2015 IL App (2d) 140933-U
No. 2-14-0933
Order filed August 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF BRIAN J. HICKEY, Petitioner-Appellee, and PATRICIA HICKEY, Respondent-Appellant.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 13-D-651 Honorable Richard D. Russo, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: In this dissolution proceeding, the trial court abused its discretion in determining maintenance and child support and in granting a disproportionate share of the marital assets to the husband. Because the trial court must reconsider these issues on remand, it is appropriate for the trial court to reconsider the propriety of a contribution to attorney fees.

¶ 2 On August 20, 2014, the trial court entered an order dissolving the marriage of the petitioner, Brian Hickey, and the respondent, Patricia Hickey. On appeal, Patricia argues that the trial court abused its discretion: in setting child support and maintenance; in its allocation of the parties' assets and debts; and by not requiring Brian to pay Patricia's attorney fees. We reverse and remand for additional proceedings.

¶ 3 I. BACKGROUND

¶ 4 The parties married on August 28, 1988. During the parties' marriage, Patricia was pregnant 11 times, from 1988 through 2003. Six children were born to the parties: Elizabeth

(born June 27, 1989), Katherine (born March 3, 1992), William (born January 29, 1993), Margaret (born December 23, 1994), Carolyn (born May 14, 1997) and Matthew (born July 2, 2003). William has been designated by the Social Security Administration as a disabled adult.

¶ 5 On March 28, 2013, Brian filed a petition for dissolution of marriage. On June 3, 2014, the parties entered into a joint parenting agreement which resolved the custody issues and was ultimately incorporated into the judgment for dissolution. The matter proceeded to a bench trial on June 3-6, 2014. At the time of trial, Brian was 50 years old and Patricia was 51 years old.

¶ 6 The evidence indicated that Brian had been a licensed attorney since 1988. He had been an equity partner at Cassiday, Schade, LLP, for the last 12 to 14 years. As an equity partner, he earned a certain percentage of the law firm's profits. He was also on the executive committee that managed the firm. Tax returns admitted into evidence indicated that Brian's gross income, not including non-reimbursed business expenses, was as follows: $421,729 in 2009, $458,325 in 2010, $506,065 in 2011, $541,866 in 2012, and $582,333 in 2013. Brian testified that his 2014 income would be about that same as his 2013 income. At the time of trial, Brian was receiving two draw checks per month, each in the amount of $14,000. The parties' 2012 tax return reflected that Brian had earned a $212,000 referral fee. Brian testified that he did not normally earn referral fees; the few referral fees that he had earned in the previous 27 years were less than $8,000 each.

¶ 7 Brian's financial disclosure statement, dated June 2, 2014, indicated that he had a monthly gross income of $41,842 and mandatory deductions of $23,560, for a net monthly income of $18,282. The disclosure statement reflected that he also had non-reimbursed business expenses of $3,756 per month. Brian testified that these expenses were for taking clients or potential clients to sporting events or out to dinner. Brian had two seat licenses for two Bears'

season tickets. He also had four White Sox season tickets and partial season tickets for the Cubs, Bulls, and Blackhawks.

¶ 8 Patricia graduated in 1985 with a Bachelor of Science degree from Loyola University. She was accepted into medical school but never attended because she intended to be a full-time mother. About six months after graduation, she started working as a lab technician and medical researcher. She continued this work for about three years, earning $23,000 per year. After the parties married, she immediately became pregnant and only continued to work for about six months. Thereafter, the parties jointly decided that Patricia should cease working outside the home. Patricia testified that she assisted Brian with his career. She hosted parties at their house for his partners and clients. She went to all the events when a spouse was required. She often listened to his opening statements and gave feedback.

¶ 9 During the parties' marriage, Patricia was completely responsible for taking care of the children and all the household responsibilities. When Brian began working as a lawyer, he worked six days a week from 7 a.m. to 7 p.m. When he started doing trials, his hours were even longer. Patricia never asked Brian to not work on weekends and never complained that he was not at home to help out. It was not until about the past ten years that the family started to have dinner together. At the time of trial, Elizabeth, William, Margaret (when not at college), Carolyn and Matthew resided at the marital residence with Patricia.

¶ 10 The marital residence was a 4800-square-foot home with five bedrooms. The parties stipulated that the fair market value of the marital residence was $785,000. At the time of trial, the mortgage balance on the marital residence was $375,000. The parties refinanced the marital residence in 2012 and had a $70,000 cash surplus which was used to pay down a home equity line of credit. The current balance of the home equity loan was $30,000.

¶ 11 After purchasing the marital residence the parties made some improvements. They finished the basement, painted, put hardwood floors upstairs, did landscaping, added a sidewalk on the side of the house, added a carport and basketball hoop for the kids, and purchased some new appliances. Brian testified that the living room set had cost between $6,000 and $8,000, the dining room set was $14,000, and the kitchen set was $9,000. Additionally, the parties had two $4,000 leather couches, a $900 chair, a $1,500 coffee table, a $1,500 computer cabinet, and two $3,000 to $4,000 credenzas. Patricia testified that the dining room set was 12 years old, the kitchen set was about five years old, and the parties' bedroom set was 15 years old. Patricia also testified that they had some area rugs worth $300.

¶ 12 In April 2014, after moving out of the marital residence and living with his parents for a year, Brian purchased a condominium in Lombard. The purchase price was $227,500. He made a $39,000 down payment and the loan balance was $182,000. The down payment was made with extra distributions he received at the end of 2013 and with part of the referral fee money, which he had placed in a PNC Bank account. The condominium was 1100 square feet. Before he moved in, he paid $1,900 to have the condo painted. He also purchased about $23,000 worth of furniture for the condo. The painting and furniture had been paid in full with his earnings.

¶ 13 Brian had been contributing to a Fidelity 401(k) since 1996. On June 20, 2012, he took out a loan of $50,000 from the 401(k) to pay off credit card debt. The loan payments were automatically deducted from his draw checks. At the time of trial, the balance in Brian's 401(k) account was $748,000. He also had a Vanguard IRA with a $10,000 balance. Patricia had an American Century Investments fund with a balance of $3,400. Additionally, Brian's employer offered an unfunded retirement benefit of $225,000 to $250,000, if Brian retired under certain conditions. Brian had a capital account with his law firm with a value of $78,500. Brian testified that this was the amount he had to pay for the firm to have a good credit rating in case

the firm needed a bank loan for capital improvements such as furniture or computer systems. Collectively, partners of the law firm had to put up around a million dollars.

¶ 14 At the time of trial, the parties had credit card debt. Brian had a Commerce Bank credit card with a $10,000 balance. Patricia had credit card debt totaling $13,000. The parties had four cars, including a 2010 Acura valued at $20,000; and a 2010 Audi TT valued at $23,000. The parties also had a 2006 Volkswagen and a 2006 Ford Expedition, each with minimal value.

¶ 15 The parties' son William started receiving Social Security Disability Insurance (SSDI) benefits in May or June 2013. William received about $725 per month. Brian, as guardian, received the payments. Brian originally started saving the money for William in an account, but later learned that someone collecting SSDI cannot have more than $2,000 in any account. At the time he learned this, he had accumulated between $5,000-7,000. When Brian received the $725 monthly payments, he retained $270 to show that William was paying rent (a requirement of receiving benefits). He gave $375 per month to Patricia. He was also giving Patricia $500 per month of the amount that had accumulated in William's account and would do so until it was gone. Thus, Brian currently paid Patricia $875 per month for William from SSDI. Brian testified that William was eligible for Medicare and food stamps. To obtain the food stamps, however, Patricia would have to take William to the office to apply for the benefits.

¶ 16 Brian testified that William currently attended a transitional program and could do so until age 22. It was like school, where a bus picked him up and dropped him off at home. Brian testified that when William was 22 years old, Brian would investigate other private programs for William to attend. The private programs would cost about $19,000 to $21,000 per year. Brian believed that William could eventually live in a group home and be employed. Patricia testified that she did not think William could hold a job because he could not stay on task and she always planned on taking care of William.

¶ 17 Patricia testified that she had not worked outside the home in 25 years. She was currently contemplating culinary school. However, she did not believe that she could maintain a full time job outside the home because of the busy schedule taking care of the children. During the summer months she had to take care of the minor children and William all day. When the children had activities to attend, she needed to drive them. She spent at least an hour on school nights helping Matthew with his homework. Patricia was not interested in a career in the medical field. During the marriage, Brian never encouraged her to work outside the home.

¶ 18 On June 30, 2014, the trial court issued an oral ruling, and ordered that a judgment be prepared and presented for entry. The final written judgment was entered on August 22, 2014, *nunc pro tunc* to August 20, 2014. The trial court noted that it considered all the evidence, the credibility of the parties, and the appropriate statutory factors. The trial determined that the marital estate consisted of the marital residence, the Lombard condominium, Brian's PNC Bank account, the joint Harris Bank checking account, the parties' four vehicles, the retirement accounts, Brian's capital account with his law firm, term life insurance policies on each party, and two Chicago Bears private ticket licenses. The marital debt consisted of Patricia's Discover card, Macy's card, American Express card, Wells Fargo card, Citibank card and a Carson's credit card. Additionally, Brian had accumulated debt on a Commerce Bank card.

¶ 19 The trial court allocated most assets and debts equally between the parties, with a relevant valuation date of June 6, 2014. The trial court ordered that Patricia could retain the marital residence for a period of 24 months or list it for sale with a real estate broker. Until the marital residence was sold, the parties were to share equally the payments for principal and interest on current mortgages, the real estate taxes, and property insurance. Additionally, if there were any major repairs other than normal upkeep of the home, the parties were to share that expense. If Patricia elected to retain the residence, she had to make that election by September 6,

2014, and thereafter refinance and take the necessary steps to remove Brian from the mortgages and deed by June 6, 2016. The amount due Brian would be half the difference between the mortgage balances as of June 6, 2014 and the stipulated value of $785,000. The Lombard condominium was awarded to Brian. The trial court awarded Patricia the 2010 Audi and Brian the 2010 Acura. The parties were to divide equally any value in the Volkswagen and Ford automobiles. All retirement accounts were to be split equally between the parties. Brian was awarded the Bears ticket licenses and his capital account with his employer.

¶ 20 As to maintenance, the trial court noted that Patricia had not worked outside the home in 22 years. However, the trial court found that she was young and talented enough to rehabilitate herself and pursue a meaningful career. The trial court found that Patricia did not wish to seek employment outside the home at the present time. Brian's attorney suggested that the trial court impute income to Patricia of $35,000 annually, and the trial court did so. The trial court stated that in setting maintenance, it considered Brian's average income, the relevant factors under section 504 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/504 (West 2012)), the duration of the marriage, and the time Patricia devoted to domestic duties. The trial court ordered that, commencing July 1, 2014, Brian was to pay Patricia $10,000 per month in reviewable maintenance for a period of 60 months. The maintenance payments were to be included in Patricia's adjusted gross income and deductible from Brian's income.

¶ 21 As to child support, the trial court found that a downward deviation from the 28% statutory guideline amount was appropriate. The trial court found that "a fair and equitable amount based upon the obligation for support of two (2) minor children to be $4,000 per month." The court reserved the issue, under section 513 of the Dissolution Act (750 ILCS 5/513 (West 2012)) of post high school educational expenses. The trial court ordered Brian to maintain his

life insurance policy, with Patricia as the beneficiary, until his obligations for child support, educational expenses, and maintenance had ceased.

¶ 22 Brian was ordered to maintain medical insurance for the parties' children while any child was a minor or a full time student. Uncovered medical expenses were to be shared equally between the parties. The trial court ordered that both parties' attorney fees and the guardian *ad litem* fees were to be paid from marital assets prior to distribution between the parties. Thereafter, Patricia filed a timely notice of appeal.

¶ 23 II. ANALYSIS

¶ 24 A. Child Support

¶ 25 Patricia's first argument on appeal is that the trial court erred in failing to make the requisite findings to support a downward deviation from the statutory child support guidelines, namely, a finding as to the statutory guideline amount of support that was due and the reasons for the trial court's deviation. Additionally, Patricia argues that the trial court erred in not awarding support for the parties' disabled adult son, William.

¶ 26 The standards governing court-awarded child support are set forth in section 505 of the Dissolution Act (750 ILCS 5/505 (West 2012)). Pursuant to section 505(a)(1), the trial court, when ordering a supporting parent to pay child support, "shall determine the minimum amount of support by using the [statutory] guidelines," *i.e.*, a percentage of the supporting party's net income according to the number of children involved. 750 ILCS 5/505(a)(1) (West 2012). For two children, the statutory guideline is 28% of the supporting party's net income. 750 ILCS 5/505(a)(1) (West 2012). Section 505(a) of the Act creates "a rebuttable presumption that child support conforming to the guidelines is appropriate." *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 28.

¶ 27 A trial court may deviate from the statutory child support guidelines if it finds that doing so is appropriate after considering the children's best interests in light of the following factors: the financial resources and needs of the child and both parents; the standard of living the child would have enjoyed had the marriage not been dissolved; the physical and emotional condition of the child; and the educational needs of the child. 750 ILCS 5/505(a)(2) (West 2012). When determining whether to deviate from the guidelines, consideration of the factors set forth in section 505(a)(2) of the Act is mandatory, not directory. *Parks v. Romans*, 187 Ill. App. 3d 445, 448 (1989). If the court deviates from the guidelines, it must state the amount that would have been required under the guidelines and its reasons for deviating from that amount. 750 ILCS 5/505(a)(2) (West 2012); *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 53. We review an award of child support for an abuse of discretion. *In re Marriage of Berberet*, 2012 IL App (4th) 110749, ¶ 37. "A trial court abuses its discretion only where its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court [citation], or where its ruling rests on an error of law." *In re Marriage of Iqbal*, 2014 IL App (2d) 131306, ¶ 44.

¶ 28 Patricia's first argument is that the trial court erred by failing to make a specific finding as to the statutory amount of child support that would have been owed had the guideline amount been awarded. This argument is forfeited. At the August 20, 2014, post-trial hearing to review the draft judgment order, Patricia's attorney declined the trial court's offer to make a specific finding as to the guideline amount of child support. Specifically, the following colloquy occurred:

> "THE COURT: It's your position that I have to come up with the figure, and I'm not saying that figure is accurate, of 6700 per month. You agree? Because that is not my understanding.

MR. STEFANEAS [Patricia's attorney]: I ask, Judge, here's my position in a nutshell on everything, and I'll be happy to talk specifics with you. What I did in my red-lined version is mirror what the transcript said.

THE COURT: That's not the question I'm asking. The question I'm asking you is, I was of the opinion, and I'm willing to learn, that I didn't have to come up with the actual amount, and long as I detailed the reason for the deviation. It's your position I need to calculate the actual amount.

MR. SAMMARCO [Brian's attorney]: You need to state a dollar amount of what you thought 28 percent of net would be.

THE COURT: Do you agree?

MR. STEFANEAS: I think you have the discretion to do whatever you want, Judge."

We note that under the invited-error doctrine, "a party cannot complain of error which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). Accordingly, because Patricia's counsel declined the trial court's offer to make a specific finding as to the statutory guideline amount of child support, she cannot complain on appeal that the trial court erred in failing to do so. *Id.*

¶ 29 Patricia next argues that the trial court erred in failing to make express findings as to its reasoning for deviating downward from the guidelines. A trial court's failure to make express findings when it orders child support that is below the statutory minimum is sufficient to warrant reversal. *In re Marriage of Charles*, 284 Ill. App. 3d 339, 347 (1996). In *People ex rel. Graham v. Adams*, 239 Ill. App. 3d 643, 647 (1993), the trial court's finding as to child support was as follows:

> "Based upon all relevant circumstances, application of the minimum guidelines set forth in Section 505 of the Illinois Marriage and Dissolution of Marriage Act is inappropriate; and, child support should be awarded in a sum less than that due to the needs of the minor and the substantial income of [the father]."

The reviewing court held that this was not an "express" finding of reasons for deviation from the statutory child support guidelines. *Id.* Accordingly, the reviewing court remanded the case for the trial court to consider the section 505 factors and make express findings as to any reasons for deviation from the statutory child support guidelines. *Id.*

¶ 30 In the present case, the trial court's written order stated:

> "After consideration of all relevant factors the Court believes that based on the total income of the parties a deviation downward from the standard of twenty eight (28%) per the guidelines is appropriate. The Court finds that a fair and equitable amount based upon the obligation for support of two (2) minor children to be $4,000.00 per month and the Court so orders as of July 1, 2014 as and for child support."

The trial court's oral ruling was essentially identical to its written order. The trial court's finding that a deviation from statutory child support guidelines was warranted based on the parties' "total income" and that a deviation was "fair and equitable" does not satisfy the statutory requirement to make express findings as to the reasons for a deviation from the statutory child support guidelines. *Id.* We note that, on the one hand, child support awards are not intended to be windfalls. *In re Marriage of Lee*, 246 Ill. App. 3d 628, 644 (1993). On the other hand, the court must consider the standard of living the children would have enjoyed absent parental separation and dissolution. *Id.* at 643-44. Where the two parents have disparate incomes, a child should not suffer because a custodial parent has a limited income. *In re Marriage of Bussey*, 108 Ill. 2d 286, 297 (1985). Accordingly, we remand the case for the trial court to make the specific

findings required by law to support the downward deviation in child support or to adjust the child support to the appropriate statutory guidelines. See 750 ILCS 5/505(a)(2) (West 2012).

¶ 31 Patricia next argues that the trial court erred in not awarding child support based on the guideline for three children since William, the parties' disabled adult child, was still residing at home and being cared for by Patricia. Generally, a parent's duty to support a child ends when the child reaches the age of majority. *In re Marriage of Thurmond*, 306 Ill. App. 3d 828, 832 (1999). However, pursuant to section 513 of the Dissolution Act, the trial court "may award sums of money out of the property and income of either or both parties * * *, as equity may require, for the support of the child or children of the parties who have attained majority" in certain instances, including:

> "(1) When the child is mentally or physically disabled and not otherwise emancipated, an application for support may be made before or after the child has attained majority." 750 ILCS 5/513(a) (West 2012).

When making an award pursuant to section 513 of the Dissolution Act, the trial court must consider all relevant factors that appear reasonable and necessary, including:

> "(1) The financial resources of both parents.
>
> (2) The standard of living the child would have enjoyed had the marriage not been dissolved.
>
> (3) The financial resources of the child.
>
> (4) The child's academic performance." 750 ILCS 5/513(b)(1) through (4) (West 2012).

As is apparent from the statute, it is appropriate to consider social security income as a financial resource of the child in determining whether to award support under section 513 of the Dissolution Act. *Id.* However, social security income is intended only to supplement other income and is not meant to be a substitute for child support. *Cross v. Cross*, 891 N.E.2d 635,

642 (Ind. Ct. App. 2008); *Paton v. Paton*, 742 N.E.2d 619, 621-22 (Ohio 2001); *Lightel v. Myers*, 791 So. 2d 955, 959-960 (Ala. Civ. App. 2000).

¶ 32 In the present case, the record indicates that in closing argument, Brian's attorney stated that *In re Marriage of Henry*, 156 Ill. 2d 541, 550-552 (1993), stood for the proposition that if a disabled child was receiving Social Security benefits, the receipt of those benefits satisfied a non custodial party's obligation for support under the law. When the trial court asked Patricia's attorney if he disagreed with that proposition, he stated that he did not disagree. However, the proposition of law set forth in *Henry* is not applicable in the present case. In *Henry*, where the noncustodial parent was disabled, the reviewing court determined that payment of social security dependent disability benefits satisfied the noncustodial parent's child support obligation because the benefits had been earned by the noncustodial parent and were made on the noncustodial parent's behalf. *Henry*, 156 Ill. 2d at 552. Here, the SSDI payments are not being made to William on behalf of a disabled parent; rather, the payments are made to William based on his own disability. Accordingly, William's social security benefits were just one factor for the trial court to consider in determining whether additional support for William was warranted under section 513 of the Dissolution Act. See 750 ILCS 5/513(b)(3) (West 2012); see also *Cross*, 891 N.E.2d at 642; *Paton*, 742 N.E.2d at 621-22; *Lightel*, 791 So. 2d at 959-960.

¶ 33 Despite the parties' apparent misunderstanding of the law on this issue, the trial court's order does not indicate that it believed it was precluded from awarding support under section 513 because of William's social security disability benefits. The trial court stated that it "considered that one child was classified as a disabled adult; and the testimony suggests that at least currently, there are sufficient resources, including *** Social Security Disability income and programs provided by the State for the support of that child." However, on remand it may be helpful for the trial court to revisit the issue. We note that Patricia did not contest Brian's

testimony that William was eligible for food stamp benefits. However, the record indicated that Brian was currently paying Patricia $875 per month for William's social security benefits, until William's $5,000-$7,000 account was depleted. It is likely that, at present, the account is depleted and Brian is only paying Patricia $375 per month for William's care even though William's SSDI benefits are $725 per month. On remand, the trial court can consider how much of the SSDI benefits should be paid to Patricia and whether additional support is needed for William's care.

¶ 34 B. Maintenance

¶ 35 Patricia next argues that the trial court abused its discretion in failing to grant her permanent maintenance, awarding an insufficient amount of maintenance, not making a finding of Brian's income, averaging Brian's income, and imputing income to her. "[T]he propriety of a maintenance award is within the discretion of the trial court and the court's decision will not be disturbed absent an abuse of discretion." *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005). An abuse of discretion occurs "only where no reasonable person would take the view adopted by the trial court." *Id.*

¶ 36 Section 504(a) of the Dissolution Act (750 ILCS 5/504(a) (West 2012)) sets forth 12 factors for the trial court to consider when deciding whether to award maintenance:

> "(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
>
> (2) the needs of each party;
>
> (3) the present and future earning capacity of each party;
>
> (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;

(5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;

(6) the standard of living established during the marriage;

(7) the duration of the marriage;

(8) the age and the physical and emotional condition of both parties;

(9) the tax consequences of the property division upon the respective economic circumstances of the parties;

(10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;

(11) any valid agreement of the parties; and

(12) any other factor that the court expressly finds to be just and equitable."

"The benchmark for determining the amount of maintenance is the recipient's reasonable needs in light of the standard of living established during the marriage." *In re Marriage of Culp*, 341 Ill. App. 3d 390, 398 (2003).

¶ 37 In the present case, the trial court abused its discretion in setting the maintenance award. In making its determination as to maintenance, the trial court stated that it considered Brian's average income and the section 504 factors. Additionally, it stated that it had adopted Brian's suggestion and imputed income to Patricia of $35,000. Imputing income of $35,000 to Patricia was an abuse of discretion. In setting maintenance, while the trial court should consider the receiving spouse's present or future earning capacity, it should only consider the evidence presented, not mere speculation. *In re Marriage of Harlow*, 251 Ill. App. 3d 152, 159 (1993). For example, in *In re Marriage of S.D.*, 2012 IL App (1st) 101876, ¶¶ 36-37, the trial court

imputed income of $37,500 to the payee spouse. The reviewing court affirmed, based on evidence showing that the payee spouse had recently graduated, earning a master's degree in social work, and was recently employed during the two years prior to trial. *Id.* Additionally, vocational experts had testified as to the amount of income the spouse should be able to obtain as a licensed social worker. *Id.* Thus, there was ample evidence supporting the imputed income. Similarly, in *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 707 (2006), the reviewing court found that the trial court had properly imputed income where the evidence established the spouse's income for the previous three years and that he had recently rejected a job that would have paid more than the imputed amount.

¶ 38 The present case is distinguishable from *S.D.* and *Hubbs*. Here, there was no evidence to support a determination that Patricia could earn $35,000. Patricia had been a stay-at-home mom for 25 years. While she was employed doing medical research for three years prior to having children, there was no evidence that her skills were still marketable after such a long gap in employment. Further, as a medical researcher she earned only $23,000 per year. Brian introduced an exhibit showing various positions that required a bachelor's degree and their various salaries. However, there was no evidence that Patricia was qualified for any of these positions. Further, there is no indication that the trial court considered that there were still two minor children and a disabled son for whom Patricia needed to provide care. See 750 ILCS 5/504(a)(5) (West 2012)). In fact, the trial court provided no explanation for the imputation of income other than that "it considered [Brian]'s suggestion." The trial court thus abused its discretion in imputing income of $35,000 to Patricia.

¶ 39 We also agree that the trial court abused its discretion in not making a finding as to Brian's income. In determining the amount of maintenance to be awarded, a trial court considers the parties' income at the time of dissolution as well as potential income. *In re Marriage of*

Walker, 386 Ill. App. 3d 1034, 1041 (2008). If a support-paying party's income fluctuates, the court may average prior income to determine a party's prospective income. *In re Marriage of Freesen*, 275 Ill. App. 3d 97, 103 (1995). As a rule of thumb, at least three prior years of income should be considered to obtain an accurate prospective income. *Id.* However, a trial court has discretion on this issue, as the facts vary in each case. *Id.* "While a court should not base net income findings upon the mere possibility of future financial resources, neither should it rely upon outdated information which no longer reflects prospective income." *Id.* at 103-04.

¶ 40 Here, the trial court never made a specific finding as to Brian's income. In setting maintenance, the trial court stated that it considered Brian's "average income." While there was evidence of Brian's income since 2009, the trial court did not state the years on which it based its consideration of Brian's average income. Further, while income averaging is appropriate when there is fluctuating income, Brian's salary had not fluctuated since 2009; rather, it had been steadily increasing. Further, Brian testified that his 2014 income would be commensurate with his 2013 income. The lack of a finding as to Brian's income makes it difficult for us to judge the propriety of the maintenance award. *In re Marriage of Douglas*, 195 Ill. App. 3d 1053, 1060 (1990). Accordingly, we remand for the trial court to make the initial calculation as to Brian's income.

¶ 41 Finally, Patricia argues that the trial court abused its discretion in failing to award permanent maintenance. Brian argues that Patricia has forfeited this argument because, during opening statements, her counsel said to the trial court:

> "And, respectfully, you are going to hear evidence that, although, this is probably going to end up being a permanent case, yes, based on the law, it most likely should be reviewable at the moment. But not for two years or [30] months; a minimum of five years."

We decline to find this argument forfeited. A trial court may, in its discretion, exceed the relief requested by a party in determining the appropriate duration of a maintenance award. *In re Marriage of Culp*, 341 Ill. App. 3d 390, 397 (2003). Accordingly, because Patricia's opening statement did not limit the trial court's discretion on this issue, we decline to find our review so limited. See *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 54 (forfeiture is a limitation on the parties and not on the court).

¶ 42 The duration of the maintenance award in this case is suspect. While maintenance is intended to be rehabilitative to allow a dependent spouse to become financially independent, permanent maintenance is appropriate when a spouse is unemployable or employable only at an income substantially lower than the previous standard of living. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 652 (2008); see also *In re Marriage of Carney*, 122 Ill. App. 3d 705, 715 (1984) ("where the spouse is not employable or is employable only at a low income, as compared to her previous standard of living, permanent maintenance is appropriate"). In addition, permanent maintenance is generally considered appropriate in circumstances where a spouse has devoted significant time to raising a family in lieu of pursuing a career. See *In re Marriage of Culp*, 341 Ill. App. 3d 390, 398 (2003) ("In lengthy marriages in which the recipient of maintenance served as caregiver for the children, ' "[t]here is no question but that Illinois courts give consideration to a more permanent award of maintenance to wives who have undertaken to * * * raise and support the family" ' ") (quoting *In re Marriage of Drury*, 317 Ill. App. 3d 201, 206 (2000)) (quoting *In re Marriage of Rubinstein*, 145 Ill. App. 3d 31, 40 (1986)).

¶ 43 In the present case, Patricia devoted many years to domestic duties in lieu of pursuing a career. Even with the job opportunities identified by Brian at trial, it is not likely that she is employable at an income that will reflect the parties' previous standard of living. Under these circumstances an award of permanent maintenance is usually appropriate. *Culp*, 341 Ill. App. 3d

at 398. We acknowledge that in *In re Marriage of Micheli*, 2014 IL App (2d) 121245, ¶ 28-30, the reviewing court found reviewable maintenance appropriate under circumstances similar to the present case; the only exception was that the wife had received a substantial portion of the marital estate. In this case, Patricia did not receive a substantial portion of the marital estate, rather, the trial court stated that it intended to divide the marital property equally between the parties. Based on the trial court's findings, it is difficult to determine whether the trial court intended that the initial reviewable maintenance award would eventually become permanent in some amount or whether it intended that Patricia would eventually become completely self-sufficient. The latter conclusion would be an abuse of discretion because, based on the evidence presented, it is clear that Patricia would not be able to maintain the standard of living experienced during the marriage without some assistance from Brian. Under the foregoing circumstances, we remand the case for the trial court to reconsider the maintenance award and enter a new order consistent with the views expressed herein.

¶ 44 C. Distribution of Marital Assets and Debt

¶ 45 Patricia's next claim on appeal is that the trial court's division of the marital assets and debts was inequitable. Section 503(d) of the Dissolution Act (750 ILCS 5/503(d) (West 2012)) requires the trial court to divide marital property in "just proportions," considering the 12 relevant factors set forth therein. The statutory factors include:

> "(1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including * * * the contribution of a spouse as a homemaker or to the family unit;
>
> (2) the dissipation by each party of the marital or non-marital property;
>
> (3) the value of the property assigned to each spouse;
>
> (4) the duration of the marriage;

(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(7) any antenuptial agreement of the parties;

(8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties." 750 ILCS 5/503(d)(1) to (d)(12) (West 2012).

¶ 46 The touchstone of proper apportionment is whether it is equitable, and each case rests on its own facts. *In re Marriage of Bentivenga*, 109 Ill. App. 3d 967, 971 (1982). "Equal distribution of marital property is generally favored, unless application of the statutory factors demonstrates an equal division would be inequitable." *In re Marriage of Minear*, 287 Ill. App. 3d 1073, 1083 (1997). We review a trial court's property distribution for an abuse of discretion. *In re Marriage of Vancura*, 356 Ill.App.3d 200, 205 (2005). A trial court abuses its discretion only where no reasonable person would have distributed the property as the trial court did. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 175 (2000).

¶ 47 In the present case, the trial court stated that it intended to distribute the marital assets equally between the parties. However, in assigning the various assets, the trial court did not

address the remaining balance in Brian's PNC account. Because the trial court stated that it intended to split the assets equally between the parties "except as otherwise noted," it is arguably implied that any balance in the account should be split between the parties. However, it is not quite clear. Furthermore, the trial court did not address the $39,000 down payment made on the Lombard condominium with marital funds. The trial court also awarded Brian the entirety of the capital account he had with his law firm (valued at $78,500) although that contribution was made with marital funds. We acknowledge that the distribution of these assets in Brian's favor is possibly offset by Brian's potential two-year contribution to the mortgage and taxes on the marital home. Brian asserts that this two-year contribution could amount to $57,200. However, this amount would still not equal the almost $120,000 Brian is receiving in the condominium down payment and the capital account. In light of the foregoing, while the trial court stated that it intended to split the assets equally, it actually awarded Brian the majority of the marital assets. Based on the length of the marriage and the disparity in the parties' future earning potential, a disproportionate award of assets in favor of Brian is an abuse of discretion. See *In re Marriage of Scoville*, 233 Ill. App. 3d 746 (1992) (property distribution of 59% to 41% in the husband's favor was an abuse of discretion, where the parties were married for 22 years and the wife was primarily responsible for raising the parties' children). Accordingly, as we are remanding for the trial court to reconsider both child support and maintenance, it is appropriate for the trial court to reconsider the distribution of the marital assets and debts.

¶ 48 D. Attorney Fees

¶ 49 Patricia's final argument on appeal is that the trial court erred in not requiring Brian to contribute to her attorney fees. The trial court ordered that the parties' outstanding attorney fees were to be paid with marital funds prior to the distribution of any assets. Thus, the trial court intended that the fees be shared equally between the parties.

¶ 50 Section 508(a) of the Dissolution Act provides that, "[a]t the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503 and in any other proceeding under this subsection." 750 ILCS 5/508(a) (West 2012). Section 503(j)(3) of the Act states that "[a]ny award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 [750 ILCS 5/503 (West 2012)] and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504 [750 ILCS 5/504 (West 2012)]." 750 ILCS 5/503(j)(3) (West 2012).

¶ 51 When a trial court must decide whether to order one party to a divorce proceeding to pay the other party's attorney fees, the court should consider, *inter alia*, the distribution of assets and debts, whether maintenance was awarded, and the parties' relative earning capacities. *In re Marriage of Keip*, 332 Ill. App. 3d 876, 884 (2002). In the present case, as we are remanding for the trial court to reconsider both the maintenance and property distribution awards, the trial court must also revisit the propriety of a contribution to attorney fees. *Id.*

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed and the cause is remanded for additional proceedings consistent with this order.

¶ 54 Reversed and remanded.