2011 IL App (2d) 080974
Nos. 2-08-0974 & 2-08-1164 cons.
Opinion filed November 21, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF JENNIFER STEEL,	)	Appeal from the Circuit Court of Du Page County.
Petitioner-Appellant and Cross-Appellee,	)	
and	)	No. 06-D-614
ROBERT STEEL,	)	
Respondent-Appellee and Cross-Appellant.	)	Honorable Rodney W. Equi, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court, with opinion.
Justices Zenoff and Schostok concurred in the judgment and opinion.

OPINION

¶ 1 Petitioner, Jennifer Steel, appeals from the order of the trial court dissolving her marriage to respondent, Robert Steel. Petitioner raises three main claims: (1) the trial court erred by classifying as nonmarital property certain of respondent's corporate interests; (2) the court erred in valuating one of the marital assets, a vacation home in Michigan (Michigan home), which it awarded to petitioner as part of the property division; and (3) the court erred in determining respondent's annual income. Respondent cross-appeals, arguing that (1) the trial court's property division did not account for respondent's payment of attorney fees, both his and petitioner's; (2) the court erred by directing

respondent to reimburse the marital estate in the amount of $289,666.74; and (3) the court erred by holding that respondent was estopped from claiming at trial that certain investments of his were nonmarital property. For the following reasons, we affirm in part, vacate in part, and remand.

¶ 2 We note first that petitioner has filed a motion to strike respondent's reply brief in support of his cross-appeal. Petitioner's sole complaint is that the brief's cover was the wrong color (respondent, as petitioner acknowledges, has since remedied the infraction by submitting a proper cover). Without further comment, we deny the motion.

¶ 3 The parties were married on May 9, 1987, and have four children: Michael, born February 13, 1989; Connor, born March 15, 1991; Katheryn, born January 9, 1995; and Kiernan, born August 22, 1996. The parties separated on March 9, 2006, and petitioner filed for divorce on March 16. On February 7, 2007, respondent moved for summary judgment regarding the property classification of his interests in three privately held companies: KA Steel Company (KASC), Montana Metals Products LLC (MM Products), and Montana Metals Properties LLC (MM Properties). On June 7, 2007, the trial court granted in part and denied in part respondent's summary judgment motion. The case proceeded to an eight-day trial in November 2007. On March 29, 2008, the trial court issued a letter ruling on the contested issues. On May 22, 2008, the court issued a judgment for dissolution of marriage. Both parties filed motions to reconsider, which the court denied. Petitioner filed an appeal, and respondent filed a cross-appeal. We provide additional background as we discuss each issue.

¶ 4 I. Property Classification and Reimbursement of the Marital Estate

¶ 5 A. Background

¶ 6 1. Procedural History

¶ 7 The first issues we address implicate both the appeal and the cross-appeal. Petitioner argues that the trial court erred in classifying as nonmarital respondent's interests in KASC, MM Products, MM Properties, and two additional privately held companies, San Francisco Foods, Inc. (SFF Inc.) and San Francisco Foods LLC (SFF LLC). In his cross-appeal, respondent challenges the trial court's order that he reimburse the marital estate for sums he used to purchase some of his shares in KASC. He also contests the trial court's holding that he was estopped from claiming at trial that his interests in certain private placements are nonmarital.

¶ 8 First, we provide further background on these issues. Respondent's summary judgment motion addressed, *inter alia*, his present 50% ownership of all KASC outstanding stock. Specifically, respondent possessed at the time of summary judgment (and still at the time of trial) 1,164.75 shares of Class A common stock and 10,482.75 shares of Class B common stock. For purposes of his motion, respondent identified three phases of his ownership of KASC stock. The first phase was his acquisition, prior to marriage, of 776.5 shares of KASC common stock, which represented one-third of the total stock of the company, with the remaining two-thirds, or 1553 shares, divided equally between respondent's brothers, Kenneth and Richard. The second phase was respondent's July 2004 purchase of 50%, or 388.25 shares, of Richard's KASC stock, with Kenneth purchasing the remaining 388.25 shares. The third phase was KASC's January 2007 stock dividend, whereby KASC issued nine shares of Class B common stock for each share of existing common stock, and the existing common stock was renamed Class A common stock.

¶ 9 The trial court found no material factual dispute that the 776.25 shares respondent acquired prior to the marriage were nonmarital property. The court did, however, find a material factual dispute regarding the classification of the 388.25 shares respondent acquired in July 2004.

Specifically, the court found it disputable whether the funds with which respondent purchased the shares—namely, monies from KASC itself—were themselves marital or nonmarital. The court further reasoned that, since a fact dispute existed as to the classification of the shares acquired in July 2004, there existed, *a fortiori*, a fact question as to the proportion of the new stock issued in January 2007 that corresponded to the 388.25 shares respondent acquired from Richard.

¶ 10 As for respondent's interests in MM Products and MM Properties, the trial court likewise found a material factual dispute whether the funds used to acquire those interests—again, monies from KASC—were themselves nonmarital or marital. Consequently, the trial court granted summary judgment for respondent as to his shares of KASC acquired before the marriage, but it denied summary judgment as to the shares of KASC he subsequently acquired and his shares of MM Products and MM Properties.

¶ 11 Neither party contests the trial court's summary judgment ruling, but both direct their challenges to the trial court's ultimate ruling on those issues after trial. We set forth the relevant evidence, most of which is undisputed.

¶ 12 2. Respondent's Use of the "Due from Officers" Account at KASC

¶ 13 In 1977, respondent began employment with KASC, where his father was president and chief executive officer (CEO). In 1982, respondent himself became president and CEO of KASC. At the time of trial, respondent was still CEO of KASC and was also chairman of the board of directors, while Kenneth was president. In July 2004, Richard retired from KASC and sold his shares to respondent and Kenneth. For as long as respondent has worked at KASC, he has received a regular salary.

¶ 14 In her claims about property classification (which we describe in full below), petitioner stresses the liberality with which respondent was loaned money by KASC through the "Due from Officers" account (DFO), which was initiated sometime in the 1980s. Various witnesses testified to the account, including respondent, Kenneth, and Bernard Ludwig, vice president of finance at KASC. The DFO allows certain KASC officers to take personal advances from the company. DFO use has been restricted to respondent, Kenneth, and Richard. The DFO is enabled by a revolving line of credit with a lending institution, which at the time of trial was Chase Bank. The collateral for the DFO is KASC stock. The brothers' DFO advances are recorded separately, and they need not keep their balances equal. When a DFO advance is given, the DFO balance increases, and when an advance is repaid, the DFO balance decreases. The DFO is treated by KASC as an asset, specifically as an account receivable. KASC charges interest on the advances, which it treats as interest income for tax purposes. DFO borrowers deduct the DFO interest on their individual tax returns.

¶ 15 There was evidence as to restrictions on DFO advances. Chase is the latest in a series of firms that have funded the line of credit enabling the DFO account. The record contains a long string of bank covenants, and amendments to these covenants, to which the lenders have succeeded in interest. Ludwig testified that the bank covenants formerly specified a flat cap on DFO advances (flat cap), but that the cap was recently removed. The bank covenants in the record corroborate Ludwig's testimony. Of these, the three most recent are dated July 22, 2005, March 8, 2006, and July 25, 2006. The July 2005 covenant provided that KASC shall not, except with the written consent of the lender, "permit as of each fiscal quarter end, its DFO to be not less than $3,000,000.00." The March 2006 amendment modified the flat cap to "$4,500,000.00 from the date hereof [March 8, 2006] to April 30, 2006, and *** $3,000,000.00 from May 1, 2006, and thereafter."

The July 2006 amendment provided that it was "delet[ing] in [its] entirety" the flat cap. Ludwig testified that there was a more recent amendment in force as of the time of trial, but he confirmed that this amendment did not reimpose the flat cap. Ludwig testified that, though the flat cap is no longer in place, Chase enforces a cap keyed to the tangible net worth of KASC (net-worth cap). Ludwig explained that the lender treats a DFO advance as a shareholder distribution that applies against KASC's tangible net worth. Respondent confirmed that there is a "relationship" between the DFO balance and KASC's net worth. The lender, respondent explained, "reduces the tangible net worth [of KASC] by the dollar amount of the aggregate DFO." Asked why KASC must "maintain an equity position," respondent explained, "It's an acutely capital intensive business. It has a very large asset base with a very high level of depreciation. And these assets have to be replaced on a very regular basis." The current net-worth cap, which fluctuates as KASC's tangible net worth fluctuates, is $10 million.

¶ 16 Ludwig recounted occasions when KASC exceeded the flat cap for the quarter and only afterwards applied for an exception from the cap. No lender refused to grant an exception. In 2000, KASC's current lender required KASC to pay down the DFO balance. KASC subsequently did so through shareholder distributions in 2000, 2001, and 2002, which totaled $13 million and reduced KASC's net worth by an identical amount. The distributions reduced the net worth of the ownership interests of Kenneth, Richard, and respondent by $4.3 million each. Ludwig noted that Kenneth, Richard, and respondent have also occasionally paid down the DFO balance with personal funds. Respondent denied that he has used "personal monies to pay down the DFO," though evidence at trial was to the contrary.

¶ 17 The witnesses agreed that the bank restrictions are the only limitations on DFO usage and that KASC has no internal policies concerning the amounts or uses of DFO advances or schedules for repayment. Ludwig administers the DFO account, and respondent testified that, to receive a DFO advance, he "simply pick[s] up the phone or e-mail[s] [Ludwig] and tell[s] him that [he] need[s] money and [Ludwig] either wires it or sends him a check." Respondent and Kenneth both testified that the DFO account is an appealing resource because the interest rate charged by KASC is less than the commercial rate and KASC does not require officers to complete paperwork for the advances. Ludwig could recall no instance when KASC has required officers to sign a promissory note regarding DFO advances.

¶ 18 Respondent and Kenneth testified that they have put DFO advances to personal use. For instance, each has used DFO funds for personal investments. Respondent acknowledged that in 2007 he made "close to" $300,000 in investments using DFO advances. The documentary evidence shows that respondent used at least $250,000 in DFO advances for investments in 2006 and 2007. Respondent identified several other personal uses to which he has put DFO funds. In 2003, respondent borrowed $11,000 to pay property taxes on the Michigan home and $22,000 to pay property taxes on the parties' former home at 445 East 4th Street in Hinsdale. In 2005, respondent used DFO funds to make a down payment on the parties' former residence at 325 East 8th Street in Hinsdale, which the parties purchased for $4.1 million. For several months during 2003, respondent took DFO advances to pay an interior designer for work on the Michigan home. Respondent acknowledged that he has never repaid KASC for the down payment on the 8th Street home. As will be detailed below, respondent also used DFO funds to acquire stock in KASC, MM Products, MM Properties, SFF Inc., and SFF LLC.

¶ 19 Ludwig was shown DFO ledgers from several recent years. As Ludwig noted, the ledgers typically do not reflect the purpose for which the recipient intended to use the DFO advance.

¶ 20 Respondent and Kenneth claimed that there were occasions when KASC refused their requests for DFO advances. Kenneth could not, however, recall a specific instance when his request was refused. Respondent testified that he has never been refused a DFO request "up to the limits set by the bank, self-imposed limits." Respondent recalled an instance in 2004 or 2005 when, in a matter of months, KASC went from a "cash position to over 18 million in debt." At that point, the lender "cut [the DFO] off." Respondent testified that the bank is "very strict" with the "three million limit" on the DFO. (Possibly, the $3 million cap that respondent mentioned here was the same $3 million cap he said was placed on the DFO at its "inception." There is no dispute, however, that the flat cap was lifted in 2006.) Respondent recalled that there were eight or nine occasions within the last three years when he was refused an advance. According to respondent, he is currently "tapped out" on his DFO and is not able to take advantage of a current investment opportunity he finds appealing. This exchange followed:

> "Q. So is it your testimony, as you sit here today, [that] you cannot access any more money against your DFO?
>
> A. I am currently beyond my limit on my DFO. Let's put it this way. The—
>
> Q. Well—
>
> A. The legal limit is 3 million. I am greater than 1.5 million, you know, slightly greater than that amount. But—
>
> Q. Well, that's different because, in the past, you have exceeded your limit—
>
> A. Right.

Q. —but still been able to borrow, right?

A. Right.

Q. And so, my question to you specifically is, even though you believe that you may have exceeded some limit are you testifying today you have no more access to your DFO?

* * *

A. I have limitations right now. I have hit my limit."

(Again, it is unclear which $3 million cap respondent referred to.) Respondent testified elsewhere, however, that he had taken a DFO advance of $8,000 that very day. Ludwig agreed that respondent is presently "tapped out" under the net-worth cap. Ludwig was also asked:

"Q. Now does [respondent], in 2006, did he discuss with you any of the uses of the advances that he requested?

A. Yes.

Q. And regardless of what [respondent] uses the money for, if he asked you for an advance, have you ever refused to give him an advance?

A. No.

(Ludwig was not asked a similar question regarding Kenneth's or Richard's requests for DFO advances.)

¶ 21 The record shows the following DFO activity by respondent for the years 2001 though 2005.

Description	2001	2002	2003	2004	2005
Beg. Balance 12/31	$3,142,837.89	$649,550.41	$1,606,621.33	$1,383,612.96	$1,658,517.32
Total Advances	$919,654.56	$1,711,693.43	$421,194.72	$834,963.20	$595,442.33
Total Paydowns	$3,577,926.86	$772,046.93	$661,084.46	$578,631.82	$813,854.65
End Balance 12/31	$649,550.41	$1,606,621.33	$1,380,657.61	$1,658,517.32	$1,491,507.34
Change in Balance	$2,493,287.48	-$957,070.92	$225,963.72	-$274,904.36	$167,009.89

(The adjustment in the opening balance for 2004 is not explained by the record.) The record does not reflect the purposes for most of these advances. The DFO ledgers from several years are in the record, but as Ludwig acknowledged, the ledgers often do not indicate the intended purposes for the advances. Ludwig testified that, as of trial, respondent's DFO balance was $1.6 million.

¶ 22 Several witnesses testified to KASC's status under federal income tax laws. These witnesses included Ludwig; Alan Alport, who provided accounting services to respondent, KASC, SFF Inc., and SFF LLC; and Dennis Czurylo, a forensic accountant who was petitioner's expert witness. According to these witnesses, KASC is a subchapter S corporation and, consequently, the earnings of KASC are taxed not to the corporation but to the shareholders, who report on their individual tax returns the earnings proportionate to their ownership shares in the corporation. See 26 U.S.C. § 1366 (2000) (explaining tax consequences for a subchapter S corporation). As Alport explained, respondent is taxed on the earnings of KASC whether they are distributed to him or retained by the corporation. Thus, KASC's retained earnings are, as Alport described them, "phantom income" to the shareholders of KASC. See *Hill v. Commissioner of Internal Revenue*, 100 T.C.M. (CCH) 513 (2010) ("An S corporation is not subject to the Federal corporate income tax. [Citation.] Instead, an S corporation's items of income, gain, loss, deduction, and credit—whether or not distributed—flow through to the shareholders, who must report their pro rata shares of such items on their individual income tax returns for the shareholder taxable year within which the S corporation's taxable year ends."). KASC makes payments to its shareholders to cover the tax due on the retained earnings. Until 2002, KASC designated these payments as shareholder distributions. From 2002 to the time of trial, KASC has designated the payments as bonuses, to be included in the

shareholder's W-2 income. According to Ludwig, KASC changed the designation on the advice of its accountants.

¶ 23 There was also testimony as to respondent's salary at KASC. Respondent's yearly base salary in the years 2001 through 2006 ranged from $400,000 to $600,000. According to Kenneth, he and respondent mutually decided on their salaries and based them on industry standards. They also obtained "the approval of the bank" for the salaries. Ludwig explained that, because salaries, like all of KASC's expenses, reduce the tangible net worth of the company, the net-worth cap necessarily limits the salaries of KASC officers.

¶ 24 Evidence was also adduced on the matter of distributions or dividends from KASC. Ludwig testified that, like DFO advances and officers' salaries, shareholder distributions or dividends are limited by the net-worth cap. Moreover, distributions or dividends must be disbursed equally to all shareholders.

¶ 25 Also relevant is the process by which respondent acquired his shares in KASC and the other companies. We discuss that process at length in the next section. As will be seen, respondent relied extensively on DFO advances and shareholder distributions from KASC in making these acquisitions. Further, some of these funds from KASC were deposited into respondent's account at Northern Trust Company (NT account) before he disbursed them to make the purchases. The NT account, which is held in respondent's name alone, is part of a revocable trust of which he is trustee and petitioner is beneficiary. The record does not show when respondent opened the NT account, but it contains account statements dated as far back as 2001. Respondent testified that he alone was responsible for handling the family finances and that, from 2001 through 2006, he used the NT account exclusively for both family expenses and personal financial transactions. KASC deposited

respondent's salary directly into the NT account. Any DFO advances or shareholder distributions from KASC that respondent did not have wired directly to another party were deposited first into the NT account. In what follows, we indicate, where appropriate, whether the record shows that the funds in question from KASC were first deposited into the NT account.

¶ 26 For clarity, we group these acquisitions by the company or companies involved rather than present them chronologically.

¶ 27 3. Respondent's Acquisition of Shares in KASC

¶ 28 There is no dispute that, prior to his marriage to petitioner, respondent acquired 776.5 shares of KASC common stock. Also at that time, Richard and Kenneth each acquired half of the remaining 1,553 shares of KASC common stock.

¶ 29 On July 23, 2004, respondent and Kenneth entered into an agreement (July 2004 contract) to purchase the entirety of Richard's KASC common stock. Respondent and Kenneth would each acquire 388.25 shares of the stock. Also by this agreement, respondent and Kenneth would purchase Richard's "27,500 shares of Voting Common Stock" in SFF Inc. (as will be further addressed below). Respondent and Kenneth were each responsible for one-half of the total purchase price of $3,336,000. The agreement called for (1) an initial payment of $760,000; (2) 47 monthly installments of $53,666.67; and (3) a final installment of $53,666.51.

¶ 30 On December 29, 2004, KASC wrote Richard a check for $760,000. Ludwig testified that, on the recommendation of its accountants, KASC recorded the disbursement as a shareholder distribution. Consistent with this, KASC's 2004 K-1 schedule reflected a $380,000 shareholder distribution to respondent. As for the monthly installment payments called for by the agreement, KASC wired $26,833.34 into the NT account in January 2005 and then made monthly wires in that

amount throughout 2005. The NT account statements for 2005, however, showed only three payments of $26,833.34 from respondent to Richard. Specifically, respondent wrote three checks in that amount, dated January 24, March 1, and March 30. As for his failure to pay Richard for the remainder of 2005, respondent acknowledged that, "for a period of time," he made no payments under the July 2004 contract. The wires from KASC for the first three months of 2005 were received on January 20, February 18, and March 18. Monthly wires from KASC for $26,833.34 continued through March 2006. Beginning in May 2006, KASC, on the recommendation of respondent's divorce attorney, began wiring the installment payments directly to Richard. KASC's corporate ledger and bank accounts show monthly wires of $53,666.67 (for both respondent's and Kenneth's payments) to Richard from May through December 2006. KASC recorded these disbursements as shareholder distributions.

¶ 31 On December 13, 2005, MM Products (an interest in which respondent had acquired in 1998, as will be described below) wired a distribution of $2,617,259 to respondent's NT account. On December 16, 2005, respondent wrote a check to KASC for $314,609, which he testified was in reduction of his DFO balance. The DFO ledger confirms a credit to respondent of $314,609 on December 16, 2005. In his brief, respondent asserts that he also used the $2,617,259 to make a payment to Richard of $529,333.44, which included "(a) $214,666 for the eight (8) monthly payments due under [the July 2004 contract] for May through December 2005; (b) a loan to Richard comprised of eight (8) advance monthly payments pursuant to the terms of the sale; and (c) repayment of a $100,000 loan Richard made to [respondent] for family expenses on May 27, 2005, unconnected to the purchase of Richard's KASC shares." Bank statements do show a wire of $529,333.44 from the NT account to Richard on December 27, 2005. At trial, however, respondent

could not recall the purpose for that wire, nor does the record indicate its purpose. Petitioner does not, however, dispute that this wire represented payment under the July 2004 contract.

¶ 32 The parties stipulated that respondent holds a 50% interest in KASC, with a value of $25.5 million as of December 31, 2006.

¶ 33 4. Respondent's Acquisition of Interests in SFF Inc. and SFF LLC

¶ 34 The record is somewhat obscure as to how respondent acquired his shares in SFF Inc. and SFF LLC, and the briefs do not totally clarify the process.

¶ 35 On January 20, 1998, respondent and Jayson Romine entered into an agreement to purchase all outstanding common stock of San Francisco Italian Foods, Inc. (SFF Italian, later renamed SFF Inc.). Respondent purchased 82.5% of the shares and Romine the remaining 17.5%. In his brief, respondent states that the price he paid was $180,000, but the purchase agreement he cites for that sum is not the agreement between SFF Italian, respondent, and Romine, but an agreement by which "San Francisco Italian Foods, Inc., a Delaware corporation" (presumably SFF Italian) purchased "San Francisco Italian Foods, Inc., a California corporation." The two agreements do appear related because respondent's purchase agreement with SFF Italian required him to loan that entity $280,000, and the agreement between the two corporations stated that respondent was funding the purchase. Indeed, the record contains two promissory notes from SFF Italian, each dated January 20, 1998. The first was for $180,000, the second for $100,000. Correspondingly, KASC's DFO ledger for January 20, 1998, shows an advance to respondent for $280,000. As for the shares of SFF Italian itself, the stated price in the January 1998 purchase agreement was $.01 for each of respondent's 82,500 shares, or $825. The DFO ledger shows no advance in that amount on or around January 20, 1998.

¶ 36 Notably, petitioner does not claim, and nothing in the record suggests, that the $280,000 in DFO funds passed though the NT account. Petitioner does not analyze the stages by which respondent acquired his interests in SFF Inc. and SFF LLC, but simply states, "[Respondent] took loans from [KASC] to pay for San Francisco Foods."

¶ 37 As for the next event in the chronology, the record again does not seem to correspond with the representations in respondent's brief. Respondent asserts that, "[l]ater in 1998, KASC advanced to [respondent] an additional $445,000 from the DFO account to purchase the other 17.5% interest in [SFF Italian]." To the contrary, there is a July 1, 1998, settlement agreement reflecting that Romine's shares were purchased by SFF Inc. and then "*retired* and assum[ed] the status of authorized but unissued stock" (emphasis added). The $445,000 was, actually, the amount that respondent agreed to pay SFF Italian for a *new issue* of 742,500 shares of SFF Italian common stock, according to a May 6, 1998, subscription agreement in the record. Kenneth confirmed in his testimony that, in 1998, respondent purchased 742,500 shares of SFF Italian for $445,500. As for whether these were DFO funds, as respondent claims, the record contains a May 6, 1998, cashier's check to SFF Italian for $445,000, issued by First National Bank of Chicago with respondent as remitter. The record also contains statements from an account that KASC held at First National Bank in 1998, but the statements for May 1998 are not included. The DFO ledger for 1998 showed an advance to respondent for $445,500 in June 1998. The parties agree that the $445,000 was a DFO advance, but the record does not show, and petitioner does not claim, that these funds were first deposited into the NT account.

¶ 38 SFF Italian subsequently changed its name to SFF Inc. By an agreement dated November 2, 1998, SFF Inc. converted respondent's then 825,000 shares of common stock into 82,500 shares

of voting stock and 742,000 shares of nonvoting stock. Also by that agreement, respondent sold all 742,000 shares of nonvoting stock: 74,200 to Richard, 333,900 to a trust for Richard's children, and the remaining 333,900 to a trust for Kenneth's children. Respondent retained the 82,500 shares of voting stock, representing 10% of the ownership of SFF Inc., and later transferred them into a trust for his children.

¶ 39 From 1998 to 2000, KASC wired SFF Inc. approximately $7.5 million to cover SFF Inc.'s operating losses. The KASC funds were all DFO advances, and respondent, Kenneth, and Richard each was charged $2.5 million on his DFO balance. SFF Inc. issued promissory notes to the brothers for the funds. These DFO advances raised the balance to such a level that, in 2000, the current lender required KASC to pay down the balance, which it did in its entirety through shareholder distributions in 2000, 2001, and 2002.

¶ 40 In 1999, Kenneth purchased 50%, or 41,250, of respondent's voting shares in SFF Inc. As consideration for the purchase, Kenneth assumed one-half of respondent's DFO liability for the loans to SFF Inc.

¶ 41 In 2000, SFF LLC was formed to permit outside investment in SFF Inc. For contributing all the assets of SFF LLC, SFF Inc. acquired a 76% interest in SFF LLC, while an outside investor, President's Forum, acquired the remaining 24%. In March and April 2001, Richard, Kenneth, and respondent together made a capital contribution to SFF LLC of $175,000. KASC advanced the funds for the contribution, and each brother's DFO was charged one-third of $175,000, or $58,333. Petitioner does not claim, and the record does not show, that the DFO funds were first deposited into the NT account. In return for the contribution, the brothers together received a .42% stake in SFF LLC, with President's Forum and SFF Inc. holding the remaining shares. Between 2000 and 2006,

the brothers loaned SFF LLC $2.5 million, the funds used being DFO advances. Each brother's DFO was charged one-third of $2.5 million, and each received a promissory note in that amount from SFF LLC.

¶ 42 In the July 2004 contract, respondent and Kenneth agreed to purchase Richard's "27,500 shares of Voting Common Stock" in SFF Inc. There was no testimony explaining, and the record does not otherwise show, how Richard came to possess these 27,500 voting shares subsequent to the November 2, 1998, purchase agreement by which he acquired 74,200 shares of *non*voting stock alone. (Also by the July 2004 contract, Richard sold his 776.5 shares of KASC common stock to respondent and Kenneth, as outlined above in Part I(A)(3).

¶ 43 In 2006, SFF LLC wired KASC $2.1 million to apply against the DFO balance incurred due to the loans, which totaled $2.5 million between 2000 and 2006. Each brother's DFO balance was proportionately reduced. A considerable balance remained on the debt as of trial, but respondent testified that he intended to forgive the debt because SFF LLC was owned largely by his and Kenneth's children. As of trial, respondent held a 7.224% interest in SFF Inc. and a .758% interest in SFF LLC. The parties stipulated that the value of these interests was $800,000 as of December 31, 2006.

¶ 44 5. Respondent's Acquisition of Interests in MM Products and MM Properties

¶ 45 In late January 1996, KASC wired MM Products $1 million, and respondent thereby acquired a 51% interest in the company, while his co-investor, Anthony Sobel, obtained the remaining 49% for his investment of $500,000. The $1 million disbursement was recorded as a DFO advance. Respondent paid no further sums for his interest in MM Products. In May 1998, President's Forum purchased an interest in MM Products, and respondent's interest was reduced to 40.26%. As a result

of the infusion of capital, MM Products disbursed $400,000 to respondent, which he applied to his DFO balance. In September 1996, MM Properties was formed, and the owners of MM Products received the same percentages of its ownership as they held in MM Products. Respondent accordingly received a 40.26% interest in MM Properties, but paid no funds for the interest.

¶ 46 In December 2005, MM Properties was recapitalized, and the company made a $6.5 million distribution to its shareholders, divided according to their *pro rata* shares. Respondent's share was $2,617,259, which (as recounted above in Part I(A)(3)) was wired to his NT account on December 13, 2005. On December 16, 2005, respondent wrote KASC a check for $314,609, which he testified was in reduction of his DFO balance. The DFO ledger confirms a credit to respondent of $314,609 on December 16, 2005. In his brief, respondent asserts that he also used the $2,617,259 to make a $529,000 payment to Richard in reduction of the balance he owed under the July 2004 contract. As noted in Part I(A)(3), however, the record does show a wire to Richard of $529,000 on December 27, 2005, but it does not indicate the purpose for that wire (though petitioner does not dispute that it represented a payment under the July 2004 contract).

¶ 47 As of trial, respondent owned a 40.26% interest in MM Products and in MM Properties. The parties stipulated that, as of December 31, 2006, respondent's interest in MM Products was worth $4,100,000 and his interest in MM Properties was worth $1,050,000.

¶ 48 6. Respondent's Acquisition of Interests in Private Placements

¶ 49 There was evidence at trial that, between 2006 and 2007, respondent utilized at least $250,000 in DFO funds to acquire interests in several private placements.

¶ 50 6. The Trial Court's Decision

¶ 51 In its letter ruling, the trial court held that respondent's interests in KASC, SFF Inc., SFF LLC, MM Products, and MM Properties were all nonmarital property. The court reasoned:

> "[T]here is little on which [petitioner] can rely to sustain her position. [Respondent] was employed by KASC and paid reasonably for his efforts. Beyond that the source of all the funds [respondent] had available was his non-marital asset KASC. The transactions were described in excruciating detail; the disbursements were accounted in the DFO account and ultimately the DFO accounts were reduced as payments were made. Whatever the term used at any given time, there was no relationship between [respondent's] personal efforts and any distribution. *In re Marriage of Samardzija*, (2006) 365 Ill. App. 3d 702; *In re Marriage of Jelinke*, (1993) 244 Ill. App. 3d 496. There is no relationship between any immediate success of the company and any particular disbursement of funds. The size of certain of the disbursements was disproportionate to any basis for compensation. Indeed, at times the disbursement of funds was clearly unjustified based on performance and threatened to place the revolving credit agreement [bank covenants] in jeopardy. Whether these disbursements were sometimes contrary to the terms of the KASC credit agreement has no bearing on the classification for our purposes here.
>
> *** The transactions here providing [respondent] with benefits of his non-marital property were reasonably made in good faith. [Petitioner] too benefits from [respondent's] non-marital estate ***. These transactions ought not be lightly set aside because the parties are unable to remain married."

¶ 52 The court then noted "two exceptions to this general determination of property flowing from [respondent's] non-marital estate." First:

> "[T]hose payments made to Richard from the 'marital' money market account [the NT account] must be reimbursed to the marital estate. It is impossible to treat all other disbursements placed into the [NT account] as 'gifts' to the marital estate if used to pay normal expenses, and then characterize these deposits differently. Therefore, the marital estate is entitled to reimbursement in the amount of $289,666.74."[1]

Second:

> "[I]t appears that the 'private placements' purchased by [respondent] were classified as marital assets throughout the entire pre-trial proceedings until the literal eve of trial (see *e.g.* Exhibit 83, [respondent's] Amended Answers to Interrogatories, qq 23). Given the inability to properly discover the depth of those transactions prior to trial as a result of such late disclosure, [respondent] is estopped from claiming the private placements as non-marital property. This is true whether or not they were purchased with DFO disbursements."

¶ 53 B. Analysis

¶ 54 We address first that portion of respondent's cross-appeal that challenges the trial court's holding that respondent was estopped from contesting the classification of the private placements. Respondent argues:

> "The evidence demonstrated that the [private placements] were purchased solely with money from the DFO Account with no participation from the marital estate. [C. 4609.] As they were acquired using non-marital money advanced from KASC, a company in which [respondent] has a non-marital interest, the trial court should have classified the investments

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[1]The court was speaking here of the payments that respondent made from the NT account to Richard under the July 2004 contract.

> as non-marital pursuant to section 503(a)(2) of the [Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(a)(2) (West 2010))]. Further, even if they were viewed as having been acquired via non-marital loan[s], given the non-marital properties of the DFO Account, the investments would nevertheless be rendered non-marital.
>
> Despite this undisputed evidence, the trial court refused to classify the investments as non-marital. The court reasoned that, up until the eve of trial, [respondent] did not assert the investments as non-marital and that, therefore, [respondent] was estopped from claiming them as non-marital property.
>
> The trial court abused its discretion in disregarding the evidence at trial and estopping [respondent] from claiming his non-marital property. [Petitioner] suffered no prejudice from [respondent's] failure to update his interrogatory answers and to formally claim that the investments were non-marital. Prior to trial, [respondent] provided [petitioner] with full and complete disclosure of the details of his acquisition of these non-marital assets. In addition, the manner of acquisition of these private placements—that they were obtained using funds from the KASC DFO Account—was fully explored prior to and at length during the trial."

¶ 55 Petitioner maintains that this argument is forfeited for lack of record citations. We agree. Respondent cites to the part of the trial record where he introduced evidence of how he acquired the private placements. However, in asserting that he provided *pretrial* disclosure of the details of the acquisition, respondent includes no record citations. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (arguments on appeal "shall contain the contentions of the appellant and the reasons therefor, with citations of the authorities and the pages of the record relied on," and "[p]oints not argued are

waived"). Consequently, this argument is forfeited, and we need not address petitioner's additional claim that the argument is forfeited because respondent did not recite the standard of review.

¶ 56 We proceed to petitioner's arguments, though we return later to the cross-appeal in order to address another argument related to petitioner's contentions.

¶ 57 The trial court's classification of property as marital or nonmarital will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *In re Marriage of Mouschovias*, 359 Ill. App. 3d 348, 356 (2005). With the exception of approximately 6% of his interest in KASC, respondent acquired all corporate assets in question during the marriage. Property acquired during a marriage is presumptively marital (750 ILCS 5/503(a) (West 2010)), and the presumption can be overcome only by clear and convincing evidence (*In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 154 (2005)). Any doubt as to the nature of the property must be resolved in favor of finding that it is marital. *Id.* at 154-55.

¶ 58 Petitioner's arguments begin, naturally, with KASC because its funds were in large part the source for respondent's acquisition of the other corporate interests. Petitioner's argument as to KASC is two-fold. First, she argues that respondent's share of the retained earnings of KASC is marital because the earnings were essentially income. Second, she argues that respondent's KASC stock is marital because it was purchased with funds that became marital through commingling.

¶ 59 On the first argument, petitioner cites case law addressing how to classify a spouse's share of the retained earnings of a closely held corporation. See *In re Marriage of Lundahl*, 396 Ill. App. 3d 495 (2009); *In re Marriage of Joynt*, 375 Ill. App. 3d 817 (2007). Respondent contends that petitioner forfeited this argument by neither arguing in the trial court that the retained earnings are marital property nor presenting evidence of the current amount of earnings retained by KASC, much

less respondent's share of those earnings. On the former point, petitioner replies by citing, inexplicably, her posttrial motion, thus begging the question of whether she originally brought the argument at trial, as would have been necessary to preserve it for appellate review. See *In re Marriage of Minear*, 181 Ill. 2d 552, 564 (1998) ("Issues not raised in the trial court are waived and cannot be argued for the first time on appeal."). Our own review of petitioner's written closing argument at trial discloses that she *did* expressly argue that the retained earnings are marital property and that she cited *Joynt* for support.

¶ 60 We also do not agree that petitioner failed to present evidence of KASC's retained earnings. Petitioner introduced into evidence respondent's income tax returns from 2001 through 2006. The retained earnings are reported on these returns as taxable income to respondent. Respondent claims that petitioner should have had the trial court "quantify the value of the retained earnings with respect to the overall value of KASC." Respondent does not, however, explain why the retained earnings could not speak for themselves, with no need for an additional valuation. Finally, as to respondent's claim that petitioner forfeited her argument by not asking the trial court to determine respondent's share of the earnings, it seems obvious to us that his share would have been 50%, commensurate with his ownership percentage of KASC—the very percentage he was required to report yearly on his individual tax return. We conclude, therefore, that petitioner has not forfeited her claim to respondent's share of the retained earnings of KASC.

¶ 61 Before addressing the merits of petitioner's claims, we note that neither party engages the trial court's reasoning in support of its determination that respondent's shares in the various companies are nonmarital. The trial court apparently concluded that the DFO advances are nonmarital because they were not compensation for respondent's personal efforts. See 750 ILCS

5/503(a)(6), (a)(8) (West 2010) (nonmarital property includes "income from property acquired [before marriage] if the income is not attributable to the personal effort of a spouse"). To determine that the DFO advances themselves are nonmarital did not, however, resolve all of the issues. The assets in question were acquired with both DFO advances *and* shareholder distributions, and the trial court did not address the nature of the latter. Moreover, one of petitioner's arguments, which the trial court failed to address, was that, even if the DFO advances were initially nonmarital, they were later commingled with marital funds, lost their identity, and became marital property. The trial court also failed to address petitioner's claim that the retained earnings of KASC are marital property because they were effectively income to respondent.

¶ 62 Turning, then, to address petitioner's argument that respondent's share of the retained earnings of KASC is marital property, we contrast her argument with a position she could have, but has not, taken, *i.e.*, that the marital estate is entitled to reimbursement for respondent's efforts at KASC. See 750 ILCS 5/503(c)(2) (West 2010) ("When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution ***."). This argument would have assumed that respondent's interest in KASC is *non*marital and that respondent's nonmarital estate must compensate the marital estate. Though some of petitioner's language rings of a reimbursement claim—such as her statement that respondent's "efforts during the marriage unquestionably and substantially increased [KASC's] earnings as a subchapter S corporation, and its net worth"—her ultimate conclusion is that respondent's interest in KASC is marital.

¶ 63 On the retained earnings issue, the overarching principle, as noted in *Joynt*, is that the retained earnings and profits of a subchapter S corporation in which the spouse has an ownership interest remain the corporation's property, and are not considered income to a spouse, until severed from the other corporate assets and distributed as dividends. *Joynt*, 375 Ill. App. 3d at 821. Under certain circumstances, however, retained earnings may be considered marital property. *Id.* at 819. There are two primary factors. The first is the extent of the spouse's ability to distribute the retained earnings to himself. *Joynt*, 375 Ill. App. 3d at 819; *Lundahl*, 396 Ill. App. 3d at 503-04. "[W]hen a shareholder spouse has a majority of stock or otherwise has substantial influence over the decision to retain the net earnings or to disburse 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 is the extent to which retained earnings are considered in the value of the corporation and utilized to fund the corporation's business. *Joynt*, 375 Ill. App. 3d at 819-21; *Lundahl*, 396 Ill. App. 3d at 503-04. *Joynt* and *Lundahl* portray contrasting pictures of a corporation's treatment of its retained earnings.

¶ 64 In *Joynt*, the spouse was president and 33% shareholder of the corporation, which had two other shareholders, holding 19.4% and 47.6% interests, respectively. The corporation's accountant explained that the firm held its retained earnings for future operating expenses. The corporation did not normally pay shareholder dividends from the retained earnings account, but "could pay retained earnings dividends through liquidation of the business or declaration of the corporate board of directors." *Joynt,* 375 Ill. App. 3d at 818. No dividend could be distributed unless approved by a majority of the shareholders, and any dividend paid to a shareholder had to be matched by an equal dividend to each of the remaining shareholders. *Id.*

¶ 65 The appellate court held that the retained earnings of the corporation were nonmarital. The court gave several reasons. First, the spouse was not a controlling shareholder and hence could not unilaterally disburse or withhold a dividend. Second, the corporation held the retained earnings to pay expenses. Third, though the spouse reported his share of the retained earnings as taxable income to the spouse on his individual tax return, the corporation paid the tax through year-end designated payments to the spouse. Fourth, the spouse received a salary from the corporation, and "[t]he only expert testimony found in the record indicates that [the spouse's] compensation during the marriage was reasonable and fair for the services he provided." *Id.* at 821. The *Joynt* court did not explain the significance of this fourth factor, the principle behind which is that, if the shareholder-spouse is undercompensated by his own choosing, and the corporation retains more earnings than are necessary to maintain its business, further income in the form of a portion of the retained earnings may be imputed to the spouse and considered marital property. See *Bates v. Bates*, 761 S.W.2d 186, 188 (Mo. Ct. App. 1988) (court determined that shareholder-spouse underpaid himself by a total of $50,000, and the court increased the marital estate by this amount).

¶ 66 In contrast to *Joynt*, the appellate court in *Lundahl* held that the retained earnings of the corporation were marital property. The court distinguished *Joynt*. First, the spouse in *Lundahl* was the sole shareholder of the corporation and could, and did, declare dividends to himself without the approval of anyone else. From 2004 to 2006, the spouse took nearly $800,000 in dividends. Second:

> "[t]he retained earnings of [the corporation] were not held by the corporation to pay expenses. They were not used to pay dividends, nor were they used in connection with the

corporation. Additionally, they were taxed to [the spouse], who paid the income tax on the earnings." *Lundahl*, 396 Ill. App. 3d at 504.[2]

¶ 67 Petitioner claims that respondent's liberal use of the DFO shows a manner of control more similar to *Lundahl* than to *Joynt*. In truth, the DFO advances do not implicate the concerns of *Lundahl* and *Joynt* at all. The issue in those cases was the spouse's ability to actually receive the retained earnings of the S corporation. While KASC's shareholder distributions, like those in *Lundahl* and *Joynt*, are an actual disbursement of retained earnings, DFO advances are not. Rather, they are secured by the retained earnings. As we understand the process, KASC's lender records the DFO advances as shareholder distributions in order to determine the level of security for the advances, but the advances are not a true disbursement of retained earnings. There was no question at trial that DFO advances are loans,[3] and petitioner does not dispute that characterization. (Though

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[2]The appellate court did not mention these particular facts until it reached its analysis. These remarks raise questions. First, it is unclear how the corporation could routinely not use its retained earnings to pay business expenses. Second, it was true in both *Joynt* and *Lundahl* that the retained earnings of the corporation "were taxed [to the spouse], who paid the income tax on the earnings." Presumably, the court meant to say that, unlike in *Joynt*, the spouse in *Lundahl* received no reimbursement from the corporation for the taxes he paid on the corporation's retained earnings.

[3]Below, in Part II, we direct the trial court to consider whether the DFO advances, despite being loans, are "income" under the broad definition that the Act assigns the term for purposes of setting maintenance. See 750 ILCS 5/505(a)(3) (West 2010). The DFO advances could be "income" under the Act regardless of whether respondent receives the retained earnings of KASC through the DFO advances.

there was no definite repayment term for any of the DFO advances, pressure to repay flowed naturally from the accrual of interest and the enforcement of the net-worth cap.)

¶ 68 Petitioner does also cite respondent's taking of "distributions" of the retained earnings, which she claims were "at [respondent's] sole discretion." The evidence is unclear as to KASC's policy on distributions, though Ludwig testified that distributions must be disbursed equally among shareholders. External restrictions on distributions, however, existed in the form of the bank covenants, which required KASC to maintain a certain level of tangible net worth—retained earnings being one component of net worth. See *INOVA Diagnostics, Inc. v. Strayhorn*, 166 S.W.3d 394, 400 (Tex. Ct. App. 2005) ("One component of net worth or stockholder's book equity value is a corporation's retained earnings."). The bank covenants are evidence that KASC, like the corporation in *Joynt* and unlike the corporation in *Lundahl*, relied on its retained earnings for its business operations and hence for its survival. In 2000, the bank required KASC to issue distributions to pay down the DFO balance. Thus, even if the DFO advances were akin to shareholder distributions that actually disbursed the retained earnings, we would not conclude that respondent had unrestricted access to funds from KASC. In any event, the level of shareholder discretion is just one factor in determining whether retained earnings are income to the spouse. The remaining factors favor respondent. First, as in *Joynt*, KASC reimbursed respondent for the taxes he paid on its retained earnings. Second, as petitioner does not dispute, the salary that respondent received from KASC, which ranged in the last several years from $400,000 to $600,000 yearly, was adequate compensation for his work at KASC. See *Joynt*, 375 Ill. App. 3d at 821.

¶ 69 Thus, the relevant factors set forth in *Joynt* and *Lundahl* weigh in favor of holding that KASC's retained earnings are not income to respondent. There are restrictions on respondent's

ability to disburse the retained earnings, KASC relies on the retained earnings to operate its business, KASC reimburses respondent for his tax payments on his share of the retained earnings, and respondent is adequately compensated at KASC through salary.

¶ 70 We turn to petitioner's claim that respondent's stock in KASC was partly acquired with funds that became marital though commingling. For purposes of this argument, petitioner assumes that the funds, consisting of shareholder distributions from KASC and MM Products, were nonmarital property before the alleged commingling. Moreover, petitioner does not claim as marital property the 776.5 shares of KASC that respondent acquired before the marriage. Her claim concerns only the 388.25 shares of stock that respondent acquired from Richard in July 2004, as well as the proportion of new stock issued from those 388.25 shares as a result of the January 2007 stock dividend. (Respondent does not dispute that, if the 388.25 shares purchased from Richard were marital, then the new stock issued from those shares would be marital as well.)

¶ 71 The provisions on commingling are contained in section 503(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503(c) (West 2010)), which states:

> "(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:
>
> > (1) When marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution, subject to the provisions of paragraph (2) of this subsection; provided that if marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the

> commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.
>
> (2) When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift, or, in the case of a contribution of personal effort of a spouse to non-marital property, unless the effort is significant and results in substantial appreciation of the non-marital property. Personal effort of a spouse shall be deemed a contribution by the marital estate."

¶ 72 Petitioner points out that respondent deposited, or had wired, into the NT account not only his salary from KASC but also disbursements such as DFO advances and shareholder distributions. Petitioner notes that respondent regularly paid household expenses and made investments from the NT account. Petitioner maintains that the trial court erred in "refus[ing] to find commingling" despite the "strong evidence" that respondent "throughout the marriage treated his business and personal finances together, as his money for any purpose he deemed necessary." Petitioner seems to claim here that this consistent commingling of funds transmuted the entire NT account into marital property and that, consequently, any interests acquired with funds from the account would be marital as well. This vastly oversimplifies the issue. There is no question about the classification of the NT account itself; respondent does not dispute that it is marital property. The question, rather, is whether certain nonmarital funds from KASC became marital when they were wired or deposited

into the NT account or while they remained in the account. This issue depends on the specific history of those funds, not on respondent's general treatment of the NT account or its status (unchallenged here) as marital property. That nonmarital funds were deposited into a marital account does not establish beyond question that the funds were transmuted into marital property. Rather, the following principles govern:

> "Although the placement of nonmarital funds into a joint checking account [[4]] may transmute the nonmarital funds into marital property [citations], nonmarital funds that are placed into a joint account merely as a conduit to transfer money will not be deemed to be transmuted into marital property. [citations]." *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 673 (2008).

"The failure to properly segregate nonmarital property, by commingling it with marital property, evinces an intent to treat the former as part of the marital estate." *Wojcik*, 362 Ill. App. 3d at 154.

¶ 73 Respondent claims that all funds used for the purchase of Richard's KASC stock pursuant to the July 2004 contract are traceable to KASC and so no commingling occurred. There are several disbursements from KASC that the evidence clearly identifies as being connected to the July 2004 purchase. First, on December 20, 2004, KASC wrote Richard a check for $760,000, representing respondent's and Kenneth's initial installments of $380,000 each. Second, on each of January 20, February 18, and March 18, 2005, KASC wired $26,833.34 into the NT account. Third, from May

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[4] The NT account was not a joint account, but we fail to see how that forecloses the possibility of commingling, as there is no dispute that the NT account contained marital property in the form of regular deposits of salary. At least, respondent develops no argument as to why it would matter that the NT account was held in his name alone.

through December 2006, KASC made monthly wires to Richard of $53,666.67 each, encompassing both respondent's and Kenneth's installments. Respondent also mentions a fourth sum, namely the $2,617,259 wired from MM Products to the NT account on December 13, 2005. Though the record does not establish that either the $2.6 million or the $529,333.44 wired from the NT account to Richard on December 27, 2005, was connected to the purchase of Richard's shares, petitioner does not dispute that they were. Obviously, of those enumerated here, the only disbursements that had the potential for commingling with marital funds were the three wires of $26,833.34 and the one wire of $2.6 million. We hold that these funds did not lose their identity through commingling.

¶ 74 Representative of the "conduit" rule to which *Heroy* alludes is this district's decision in *Wojcik*, which contains two contrasting factual scenarios that help illustrate the rule. The respondent in *Wojcik* claimed a motorcycle as his nonmarital property, and the petitioner claimed an automobile as her nonmarital property. Each party claimed that the item was nonmarital because it was purchased with nonmarital funds. Because in each instance the funds had first been placed in the parties' joint checking account, the presumption arose that the funds were a gift to the marital estate. *Wojick*, 362 Ill. App. 3d at 155; see also *In re Marriage of Berger*, 357 Ill. App. 3d 651, 660 (2005) ("courts will presume a spouse who placed nonmarital property in joint tenancy with the other spouse intended to make a gift to the marital estate"). In analyzing the gift issue, however, we found it relevant whether the party was able to trace the proceeds, and in this way the gift issue overlapped with the issue of whether the nonmarital funds lost their identity through commingling with marital property. See *Wojcik*, 362 Ill. App. 3d at 154 ("The failure to properly segregate nonmarital property, by commingling it with marital property, evinces an intent to treat the former as part of the

marital estate."). We held that the petitioner rebutted the gift presumption but that the respondent did not. *Id.* at 154-55.

¶ 75 The respondent in *Wojcik* inherited funds, which indisputably were nonmarital property, and deposited them into the parties' joint bank account. After "several months," during which time the funds were "transferred between various accounts and certificates of deposit," the respondent purchased the motorcycle with funds from the joint account. *Id.* at 155. The respondent claimed that he purchased the motorcycle with the inherited funds, but he produced "no documentary evidence to show that the specific funds inherited were segregated and ultimately used for the purchase." *Id.* We concluded that, "[g]iven the length of time that the money was in the marital accounts prior to the purchase, and in light of [the respondent's] inability to specifically trace the assets used for the purchase," the respondent failed to overcome the presumption that the motorcycle was marital property. *Id.* By contrast, we found that the petitioner did overcome the presumption, because the funds—a bequest from her brother—with which she purchased the automobile had been placed in the parties' joint account "for only one day" before the purchase, and she testified that she had placed the funds in the account "merely as a conduit to transfer the money." *Id.*

¶ 76 Despite the clarity of this court's precedent that whether nonmarital funds have lost their identity through commingling requires attention to the specific history of those funds, petitioner resorts exclusively to evidence of how respondent generally used his NT account. Viewing the issue against the relevant factual background, we cannot conclude that the specific funds in question lost their identity. The wires to the NT account on January 20, February 18, and March 18, 2005, of $26,833.34 were contemporaneous with checks to Richard, each for $26,833.34, on January 24, March 1, and March 30, 2005. Less than 14 days before each of the three checks was written to

Richard, the identical amount was wired into the NT account. The correspondence between the inflows and outlays was unmistakable given the matching amounts and the relatively short period between each deposit and check. Though the delay was several days in excess of the time the nonmarital proceeds deposited by the petitioner in *Wojcik* remained in the parties' joint bank account, the time differential is not dispositive. Petitioner does not dispute, and the evidence uniformly shows, that respondent arranged for KASC to wire these amounts as installment payments under the July 2004 contract. His intent, evidently, was to use the NT account as a conduit for the wires from KASC.

¶ 77 We reach the same conclusion regarding the $2.6 million wired from MM Products on December 13, 2005. Two weeks later, on December 27, 2005, respondent wired Richard $529,333.44. As with the wires for $26,833.34, petitioner does not direct her argument to the specific history of the $2.6 million wire. We note that, from our review of the NT account statement for December 2005, there were insufficient funds for the $529,333.44 wire to Richard apart from the $2.6 million wire from MM Products. Petitioner has not persuaded us that either the three wires from KASC of $26,333.34 or the single wire of $2.6 million from MM Products lost its identity in the NT account.

¶ 78 Petitioner cites *In re Marriage of Davis*, 215 Ill. App. 3d 763 (1991). Instead of discussing the facts in *Davis* and applying them to the facts at hand, petitioner simply asserts that, under *Davis*, "the circuit court should have classified [the KASC] shares purchased by admittedly commingled marital and non-marital property, marital property." *Davis* is readily distinguishable. The issue in *Davis* was the classification of a cash management account (the 10002 account) for a money market known as the CMA Money Fund, held by the respondent. "By virtue of the structure and operation

of the *** account, no deposited funds were held in cash." *Id.* at 769. Rather, "[b]y the end of the month, deposited funds had been used to purchase other stocks, bonds, or shares in the *** CMA Money Fund." *Id.* Into this account the respondent deposited "$241,461.88 in stocks, bonds, and other securities and $153,000 in cash," all of which the respondent had inherited, and all of which were indisputably nonmarital assets. *Id.* at 767. Afterwards, he deposited over $340,000 in marital funds into the account. *Id.* at 769. Subsequently:

> "[S]hares of the CMA Money Fund were sold to release funds to cover checks written against the account when the temporary cash holdings were insufficient. As each inherited holding was sold, the cash received was used to purchase more shares in the CMA Money Fund, and they in turn were sold to purchase new securities. Though such funds were initially nonmarital property, when excess marital funds were placed in the 10002 account, additional shares of the CMA Money Fund were also purchased." *Id.*

¶ 79 The appellate court concluded that the entire 10002 account became marital because, through the rolling purchases and sales of CMA Money Fund shares, marital and nonmarital property were "commingled into newly acquired property resulting in a loss of identity of the [nonmarital property]" (750 ILCS 5/503(c)(1) (West 2010)). The court could find "no distinction *** between the CMA Money Fund shares bought with the proceeds from the sale of inherited securities and the shares bought with marital funds." *Davis*, 215 Ill. App. 3d at 769. The respondent produced statements for the 10002 account, but "[b]ecause of the very nature of the 10002 account, it is impossible to ascertain the source of the funds with which specific stocks and securities were purchased." *Id.* at 770.

¶ 80 Here, by contrast, the nonmarital funds never lost their identity, because they were traceable, having been deposited into the NT account shortly before they were disbursed to purchase the KASC shares. Again, petitioner discusses neither the facts of *Davis* nor—more importantly—the facts of the present case as they show the history of the specific funds in question. We conclude that the trial court did not err in classifying respondent's shares of KASC as nonmarital.

¶ 81 As for respondent's interests in SFF Inc., SFF LLC, MM Products, and MM Properties, petitioner's argument runs just these lines:

> "The purchases of [respondent's] interests in [SFF Inc., SFF LLC, MM Products, and MM Properties] were likewise funded in part by [respondent's] DFO account. Reductions or 'paydowns' of the balance of [respondent's] DFO account came not only from distributions from [KASC] but also by personal checks or wired funds out of [the NT account], in which [respondent] commingled marital and non-marital funds. Thus from the manifest weight of the evidence, the clear evidence of commingled funds transmuted into marital property by law and by statute, are themselves transmuted into marital property, subject to the statutory right of [respondent's] non-marital 'estate' to be reimbursed for the monies contributed, notwithstanding transmutation."

Petitioner again relies on respondent's custom of treating the NT account as the single repository for his marital and nonmarital funds. Again, there is no question that the NT account was, at all relevant times, marital property, and, again, this undisputed fact does not settle the issue because nonmarital property can maintain its identity even when deposited into a marital account.

¶ 82 As for respondent's shares in MM Products and MM Properties, there was no potential for commingling since the funds that respondent used to purchase his shares in MM Products were wired

directly from KASC to MM Products, and respondent paid no additional outside funds to acquire his interests in MM Properties. We hold, therefore, that respondent proved that his interests in MM Products and MM Properties are nonmarital.

¶ 83 As for SFF Inc. and SFF LLC, we noted above that the parties have failed to reconstruct respondent's rather convoluted path to ownership of his shares in those entities. Respondent claims, and petitioner does not dispute, that he acquired his interests in SFF Inc. and SFF LLC with disbursements from KASC, including (1) a $180,000 DFO advance in January 1998; (2) a $445,000 DFO advance in June 1998; (3) a $58,000 DFO advance in March or April 2001; and (4) a series of shareholder distributions made in connection with the July 2004 contract, by which respondent agreed to purchase not only Richard's KASC shares but also his shares in SFF Inc. Concerning disbursement (4), we concluded above that respondent's payments under the July 2004 contract involved no commingling of marital and nonmarital funds resulting in loss of identity of nonmarital funds. As for disbursements (1) through (3), petitioner does not claim that the DFO funds were first deposited into the NT account, and in fact she fails altogether to address the specific history of these funds. Accordingly, because the funds used to acquire the interests in SFF Inc. and SFF LLC were nonmarital property and there is no issue of commingling, those interests are nonmarital.

¶ 84 We note that petitioner makes reference to respondent's periodic use of proceeds from the NT account to pay down the DFO balance. Petitioner does not, we stress, raise in this appeal a claim for reimbursement to the marital estate for the funds that respondent used to pay down the DFO debt.

¶ 85 Finally, we turn to respondent's argument on cross-appeal that the trial court erred in holding that the marital estate is entitled to reimbursement for the "payments made to Richard from the [NT account]." Petitioner contends that this argument is forfeited because respondent failed to recite a

standard of review governing the issue. See Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008) ("The appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument."). Though respondent did not state the standard of review, he did cite cases on reimbursement that recite the standard. Moreover, as we note below, the issue of reimbursement is intertwined with the issues of property classification raised by petitioner. Respondent recited the standard of review in responding to those arguments. For these reasons, we decline to find respondent's argument forfeited.

¶ 86 The trial court cited the sum of $289,666.74, but respondent suggests that the court made a mathematical error, the true sum being $295,666.74, consisting of (1) the three payments of $26,833.34 to Richard in early 2005; and (2) $214,666.72, which represented eight overdue payments of $26,833.34 and was included in the December 2005 wire to Richard in the amount of $529,333.34. All of these funds paid to Richard were first deposited, at respondent's direction, into the NT account. The trial court reasoned that it would be "impossible to treat all other disbursements placed into the [NT account] as 'gifts' to the marital estate if used to pay normal expenses, and then characterize these deposits differently." We note that "courts will presume a spouse who placed nonmarital property in *joint tenancy* with the other spouse intended to make a gift to the marital estate" and that the presumption can be overcome only by clear and convincing evidence. (Emphasis added.) *Berger*, 357 Ill. App. 3d at 660. This presumption did not arise here, however, because the NT account is not a joint account but is part of a revocable trust of which respondent is trustee and petitioner is beneficiary. That the account contained marital property, most obviously respondent's salary, does not make a difference. The salary was marital not because it was a gift to the marital

estate when deposited but because it was marital property when earned, being remuneration to respondent during the marriage. See *In re Marriage of Phillips*, 229 Ill. App. 3d 809, 818 (1992) ("remuneration to a spouse, in whatever form, during the marriage is considered marital property").[5] Because the NT account is not a joint account, no gift presumption arose from respondent's deposits into it. Even if a gift presumption did arise regarding the funds from KASC and MM Products that were ultimately used to pay Richard, the presumption was overcome in the same way the petitioner in *Wojcik* overcame it: by tracing the funds in question. Respondent, by clear and convincing evidence, traced the path of the funds from their origin in KASC and MM Products, through the NT account, and to the recipient, Richard. We conclude that the trial court erred in directing respondent to reimburse the marital estate for the $295,666.74, which, we agree with respondent, was the correct sum of the payments the trial court had in view.

¶ 87 Because the reimbursement was factored into the property division, we remand for the trial court to revisit that allocation. We affirm, however, the trial court's holding that respondent's interests in KASC, SFF Products, SFF Properties, MM Products, and MM Properties are all nonmarital.

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[5]This is not in tension with our refusal above to find that there could have been no commingling because the NT account is held in respondent's name alone. The gift presumption is a presumption of intent that is based specifically on the fact of joint tenancy and holds irrespective of the contents of the joint account. By contrast, the issue of commingling arises whenever nonmarital and marital funds are mixed. Notably, section 503(c)(1) does not condition the existence of a commingling issue on whether the asset in which marital and nonmarital funds are mixed is jointly held by the parties.

¶ 88 II. Respondent's Annual Income

¶ 89 Next, petitioner argues that the trial court miscalculated respondent's annual income for purposes of child support and maintenance. In addressing the issues of maintenance and child support, the trial court said:

> "[Respondent's] closing concedes 'income from all sources' of easily $1,000,000 per year, despite W-2 income of $600,000. Most certainly there have been years when [respondent's] income from all sources far exceeded that amount, but the figure is reasonable and fair for purposes of the following inquiry. Utilizing that earnings base, the court orders [respondent] to pay all educational and boarding expenses of the children, as well as the reasonable college expenses of the children. After considering the present residential circumstances of the children, the court also awards [petitioner] child support in the amount of $10,000 per month in addition to [her allocated share of the marital estate]. While this constitutes a deviation from the statutory guidelines, the court orders the deviation considering the other payments to be made by [respondent], the property awarded to [petitioner], and the maintenance award described below. The support is based upon income from all sources of approximately $1,000,000 per year, and is payable until the youngest child is emancipated or completes high school or turns nineteen, as contemplated by the statute. ***"
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> Section 504 [(750 ILCS 5/504 (West 2010))] provides in part [that] 'maintenance may be paid from the income or property of the other spouse after consideration of all relevant factors, including ***.' The court recognizes that section to permit the payment of maintenance from the non-marital property of a spouse, and certainly the 'disbursements' attributable to the non-marital property of that spouse. After weighing the appropriate

> statutory and other factors, the court orders [respondent] to pay periodic maintenance in the amount of $35,000 per month, terminable upon the occurrence of any statutory terminating event. While [respondent] argues vehemently that the standard of living during the marriage was modest, at the same time [respondent] was amassing a substantial non-marital estate and contributing larger sums to the accumulation of property (marital and non-marital) and clearly has the non-marital wherewithal to pay two or three [times] the amount ordered without any diminution of his lifestyle. Several statutory factors require a maintenance award: consideration of the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance; the present and future earning capacity of each party; the fact that [petitioner] will never afford the lifestyle of the parties regardless of time to acquire appropriate education, training, and employment[;] the duration of the marriage; [and] the age and the physical and emotional condition of both parties. A marriage of this length deserves a greater measure of financial respect than [respondent] offers."

¶ 90 The trial court, though acknowledging that respondent's annual income "far exceeded" $1 million for some years, decided that it was "reasonable and fair" to take respondent's income as being $1 million yearly. The court did not indicate how it arrived at this figure. The court alluded to a "concession" by respondent, but at most the concession was to "net cash income" of between $500,000 and $800,000 a year from 2001 though 2006—not to $1 million in income per year. Of course, the trial court had the duty to ascertain whether respondent's concession was self-serving and to make its own calculation of respondent's income. Indeed, there was much to analyze given respondent's exceedingly broad and diverse range of ownership interests. His potential sources of

income include not only his salary from KASC but also (1) myriad investments, (2) DFO advances, and (3) shareholder distributions from KASC and other corporations of which he is a shareholder. Unfortunately, though we are called upon to review the $1 million figure, we have no actual calculation to critique. It is not our province, as a court of review, to determine such a fact-intensive issue in the first instance. We do note that even a cursory review of the record shows the $1 million figure to be exceedingly low even as an average. For instance, from 2001 through 2006, respondent received—in addition to his salary from KASC ranging from $400,000 to $600,000 yearly—millions in shareholder distributions from KASC and other corporations. See *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1018-19 (2009) (though retained earnings of an S corporation are not income, they become so when disbursed to the shareholder in the form of distributions). For instance, the distributions in 2005 and 2006 alone totaled nearly $4 million.

¶ 91 Kathleen Belmonte Newman, petitioner's expert in lifestyle analysis, compared the outlays and inflows reflected on the parties' credit card and bank statements and concluded that the parties enjoyed a "luxury" lifestyle, spending from $1.825 to $4.652 million annually. The yearly inflows ranged from $1.6 to $4.2 million. Newman did not distinguish among the sources for the inflows, which evidently included DFO advances. As noted above in Part I(A)(1), respondent's DFO advances amounted to hundreds of thousands of dollars a year. Whether these advances constituted "income" to respondent under section 505(a)(3) of the Act (750 ILCS 5/505(a)(3) (West 2010)) is an issue the trial court should consider on remand. See *In re Marriage of Rogers*, 345 Ill. App. 3d 77, 80 (2003) (holding that proceeds of loan from spouse's parents were "income" to the spouse under section 505 of the Act), *aff'd on other grounds*, 213 Ill. 2d 129, 139 (2004) (disagreeing that the proceeds in question were a loan rather than a gift, but noting that, "[f]or purposes of determining

a parent's net income, section 505 of the Act authorizes the deduction of amounts expended in repayment of certain types of debts. There is no corresponding provision authorizing the exclusion of loan proceeds"); see also *In re Marriage of Tegeler*, 365 Ill. App. 3d 448, 457-58 (2006) (holding that spouse's line of credit was not "income" under section 505 of the Act and noting that, though loan proceeds generally should not be considered "income," there might be cases in which it is appropriate to treat them as such).

¶ 92 Accordingly, we remand for the trial court to make the initial calculation of respondent's income. Section 505(a)(3) of the Act defines "net income" broadly as "the total of all income from all sources," minus certain deductions (750 ILCS 5/505(a)(3) (West 2010)). Though this definition is given expressly for determining child support obligations, it applies as well to maintenance determinations. See *In re Marriage of Sharp*, 369 Ill. App. 3d 271, 280 (2006). The Act does not define "income," but cases have defined it as "something that comes in as an increment or addition, a gain or profit that is usually measured in money, and increases the recipient's wealth." *Id.* Income includes "any form of payment to an individual, regardless of its source, and regardless of whether it is nonrecurring." *Id.*

¶ 93 Respondent argues that any "miscalculation" of his income would have been harmless error. Of course, respondent assumes that there was a calculation, which there was not.

¶ 94 For the foregoing reasons, we vacate the trial court's income determination as well as the awards of child support and maintenance. Once the trial court makes a proper income calculation, it should revisit the issues of child support and maintenance.

¶ 95 III. The Michigan Home and the Property Allocation

¶ 96 The third and final issue raised by petitioner relates to the Michigan home, which was awarded to her as part of the property allocation. Petitioner argues that the property allocation is inequitable given the trial court's valuation of the Michigan home. She asserts that the valuation was excessive and that the mortgage and other expenses associated with the Michigan home consume most of her monthly maintenance award. Petitioner asks that we remand this case for the trial court to reconsider the valuation of the Michigan home or to increase her maintenance award given the expenses associated with the home.

¶ 97 We affirm the trial court's valuation of marital property unless it is against the manifest weight of the evidence, while we review the trial court's ultimate division of the marital estate for an abuse of discretion. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 699-700 (2006); see also *In re Marriage of Abrell*, 236 Ill. 2d 249, 275 (2010).

¶ 98 Respondent testified that the parties paid approximately $450,000 for the land on which they built the Michigan home. Construction of the home was completed by Thanksgiving of 2002. The home was 10,000 square feet, and the cost of construction was $3.2 million. The parties also spent $1 to $1.2 million in furnishing the house.

¶ 99 In August or September 2006, petitioner moved out of the parties' primary residence in Hinsdale and began residing in the Michigan home, where she was still living at the time of trial. The parties both testified that they agreed to place the Michigan home for sale. They consulted a real estate agent, who recommended that the house be priced between $5.9 and $6.1 million. The parties have yet, however, to decide on a listing price (though remarks in petitioner's brief appear to suggest that the home is currently on the market).

¶ 100 Respondent testified to the current expenses associated with the Michigan home. The home is encumbered by a primary mortgage with a balance of $1.3 million and a monthly payment of $11,628, and a home equity mortgage with a balance of $2.4 million and a monthly payment of $13,984. The property taxes are approximately $36,000 per year. Other yearly costs are, approximately, $2,500 for heating and fuel, $4,500 for electricity, and $5,100 for homeowners insurance.

¶ 101 The trial court valued the Michigan home at $5.5 million. Adjusting for respondent's reimbursement (which we addressed above in Part I(B)), the trial court valued the marital estate at $6,822,132.74. Based on the size of respondent's nonmarital estate (valued at $35,532,403) and his far greater earning capacity than petitioner's, the court awarded petitioner 75%, and respondent 25%, of the marital estate. As part of petitioner's share, the court awarded her the Michigan home, in which the parties had equity of $1,687,590. The balance of the $5,123,024 awarded to petitioner consisted of private placements, bank accounts (including the NT account), and a share in respondent's retirement account at KASC.

¶ 102 Petitioner's first argument is that the trial court lacked "competent evidence" to assign a value to the Michigan home, because the court "did not have any expert valuation testimony," the sole evidence consisting of the price for the lot, the cost of constructing the house, and the listing range of $5.9 to $6.1 million proposed by the realtor. We refuse to entertain petitioner's complaint about the quality of the evidence on valuation where she herself did not attempt to introduce any better evidence. See *In re Marriage of Smith*, 114 Ill. App. 3d 47, 54 (1983) ("[I]t is the parties' obligation to present the court with sufficient evidence of the value of the property. Reviewing courts cannot continue to reverse and remand dissolution cases where the parties have had an

adequate opportunity to introduce evidence but have failed to do so. Parties should not be allowed to benefit on review from their failure to introduce evidence at trial."). Even if petitioner could be heard to complain about the evidence on valuation, we would find that evidence sufficient. Where the parties have not presented more probative evidence on valuation, the trial court may rely on the price for which the parties purchased the property, even if the sale was several years before trial. *In re Marriage of Landwehr*, 225 Ill. App. 3d 149, 153 (1992). In *Landwehr*, the trial court, at the 1989 dissolution hearing, valued the petitioner's 1986 Oldsmobile Cutlass at $15,980 and his 1976 Mercedes Benz at $16,000. The appellate court rejected the petitioner's challenge to the valuation:

> "It was [the petitioner's] testimony that he purchased the [Oldsmobile] for $16,000 and the Mercedes Benz for $12,000. [The petitioner] concedes that he presented no evidence at trial as to the present value of either automobile. At the time of the judgment, the Oldsmobile was approximately three years old and the Mercedes-Benz was approximately 13 years old.
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> The only evidence in the record regarding the actual value of the automobiles is their purchase price and, therefore, we find no reason to disturb the determination of values made by the trial judge. It would be a matter of speculation to assume, without evidence, that the age of the automobiles, alone, indicates some other valuation would be more proper. In that regard, we note, the appellate court has criticized the practice of parties in dissolution proceedings to challenge the trial judge's determination of the value of property where the parties, themselves, have failed to provide evidence upon which a purportedly more fair valuation might be made. [Citation.]" *Id.*

¶ 103 Here the trial court had more evidence than was presented in *Landwehr*. That evidence consisted of the price of the lot for the Michigan home ($450,000), the price of the home's construction ($3.2 million), and the realtor's recommended listing price range ($5.9 to $6.1 million). We assume that the trial court had a reason for valuing the property at $400,000 less than the lower point of the price range recommended by the realtor. The trial court might well have thought that $5.5 million was more faithful to the original combined price ($3.6 million) of the home and lot, adjusted for the passage of time between the completion of construction, in November 2002, and the time of trial, in November 2007.

¶ 104 Petitioner asks that, in reviewing the trial court's valuation, we take "notice" of two "truisms," namely that: (1) homes rarely sell for their initial listing price; and (2) the housing market has continued a substantial downturn, including up to the time of judgment, with property values correspondingly suffering. Petitioner cites no authority by which we may take account of these supposed truths about the real estate market, and we decline to do so. She also asks that we consider that the Michigan home "sits unsold during the current market, a 'white elephant' out of proportion with the value of surrounding properties." Petitioner does not cite to the record for this proposition. (From the record, it appears that the Michigan home had not been listed as of the time of trial.)

¶ 105 Petitioner's next contention is that the property allocation was inequitable because her combined monthly mortgage payments ($25,542) on the Michigan home, not to mention the property taxes on the home and the cost of upkeep, consume most of her monthly maintenance of $35,000. Petitioner asks that we either reallocate the marital property or award her additional maintenance. Petitioner's argument is moot because we have already determined that we must vacate the maintenance award because the trial court never made a calculation of respondent's income.

¶ 106 In the interests of judicial economy, however, we note that, failing an increase in petitioner's maintenance award on remand due to the revisiting of respondent's income, the trial court need not adjust her maintenance or the property division to compensate for the expenses associated with the Michigan home. Petitioner has in the Michigan home an asset reasonably valued at $5.5 million, and her equity, at $1.6 million, is substantial. If petitioner is displeased with the level of encumbrance and the expense of upkeep, she may seek to sell the property. As we noted above, petitioner's claim that market conditions are unfavorable for selling the property is without foundation in the record and she cites no authority by which we may take notice of those conditions.

¶ 107 IV. Remaining Issues in Respondent's Cross-Appeal

¶ 108 Respondent raises three main contentions in his cross-appeal, two of which—the issue of reimbursement and the issue of the classification of respondent's private placements—we addressed in Part I(B). Respondent's remaining argument is that the trial court erred by awarding petitioner the NT account with its balance as of October 31, 2007 (the last day of the month before the dissolution hearing was held), when the balance was subsequently diminished through respondent's payments of his and petitioner's attorney fees as ordered by the trial court.

¶ 109 Petitioner argues that respondent forfeited this argument by failing to recite the standard of review governing the issue. See Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008) ("The appellant must include a concise statement of the applicable standard of review for each issue ***."). Respondent's argument is, in essence, a valuation argument. Respondent did not recite the standard of review in the body of this particular discussion, but he did cite cases that recite the standard. Moreover, earlier in his brief, in response to petitioner's own valuation argument, respondent stated the standard of review for valuation issues. We conclude that respondent did not forfeit this argument.

¶ 110 Moving to the merits, we note that the balance of the NT account was $1,100,111 as of October 31, 2007. For his claim that the account balance was reduced to $313, 414.78 by May 2008 (when the trial court rendered its judgment), respondent points to two motions he filed, dated April 17, 2008, and May 22, 2008, to which he attached statements from the NT account from November 2007 to May 2008. Petitioner asserts that these documents were never admitted into evidence at the November 2007 trial. Respondent responds, naturally, that the account activity on which he relies occurred *after* the trial. Respondent, however, never moved to reopen the proofs. Therefore, he cannot even establish that the balance of the NT account diminished after November 2007, and his argument fails.[6]

¶ 111 The last matter we address is petitioner's motion for us to sanction respondent for his arguments on cross-appeal. Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994) permits a reviewing court to impose, in its discretion, a sanction on the appealing party where the appeal is frivolous or not taken in good faith. Petitioner claims that the "dearth of competent authority, citation, argument, or compliance with the [supreme court rules] *** amply demonstrates" that the cross-appeal was brought "merely because [petitioner] had the 'audacity' to bring her own appeal." We decline to impose sanctions. One of respondent's contentions (concerning the reimbursement issue) prevailed here. The remaining two contentions (concerning the classification of the private placements and the property allocation) failed not because respondent included no record citations at all, but because he did not include proper record citations at critical places in his argument. While

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[6]Even if respondent could have proven this fact, there is no indication that the trial court held respondent accountable for the decrease in the account balance. Petitioner did not, we note, make a claim for dissipation based on respondent's use of the account since October 31, 2007.

we still do not condone respondent's handling of these arguments, his cross-appeal is not, on balance, worthy of sanctions. See *Carlson v. City Construction Co.*, 239 Ill. App. 3d 211, 247 (1992) ("Even though some of the issues raised on appeal were more obviously sustainable than others, we disagree that this appeal as a whole was frivolous.").

¶ 112 V. Conclusion

¶ 113 For the foregoing reasons, we vacate the trial court's determination of respondent's income and its awards of maintenance and child support. Once the trial court makes a calculation of respondent's income, it should revisit the issues of maintenance and child support. We also vacate the property division and remand for the trial court to correct its erroneous holding that the marital estate is entitled to a reimbursement of $295,666.74 from respondent's nonmarital estate.

¶ 114 Affirmed in part and vacated in part; cause remanded.