Theodore asserts that the loan to shareholders was classified as an asset to T.D.S. Machining and was included in the company's valuation, and that in assigning him the value of the loan to shareholders, the trial court gave Sherry a double dip into the parties' assets. See *In re Marriage of Schneider*, 343 Ill. App. 3d 628, 637 (2003) rev'd in part on other grounds, *In re Marriage of Schneider*, 214 Ill. 2d 152 (2005) (affirming loans to shareholders are to be included in determining the fair market value of a marital business).

¶ 65 While we agree that loans to shareholders can be included in a marital business's valuation, there are two issues that Theodore does not address in the present situation. First, the stipulation does not say that it includes the loans to shareholders in its valuation. In the

stipulation for the company's value the parties specifically note that the valuation "includes value of 2011 Ford F150 Truck" and is silent on any loans. Further, Theodore's counsel questioned the CPA, in part, on the loans to shareholders, specifically after the court noted that it would give counsel "a heads up" if she "start[ed] to get into the issue where [the court] would have to throw out the stipulation." Seemingly then, the court did not believe that the loans to shareholders were a part of the stipulated value of the company, such that a "head's up" was warranted. Second, the stipulated value of the business predates the disputed loans to shareholders. T.D.S. Machining was valued at $401,900 on December 31, 2015. Both parties agreed to the stipulation and as to the date of the stipulated amount. The $32,506 amount listed as a loan to shareholders appears for the first time on the company's 2017 tax returns, well after the stipulated valuation date. We therefore hold that the loans to shareholders were not a part of the company's valuation, and the trial court did not err in assigning that marital asset to Theodore.

¶ 66 D. Attorneys' Fees

¶ 67 Finally, Theodore contends that the trial court erred in ordering him to pay $5660 towards Sherry's attorney's fees under section 503(j) and 508 of the Act. He argues that the trial court made factual errors and ignored several relevant factors in rendering its decision. In response, Sherry argues that the trial court was within its discretion in ordering Theodore to pay a portion of her attorney's fees because of his greater ability to earn income and litigiousness.

¶ 68 Ordinarily, the primary obligation for the payment of attorney's fees rests on the party on whose behalf the services were rendered, but, in a marital dissolution action, the trial court is authorized to order one party to contribute to the other party's attorney's fees. *In re Marriage of Kane*, 2016 IL App (2d) 150774, ¶ 22. Section 508 of the Act allows the court to award "a

reasonable amount" for another party's attorney's fees, so long as it is in accordance with "subsection (j) of Section 503." 750 ILCS 5/508(a) (West 2016). Section 503(j) provides that hearings for fees shall be decided "based on the criteria for division of marital property *** [and] on the criteria for an award of maintenance." *Id.* § 503(j)(2). Trial courts should consider the relative financial circumstances of the parties, including the allocation of assets and liabilities, maintenance, and the relative earning abilities of the parties in awarding attorney's fees. *In re Marriage of Tworek*, 2017 IL App (3d) 160188, ¶18. The allowance of attorney's fees and the amount awarded are decisions within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *In re Marriage of Baniak*, 2011 IL App (1st) 092017, ¶9.

¶ 69 Theodore's argument that the trial court made factual errors in awarding Sherry attorney's fees by stating he "refused to waive his claim for maintenance" and that he requested income be imputed to her "because she watches their grandson" is meritless. When reviewing fact-based determinations, we will accord a degree of deference to the determination of the trier of fact and disturb the determination only when it is against the manifest weight of the evdinece. *Corral v. Mervis Industries*, 217 Ill. 2d 144, 154 (2005). A factual finding is only against the manifest weight if the opposite conclusion is apparent or when the findings are unreasonable, arbitrary, or not based on the evidence. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 70. After examining the record before us, we find that these factual findings are in line with what was presented to the trial court and are not against the manifest weight of the evidence.

¶ 70 Before trial began on May 15, 2018, the trial court specifically asked Theodore's counsel, "Has your client waived maintenance, counsel?" To which Sherry's counsel responded, "[he h]as

not waived maintenance, Judge *** There is no stipulation as to that." Theodore's counsel did not dispute this. Further, upon the conclusion of the closing arguments, this exchange occurred:

"[Theodore's Counsel]: And, Judge, we would indicate to the Court that Mr. Jablonski would be barred from maintenance--

THE COURT: So he is waiving it now?

[Theodore's Counsel]: And he will waive maintenance, yes, Judge."

From the record available to us on appeal, it is clear that when provided an opportunity to waive his claim for maintenance by the court at the outset of trial, Theodore did not. Instead, the entire trial took place with that as an issue before the court, until he waived it in closing arguments.

¶ 71 Theodore's counsel also argued in closing that "Ms. Jablonski does have the ability to work. *** She has worked with the grandson of the parties taking care of him when he was young and could, certainly, do something as a nanny." The trial counsel's argument supports the court's finding that Theodore wanted to impute income to Sherry because she had, in the past, taken care of the parties' grandson and directly contradicts Theodore's argument on appeal, and is therefore not against the manifest weight of the evidence.

¶ 72 Turning to Theodore's substantive argument, he asserts that Sherry was awarded a significant portion of the marital estate, including over $700,000 in cash assets, so she had "ample liquid assets" to pay her own attorney's fees. However, based on the evidence presented to the trial court, the trial court's order that Theodore pay $5660 toward Sherry's attorney's fees was not an abuse of discretion. Theodore's base salary is $144,000 annually with an annual six-figure bonus. Theodore is the sole shareholder of T.D.S. Machining, and he alone determines his income. Sherry does not work and will be dependent upon the maintenance she receives from Theodore for her daily living needs. Although the spouse seeking an award of attorney's fees

must establish her inability to pay the fees, that inability exists where requiring payment of fees would "strip that party of her means of support or undermine her financial stability." *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Here, if ordered to pay the full amount of her attorney's fees, Sherry's "ample" liquid assets would be reduced with no way to replenish them. Because of the discrepancy between the parties' ability to earn, the trial court's order "equalizing" Sherry's attorney's fees and ordering Theodore to pay $5660, particularly in light of the arguments advanced in the trial noted above, was not an abuse its discretion.

¶ 73 III. CONCLUSION

¶ 74 For the reasons stated, we affirm the trial court's judgment for dissolution of marriage except for (1) the lack of a cap on the maintenance payments from Theodore's future bonuses, (2) the additional $3547.41 Sherry received by the court not following the agreed June 2017 order, and (3) the court's order than Sherry receive 50% of any gross sale price over $401,900 of any future sale of T.D.S. Machining. We remand for further proceedings consistent with this order.

¶ 75 Affirmed in part; reversed in part and remanded with instructions.