CASE LAW PERTAINING TO FINANCIAL STATEMENTS

I. Retained Earnings

A. ***IRMO Joynt***, 874 N.E.2d 916 (3rd Dist. 2007)
   1. Look at: (1) nature and extent of stock holdings (i.e., whether party is a majority shareholder who can distribute retained earnings or not), and (2) whether retained earnings are an asset to company (reason for retained earnings) to determine whether retained earnings are marital property or not

B. ***IMRO Schmitt***, 909 N.E. 2d 221 (2nd Dist. 2009)
   1. IMDMA states that income from non-marital property becomes marital unless the person claiming it is non-marital can prove that by clear and convincing evidence. In a situation where the party is the sole shareholder of a subchapter S corporation, the retained earnings necessarily came from his personal efforts, and thus are marital.
   2. *See also*, ***IRMO Lundahl***, 919 N.E.2d 480 (1st Dist. 2009)

C. ***IRMO Steel***, 2011 IL App (2d) 80974
   1. Court found retained earnings were not income because: (1) there are restrictions on the ability to disperse retained earnings (party did not have control), (2) company relied on retained earnings to pay future operating expenses, (3) company reimbursed party for his share of taxes on his pro rata share of retained earnings, and (4) party was already adequately compensated without retained earnings

II. Goodwill

A. Goodwill is the ability to acquire future income; the value of a business or practice that exceeds the combined value of the physical assets

B. ***IRMO Talty***, 166 Ill.2d 232 (1995)
   1. Discussion of Personal v. Enterprise Goodwill
      A. Enterprise Goodwill = exists independently of personal efforts, and will outlast a person's involvement in the business, usually related to the intangible value of the products a company sells
      B. Personal Goodwill = depends on the personal efforts or a particular person, and will cease when that person's involvement with the business ends
   2. Enterprise goodwill is a considered an asset and should be included in a business valuation; personal goodwill is not property and should not be considered
   3. Beware of double-counting personal goodwill: If personal goodwill is considered first to give one spouse a disproportionate share of the marital assets (based on a consideration of the parties' respective incomes), and then used in valuing a business, the court impermissibly double-counts personal goodwill

C. ***IRMO Schneider***, 214 Ill.2d 152 (2005)
   1. Further discussion of impermissible double-counting of personal goodwill
   2. Business at issue was a professional corporation (dental practice)

D. For further discussion of double-counting and distinction between enterprise and personal goodwill, *See*: ***IRMO Alexander***, 857 N.E.2d 766 (5th Dist. 2006); ***IRMO Head***, 273 Ill.App.3d 404 (1st Dist. 1995)

III. Future Earnings

A. Courts are divided on whether it is appropriate for a valuation to project future earnings, and then discount them back to obtain a present value (capitalization of earnings)

B. Not in favor = 5th District

1. ***IRMO Frazier***, 125 Ill.App.3d 473 (5th Dist. 1984)
    A. Because property must be valued at the time of dissolution, and the future earnings method necessarily considers post-marital personal efforts of a party, it is improper to use this method to value a business in dissolution proceedings.
    B. Business at issue = insurance agency
    C. *See also*, ***IRMO Cutler***, 334 Ill.App.3d 731 (5th Dist. 2002)

C. In favor = 3rd District

1. ***IRMO Rowe***, 130 Ill.App.3d 689 (3rd Dist. 1985)
    A. Differentiated ***Frazier*** – valuing uniform company based on capitalized earnings is permissible because, unlike ***Frazier***, business income was not dependent on the personal efforts of one person – business at issue was an ongoing business, with inventory and equipment that would not disappear as an entity if party walked away, was marketable for purchase, and would be available for purchase by an interested buyer

D. Somewhere in between = 2nd District

1. ***IRMO Suarez***, 148 Ill.App.3d 849 (2nd Dist. 1986)
    A. All businesses (even manufacturing, repair, etc.) depend to some extent on personal efforts. Should not give one party the benefits of the other's post-dissolution efforts, which is necessary if a capitalization of earnings approach is used; however, the future earning potential can be considered enterprise goodwill

IV. Valuation of Closely-Held Business

A. ***Blackstone v. Blackstone***, 288 Ill.App.3d 905 (1st Dist. 1997)

1. The burden of presenting the court with a value of a business is on both parties
2. Once the court made a specific finding that one party's valuation expert was not credible, and the other party did not offer a value of the business, the court necessarily had a failure of proof to support a valuation and the case must be remanded to determine the value of the company
3. The court should consider whether and at what price a closely held company can be sold to a third party
4. A discount for lack of marketability may be taken, but it is not necessary

B. ***IRMO Grusten***, 304 Ill.App.3d 12 (1st Dist. 1999)

1. Discussion of different approaches to valuing a closely held company

A. <u>Excess Earnings Approach</u> = When closely held companies take advantage of setting their own compensation by increasing their salary and bonus, rather than receive dividends, to lower the company's tax burden, the compensation received exceeds the compensation that a non-owner hired to do the same job would get. The excess payments are therefore added back into the value of the company and capitalized.
B. <u>Capitalization of Earnings Approach</u> = Discounted present value of future earnings, estimated by the use of recent past earnings
C. <u>Comparative Sales Approach</u> = Determines the value of a company by looking at the sales price of similar companies, or shares of the company at issue

2. Trial (and Appellate) Court rejected both parties' experts valuation methods. Appellate Court determined that the proper way to value the company was by looking at the price that company paid for H's co-founder's widow's 50% share of the company 3 years prior, and then adjusted for the increase in gross revenues since then
3. If Court's valuation is within the range testified to by the experts, it will not be disturbed unless it is against the manifest weight of the evidence.

C. ***<u>IRMO Sanfratello</u>***, 393 Ill.App.3d 641 (1st Dist. 2009)

1. A party cannot refuse to provide requested documentation or facts pertaining to the value of a business, and then use the lack of such facts to challenge the court's determination of the value of the business

Page 72

681 N.E.2d 72
288 Ill.App.3d 905, 224 Ill.Dec. 90
In re the Marriage of Georgia BLACKSTONE, Petitioner-Appellee,
v.
Ronald BLACKSTONE, Respondent-Appellant.
No. 1-94-2780.
Appellate Court of Illinois, First District, Sixth Division.
May 30, 1997.

Page 73

[224 Ill.Dec. 91] [288 Ill.App.3d 906] Schaps, Grotta & King, Palos Park (Joel P. Schaps, Jane F. Fields, of counsel), for Respondent-Appellant.

Page 74

[224 Ill.Dec. 92] Boyd & Crane, Chicago (William Stewart Boyd, of counsel), for Petitioner-Appellee.

Justice ZWICK delivered the opinion of the court:

On October 12, 1989, petitioner, Georgia Blackstone, filed this action for dissolution of her marriage to respondent, Ronald Blackstone. After trial, which commenced on January 28, 1992, the circuit [288 Ill.App.3d 907] court entered bifurcated interlocutory orders. The first order, entered on December 21, 1993, valued and divided the marital property. A second order, entered December 30, 1993, dissolved the marriage. Subsequently, on February 9, 1994, the trial court entered final judgment incorporating the earlier rulings. Respondent filed a post-trial motion which was denied July 15, 1994. He then filed timely notice of appeal.

On appeal, respondent argues the trial court abused its discretion in valuing and distributing the marital estate. Specifically, respondent argues (1) the trial court improperly valued three corporations owned by respondent as having a value to the marital estate of $300,000, when the only expert testimony at trial indicated that the corporations had a fair market value of $0 and (2) the overall division of marital debts was so disproportionate as to establish an abuse of the trial court's discretion.

The record establishes that the parties were married in Cincinnati, Ohio, on July 2, 1960. Respondent, in 1968, began working for R.R. Donnelly Co. in Chicago. In 1984, respondent started a printing business known as Atrium Graphics. Atrium Graphics was owned as a partnership between respondent and a man named Andrew Landum and was located in the State of Illinois Building. The parties' initial investment in Atrium Graphics was $105,000, $90,000 of which were proceeds from a Small Business Association loan.

In February, 1985, after discussions with petitioner, respondent voluntarily terminated his employment with R.R. Donnelly. He received a severance package which included payment of his full salary and benefits through the 1985 calendar year.

In March of 1985, respondent began preparation for the purchase of a Wendy's restaurant franchise. The training program required by the franchisor, Wendy's International, lasted approximately 14 weeks and required respondent to travel to Ohio. Respondent testified that he returned to Chicago on the weekends and spent his time then working with Landum at Atrium Graphics.

Subsequently, in 1985, respondent. incorporated three corporations to operate the Wendy's franchise. RJB Properties, Inc., handled the daily operations of the restaurant. RGJ Management Company owned the land and the restaurant building which were located at 117th and Halsted

fastcase

Streets in Chicago. Two Bus Enterprises, Inc., rented employees to RJB Properties so as to avoid the higher taxes imposed upon food service employees. Respondent testified that the couple's initial investment in the three corporations was "probably between $250,000 and 300,000."

In addition to owning and managing the Wendy's restaurant and [288 Ill.App.3d 908] Atrium Graphics printing shop, respondent began to make bids on institutional food services contracts through RJB. Respondent testified that, by 1991, RJB had submitted 75 to 100 bids for various institutional contracts, of which 7 or 8 were accepted by institutions such as the Cook County Jail, the Cook County Sheriff's Office and the Chicago Public Schools. RJB also owned and serviced eight vending machines which dispensed food at CTA train stations.

Petitioner, at the time of trial, was earning in excess of $60,000 per year. In addition, over the course of the marriage, she had earned substantial retirement benefits. Respondent testified that he drew no salary from RJB in the first few years of its operation. In 1990, RJB paid him $24,000. The following year, 1991, respondent was paid $50,000.

Respondent's expert, accountant and attorney James Friel, prepared a report on the value of RJB. The report stated that whatever profits were being generated by the food service contracts were being overwhelmed by the restaurant's continuing and substantial

Page 75

[224 Ill.Dec. 93] operating losses. In fact, after reviewing the various corporate tax returns, Friel concluded that RJB had experienced, since its incorporation and through the year 1990, a retained earnings deficit, of $475,000. Friel testified this meant the corporation would have to earn nearly half a million dollars just to pay off existing liens on its assets or, alternatively, to achieve a positive book value. He also compared a potential sale of RJB with records of recent fast-food restaurant sales. His comparison led him to believe that no buyer would ever be willing to purchase RJB in light of its operating history and its debt. He concluded that RJB's fair market value was therefore $0.

On cross-examination, Friel admitted RJB's gross sales were showing a rising trend, but noted that. expenses were rising commensurately. He admitted he did not value RJB's food service contracts or other corporate assets individually, but had decided not to do so because their value did not matter in light of the substantial losses the Wendy's restaurant had incurred. He also stated he did not evaluate the food service contracts because they were not automatically renewable and were non-assignable. This meant they would not be of significant interest to a prospective purchaser of RJB.

Friel stated, also during cross-examination, that he had not performed any valuation on respondent's other companies, RGJ Management and Two B's Enterprises. He did not do so because respondent and respondent's attorney told him these companies had only minor value. They also told him that they were unwilling to pay him to perform a business appraisal on these companies.

[288 Ill.App.3d 909] Friel stated he did not focus on the fact that RJB had been paying down its debts as a factor in determining RJB's fair market value. He admitted that an "unusual" expense of $126,945 had been taken by the corporation in 1991 for "professional fees," but said it was not necessarily an improper charge in light of the company's significant gross sales which exceeded $4,000,000. Friel denied that the corporation had any good will.

fastcase

Following testimony and during final argument, petitioner argued that respondent's shares in the three corporations were marital property and should be split 50/50. She offered no evidence of the dollar value of respondent's stock in the companies, but instead suggested that the court put her in charge of the daily operations of the various businesses.

In his argument, respondent admitted the three corporations were marital property, but characterized petitioner's suggestion she be put in charge of the operating the three corporations as "nonsensical." He instead submitted a proposed division of marital assets and debts in which he would be awarded all of the corporate shares of RJB, RGJ Management and Two B's, including their debt. He suggested that such a division was fair in light of the corporations' extensive liabilities and his sole involvement during the course of the marriage in running the businesses.

After concluding the proceedings, the trial court issued its ruling. The court determined that petitioner's annual salary was in excess of $60,000 and respondent's salary was $50,000. Neither party was awarded maintenance as the evidence indicated they were both self sufficient. The court concluded the three corporations owned by respondent were marital property and rejected petitioner's suggestion that she be put in charge of running them because she had no expertise or experience in doing so. The trial court also rejected the testimony of respondent's expert witness, James Friel. The court stated that it found both his testimony and his analysis of RJB's value to not be credible. The court found that Two B's Enterprises had no value, but it determined that RJB and RGB Management, the latter which owned the land and building on which the Wendy's restaurant was located, had a combined value of $300,000. Accordingly, the corporate assets and debts were awarded to respondent. Petitioner was awarded a corresponding offset of $150,000. The remaining marital assets were divided by the court in a "Marital Balance Sheet," which we will discuss later in this opinion.

Respondent first argues that there is insufficient evidence in the record to support

Page 76

[224 Ill.Dec. 94] the court's valuation of the three corporations. Section 503(d) of the Marriage and Dissolution [288 Ill.App.3d 910] Act (the Act) directs the trial court to divide marital property in "just proportions," after considering all relevant factors including the contribution made by each party to the acquisition of the marital property; the duration of the marriage; the parties' relevant economic circumstances; the age, health, occupation and needs of each party; and the parties' reasonable opportunity for future acquisition of assets and income. 750 ILCS 5/503(d) (West 1994).

In a dissolution proceeding, the burden of presenting the court with sufficient evidence to fairly evaluate and divide the marital property does not fall upon the petitioning spouse alone, but rather, is an obligation existing with both parties. See In re Marriage of Courtright, 155 Ill.App.3d 55, 59, 107 Ill.Dec. 738, 507 N.E.2d 891 (1987); In re Marriage of Deem, 123 Ill.App.3d 1019, 1023, 79 Ill.Dec. 542, 463 N.E.2d 1317 (1984). In this case, however, the record establishes that neither party met this burden, at least with respect to the valuation of the three corporations now in dispute.

Petitioner failed to offer any evidence of the value of the respondent's corporate shares, even though she readily recognized that these shares were one of the marital estate's most significant assets. Although respondent did offer evidence of the value of his closely held businesses in the form of expert testimony from James Friel, the trial

fastcase smarter legal research

court ultimately rejected both Friel's testimony and his analysis.

So long as the trial court's valuation of marital assets is within the range testified to by expert witnesses, it will not ordinarily be disturbed on appeal. In re Marriage of Olson, 223 Ill.App.3d 636, 646, 166 Ill.Dec. 60, 585 N.E.2d 1082 (1992); In re Marriage of Brooks, 138 Ill.App.3d 252, 93 Ill.Dec. 166, 486 N.E.2d 267 (1985). It follows that when the trial court renders a valuation that is outside the expert testimony presented at trial, we have the obligation of more carefully scrutinizing the trial court's determination. This is because evidence of both the marital and nonmarital assets of the parties must be shown on the record in order for a reviewing court to determine the propriety of the division of marital property. Deem, 123 Ill.App.3d at 1023, 79 Ill.Dec. 542, 463 N.E.2d 1317. After carefully scrutinizing the record to determine whether the trial court's valuation in this case can be supported by the evidence presented, we conclude that it can not.

The only credible evidence which might support a valuation of $300,000 was respondent's testimony that the couple had capitalized the corporations with between $250,000 and $300,000 when the corporations were formed in 1985. This was, however, more than six years before the trial. It is established that there is no particular relationship between the stated capital of a corporation at the time it is [288 Ill.App.3d 911] incorporated and the corporation's fair value after several years in operation. See In re Marriage of Weiss, 129 Ill.App.3d 166, 173, 84 Ill.Dec. 378, 472 N.E.2d 128 (1984); Olsher v. Olsher, 78 Ill.App.3d 627, 636, 34 Ill.Dec. 32, 397 N.E.2d 488 (1979). Returning petitioner's share of the couples' initial investment to her six years later, as if nothing had happened in the intervening period of time, is necessarily arbitrary, particularly when the only testimony on the financial health of RJB, the most significant corporation, suggested it had suffered severe financial problems.

We sympathize with the trial court's dilemma in not having a satisfactory valuation of the three corporations at the close of the trial. We also agree that splitting the stock and awarding the day-to-day management of the three corporations to petitioner, as she had requested, was not an ideal disposition under the facts presented. Such a ruling would be contrary to the Act's general policy of severing the economic ties which exist between the parties. In re Marriage of Isaacs, 260 Ill.App.3d 423, 431, 198 Ill.Dec. 169, 632 N.E.2d 228 (1994); In re Marriage of Banach, 140 Ill.App.3d 327, 331, 95 Ill.Dec. 142, 489 N.E.2d 363 (1986); but see In re Marriage of Simmons, 87 Ill.App.3d 651, 657, 42 Ill.Dec. 706, 409 N.E.2d 321 (1980)(dividing stock between divorcing spouses upheld where complaining spouse insisted at trial that corporation's value was $0). Nonetheless,

Page 77

[224 Ill.Dec. 95] it is the duty of the trial court, as finder of fact, to determine which experts and testimony to believe. Doser v. Savage Manufacturing and Sales, Inc., 142 Ill.2d 176, 196, 154 Ill.Dec. 593, 568 N.E.2d 814 (1990). Once the court made a specific finding that the only witness to offer evidence on the valuation issue was not credible, there was a necessary failure of the proof, and any valuation made by the court without a financial analysis of the health of the corporations was necessarily arbitrary. See Deem, 123 Ill.App.3d at 1023, 79 Ill.Dec. 542, 463 N.E.2d 1317.

Petitioner argues that we should affirm the trial court's judgment with respect to the value of respondent's corporate shares, despite her failure to put in evidence on the question of valuation, by relying upon the court's decision in In re Marriage of Bauer, 138 Ill.App.3d 379, 93 Ill.Dec. 108, 485

fastcase

N.E.2d 1318 (1985). In Bauer, as here, the petitioner failed to offer expert testimony on the value of her spouse's closely held corporation. The respondent, in contrast, offered an expert who valued the corporation at $1,000. The expert based this valuation on the cost of incorporating the business and the initial value of the corporation's capital stock. Bauer, 138 Ill.App.3d at 383, 93 Ill.Dec. 108, 485 N.E.2d 1318. He opined that there were no other significant corporate assets because the business was solely dependent upon the personal efforts of the respondent. The court rejected the expert's testimony, but, despite the lack of a credible expert evaluation, determined that the corporation [288 Ill.App.3d 912] had a value to the marital estate of $66,000. The appellate court affirmed, finding this valuation could be supported, in part, by trial exhibits which detailed the corporation's financial history and the salaries that had been paid to respondent by the corporation over a period of years.

We find Bauer to be distinguishable because the proof in here is substantially different. In Bauer, the petitioner worked at a significantly smaller business consisting of a single corporation which had no employees, besides the respondent. In contrast, petitioner here owned and operated three corporations with managers, dozens of employees, real estate, and gross sales in excess of $4,000,000 annually. Although the court in Bauer apparently believed it was reasonable to affirm the trial court's valuation of respondent's business at $66,000 based on the evidence presented to it, such an approach is not reasonable in this case. [1]

On review of a case such as this, where the record does not support any valuation of a very substantial marital asset, we conclude that the only reasonable course is for us to order further proceedings at which sufficient evidence on the question of valuation can be presented. Further, to achieve a just apportionment, modification of the trial court's previous distribution is authorized as part of our mandate if, upon remand, such modification is dictated by the evidence elicited on the revaluation. In re Marriage of Boone, 86 Ill.App.3d 250, 252, 41 Ill.Dec. 750, 408 N.E.2d 96 (1980). Accordingly, we reverse and remand the case so that the trial court can take additional evidence on the valuation and apportionment issues.

Although our decision to remand the case for further proceedings would appear to moot respondent's remaining argument that the trial court's division of marital property was so disproportionate as to require reversal, we elect to address respondent's second issue. We do so both because it likely that, absent comment, many of the arguments made on appeal will be again presented to the trial court on remand; in addition, we find it necessary to correct errors made by the trial court in presenting as part of its order a balance sheet [288 Ill.App.3d 913] which we find to have been the source of some confusion between the parties.

Page 78

[224 Ill.Dec. 96] In both the trial court and on appeal, respondent has advanced the unwavering position that, because there is no market for his shares of RJB stock, and because the corporation has a substantial negative book value, RJB's shares must necessarily be valued at $0. Respondent implies that, if his expert's testimony had been credible, it would be per se error for the trial court to fail to do so. As the trial court implicitly recognized in disregarding Friel's analysis, however, such a narrow view of valuation is not proper.

The appraisal of a closely held corporation is as much an art as it is a science. There are simply no precise rules for fairly evaluating such businesses in the dissolution context. Bauer, 138 Ill.App.3d at 385, 93 Ill.Dec. 108, 485 N.E.2d 1318; In re Marriage of Mitchell, 103 Ill.App.3d 242, 58

fastcase

Ill.Dec. 684, 430 N.E.2d 716 (1981). Despite the fact that closely held corporations may be without established market value, they may, nevertheless, possess an ascertainable value with respect to the division of marital property. In re Marriage of Thomas, 239 Ill.App.3d 992, 181 Ill.Dec. 512, 608 N.E.2d 585 (1993); Bauer, 138 Ill.App.3d at 385, 93 Ill.Dec. 108, 485 N.E.2d 1318. In valuating a closely held corporation, an expert witness may take a deduction for its unmarketability, but such a deduction is not mandatory. Zokoych v. Spalding, 123 Ill.App.3d 921, 937, fn. 4, 79 Ill.Dec. 389, 463 N.E.2d 943 (1984).

Nor has "book value" been found to be a particularly good measure for appraising the fair value of a corporation. In re Marriage of Reib, 114 Ill.App.3d 993, 1000, 70 Ill.Dec. 572, 449 N.E.2d 919 (1983); Beerly v. Department of Treasury, 768 F.2d 942 (7th Cir.1985). Indeed, in Beerly, the court characterized book value as being a "virtually meaningless index" for purposes of arriving at a fair appraisal.

Our point is simply that it would be a mistake, on remand, for either petitioner or respondent to focus myopically on any given valuation method or financial aspect of the three corporations in arguing its fair value to the marital estate. On remand, the question of whether the businesses could be successfully sold to a third party and at what price that sale might take place is clearly relevant. So too is the corporation's "book value." Nonetheless, the determination of these considerations is not in itself dispositive of any ultimate issue in the case.

Our second observation concerns the trial court's "Marital Balance Sheet," a document first created by respondent and then modified by the trial court in rendering its decision. Our criticism of this document is that it has presented a misleading picture of the marital estate, possibly substantially overstating the actual debts of the parties. The Marital Balance Sheet is set out by the trial court in its ruling in the following format:

MARITAL BALANCE SHEET

" " " "DESCRIPTION" " " " VALUATION
" " " "AWARD" " " "
ASSETS HUSBAND
WIFE
1. Wife's Pension 256,860
256,860
2. N.Y. Life Insurance 6,720
6,720
3. Minnesota Mutual 7,116
7,116
4. Aetna 11,300
11,300
5. Kemper 3,370
3,370
6. Wife's IRA Unknown
100%
7. Three Corporations 300,000
300,000
8. Offset award for 3 Corps 150,000
150,000
9. Jewelry 6,720
6,720
10. Respondent's Soc. Security 82,730
82,730
11. 17708 Cherrywood Lane (Equity)
70,000 70,000
12. L.A. Condo (Equity) 87,000
44,000 43,000
13. Donnelly Retirement 19,296
19,296
14. Stocks 17,796 17,796
TOTAL: 1,018,908 533,822
485,086
DEBTS HUSBAND
WIFE
1. Kodak 81,000 40,500
40,500
2. Mary Ferguson 14,500 7,250
7,250
3. First Bank of Oak Park 250,000
250,000
4. First Bank of Oak Park 7,000
7,000

5. First Bank of Oak Park	8,000	8,000	
6. Austin Bank	15,000	15,000	
7. RJB Properties	11,000	11,000	
8. Atty Mahar	5,500	5,500	
9. Wendy's International	21,734	21,734	
10. Lease AM (equipment)	32,535	32,535	
11. Delavant (royalties)	7,602	7,602	
12. Wendy's (WNAP)	3,801	3,801	
13. State payroll tax	4,284	4,284	
14. Misc. vendors (A/P)	8,118	8,l18	
15. Wendy's Co-op	56,427	56,427	
16. Canteen Corp.	140,021	140,021	
17. Offset to petitioner(3 corps)	150,000	150,000	
* Dissipation by petitioner	12,500	12,500	
TOTAL:	829,022	768,772	60,250
NET TOTALS:	189,886	(234,950)	424,836

Page 79

[224 Ill.Dec. 97] [288 Ill.App.3d 915] Our objection to this document is that nearly all of the debts listed as marital debts do not actually belong to the marital estate. Rather, the debts were incurred by the various corporate entities which are necessarily separate and distinct legal entities (RJB, RGJ Management and Two B's). The record indicates that when the court attributed a $300,000 asset value to the "Three Corporations," the court intended for this value to be a net value. Thus, the $300,000 valuation already incorporates within it the effect of any associated corporate debt. Including the debts of the corporations again individually on this balance sheet therefore overstates the debt.

The error in this regard appears to be traceable to respondent's pre-trial memorandum in which he lists all of the corporate debts in this way, as if all of the corporate and partnership debt were part of the marital estate. Accounting for business debt in this way, however, results in making it appear as if the respondent is assigned 93% of all the marital debt simply because he has been awarded possession of the three corporations, while petitioner has been assigned only 7% of the marital debt. This error accounts for almost all of the "disproportionate" distribution of which respondent now complains.

We recognize that, in preparing his pre-trial memorandum, respondent may have accounted for corporate debt in this way not to deliberately mislead the court, but rather, because many or all of these debts may have been personally guaranteed by one or both of the parties. In such a case, the potentiality exists that whatever debt remains unpaid would, ultimately, become the obligation of one or both of the parties. Nonetheless, contingent liabilities are not fairly treated as marital debt, and we find it to be error to treat them as such. if, on remand, the parties wish to account for contingent liabilities, they must do so in such a way so as to not overstate their potential personal liability. Cf. Covey v. Commercial National Bank, 960 F.2d 657 (7th Cir.1992) (court may find value of contingent liability by first determining likelihood that contingency will occur [288 Ill.App.3d 916] and discounting liability accordingly); but see In re Marriage of Zells, 197 Ill.App.3d 232, 237, 143 Ill.Dec. 354, 554 N.E.2d 289 (1990), affirmed in part, reversed in part, 143 Ill.2d 251, 157 Ill.Dec. 480, 572

Page 80

[224 Ill.Dec. 98] N.E.2d 944 (1991)(husband's contingent legal fees not properly considered asset of either marital estate, or of law practice from which it is derived, because contingent fee represents

merely an unenforceable expectation of future income).

Finally, we are compelled to make one final note. In his pre-trial memorandum, petitioner valued the petitioner's interest in a New York Life Insurance policy as having a value to the marital estate of $2,304. In the trial court's "Marital Balance Sheet," however, the court valued this policy at $6,720, the same value the court placed upon the petitioner's jewelry. There appears to be nothing in the record to support a valuation of $6,720 for the New York Life insurance policy, and we cannot help but wonder whether the court has inadvertently duplicated the $6,720 entry in preparing the balance sheet. We point this out only to suggest that the court may wish to revisit this issue on remand.

In sum, we reverse and remand the case for further proceedings at which the trial court may take additional evidence so as to properly value respondent's three corporations and re-calculate the debt properly attributed to the marital estate. In recalculating the valuation of marital assets and debts, the court may adjust its previous distribution as it believes is just. We note, however, that the court must make its re-valuation as of the date of dissolution, not the date of re-trial. In re Marriage of Rossi, 113 Ill.App.3d 55, 60, 68 Ill.Dec. 801, 446 N.E.2d 1198 (1983); Brooks, 138 Ill.App.3d at 260, 93 Ill.Dec. 166, 486 N.E.2d 267.

For the foregoing reasons, the judgment of the circuit court of Cook County with regard to the valuation and apportionment of the parties' marital assets and debts is reversed and remanded for further proceedings as consistent. with this opinion.

Reversed and remanded.

RAKOWSKI and LEAVITT, JJ., concur.

----

1 We also note that the court's analysis in Bauer may no longer be viable in light of our supreme court's decision in In re Marriage of Talty, 166 Ill.2d 232, 209 Ill.Dec. 790, 652 N.E.2d 330 (1995). In Talty, the court determined that it is permissible to consider so-called "enterprise goodwill" in valuing a corporation for purposes of apportionment, but that it is inappropriate to consider the "personal goodwill" of the spouse who operates the corporation. See Talty, 166 Ill.2d at 239-40, 209 Ill.Dec. 790, 652 N.E.2d 330. The supreme court's distinction between these types of goodwill appears consistent with concerns raised by Justice Jiganti in the Bauer dissent. Bauer, 138 Ill.App.3d at 391, 93 Ill.Dec. 108, 485 N.E.2d 1318.

fastcase

Page 766

857 N.E.2d 766
In re MARRIAGE OF James O. ALEXANDER, Plaintiff-Appellant, and Valery M. Alexander, Respondent-Appellee.
No. 5-05-0109.
Appellate Court of Illinois, Fifth District.
September 7, 2006.

Page 767

Morris Lane Harvey, Law Offices of Harvey & Bradley, LLC, Mt. Vernon, IL, for Appellant.

Edward J. Heller, Reed, Heller, Mansfield & Gross, Murphysboro, IL, for Appellee.

Justice WELCH delivered the opinion of the court:

The petitioner, James O. Alexander, appeals a judgment of dissolution entered by the circuit court of Saline County dissolving his marriage to the respondent, Valery M. Alexander. On appeal, James raises the following six issues: (1) whether the circuit court erred in admitting David Wood's testimony regarding the value of enterprise goodwill in James's medical practice, (2) whether the circuit court erred in its valuation of James's medical practice, (3) whether the circuit court's award of interim attorney fees to Valery violated section 501(c-1) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/501(c-1) (West 2002)), (4) whether the circuit court erred in its final award of attorney fees, (5) whether the circuit court erred in its valuation of James's Vanguard accounts, and (6) whether the circuit court erred in its award of child support. For the reasons that follow, we affirm the judgment of the circuit court.

The parties in this case were married on August 10, 1985. Three children were born to the marriage: Logan, born October 2, 1988, Ethan, born May 22, 1992, and Megan, born December 28, 1993. The parties separated in July 1999. On November 6, 2001, James filed a petition to dissolve the marriage. A dissolution hearing was conducted over several days between July 20, 2004, and December 20, 2004.

The evidence presented at the dissolution hearing revealed that James graduated from medical school in 1988. In 1997, he opened his own medical practice as a family practitioner. At the time of the

Page 768

dissolution, James had offices in Harrisburg and Marion and employed two physician assistants. According to his 2003 tax return, the practice grossed approximately $950,000, of which James reported his gross business income at $201,841. His 2002 tax return reported that his practice grossed approximately $842,000, of which James reported his personal gross business income at $325,416.

While James pursued his medical career, Valery concentrated her efforts on raising the children. As the children got older, Valery began working full-time as a teacher in the Harrisburg school district. According to her 2003 tax return, her annual income was $33,527.

The bulk of the evidence presented at the dissolution hearing pertained to the value of James's medical practice. This evidence, along with other evidence presented during the hearing, will be set forth in greater detail where relevant in this disposition. For now, it is sufficient to note that the circuit court valued James's medical practice at $379,473, of which $160,000 consisted of enterprise goodwill.

fastcase

In its judgment order, the circuit court found that the total value of the parties' marital property was approximately $1 million, including the value of James's medical practice. The circuit court divided the marital property equally. In addition, the circuit court found that James had an annual pretax income of $350,000, and the court awarded Valery monthly maintenance in the amount of $2,000, ordered James to pay monthly child support in the amount of $5,333, and ordered James to pay $25,000 of Valery's attorney fees. James appeals this order.

The first issue raised by James on appeal is whether the circuit court erred in admitting David Wood's expert testimony pertaining to the value of enterprise goodwill in James's medical practice. In its order, the circuit court noted the extremely "different evaluations" that each party had placed on the value of James's medical practice. The circuit court noted that James claimed that the practice was worth $20,000 and that Valery claimed that the practice was worth $581,000. This first issue raised by James strictly pertains to the value of enterprise and personal goodwill in the practice.

At the dissolution hearing, Wood testified that, in his opinion, James's medical practice had a total goodwill value of $350,000, of which $245,000 consisted of enterprise goodwill and $105,000 consisted of personal goodwill. In reaching his conclusion, Wood testified that he utilized an approach called the multiattribute utility theory. On appeal James argues, as he did before the circuit court, that Wood's testimony pertaining to the value of enterprise and personal goodwill should not have been admitted because the multiattribute utility theory used by Wood to form his opinion is a novel scientific methodology that is not generally accepted in the relevant scientific community. Accordingly, James argues that Wood's opinion on the amount of the total goodwill that constituted enterprise goodwill was inadmissible under *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923).

After considering James's arguments, the circuit court specifically found, "Mr. Wood's approach, though not scientific, was thoughtful and persuasive." Although the circuit court admitted Wood's testimony, it rejected Wood's proposed total goodwill figure of $350,000 and found that James's medical practice had a total goodwill value of $240,000. The circuit court then employed Wood's opinion to the extent that Wood suggested that approximately two-thirds of the total goodwill in the practice consisted of enterprise goodwill. The circuit court then found that $160,000 of the total value of goodwill in

Page 769

James's medical practice constituted enterprise goodwill. Before examining whether Wood's testimony was properly admitted, we briefly examine the importance of distinguishing enterprise goodwill from personal goodwill for purposes of a dissolution proceeding.

Goodwill represents the ability to acquire future income and has been defined as "`"`the value of a business or practice that exceeds the combined value of the physical assets.'"'" *In re Marriage of Schneider,* 214 Ill.2d 152, 166, 291 Ill.Dec. 601, 824 N.E.2d 177 (2005) (quoting *In re Marriage of Talty,* 166 Ill.2d 232, 238, 209 Ill.Dec. 790, 652 N.E.2d 330 (1995) (quoting *In re Marriage of White,* 151 Ill.App.3d 778, 780, 104 Ill.Dec. 424, 502 N.E.2d 1084 (1986) (quoting 2 Valuation & Distribution of Marital Property § 23.04(1) (Matthew Bender ed.1984)))). Goodwill may be categorized as enterprise or personal. Enterprise goodwill is that which exists independently of one's personal efforts and will outlast one's involvement with the business. *In re Marriage of Talty,* 166 Ill.2d at 240, 209 Ill.Dec. 790, 652 N.E.2d 330. Personal goodwill is that which is attributed

fastcase

to one's personal efforts and will cease when that person is no longer involved in the business. *In re Marriage of Talty,* 166 Ill.2d at 240, 209 Ill.Dec. 790, 652 N.E.2d 330. Enterprise goodwill is considered a marital asset for the purposes of the just division of marital property. Personal goodwill is not considered a marital asset for the purposes of the just division of marital property. The supreme court observed that because other factors under section 503(d) of the Act (750 ILCS 5/503(d) (West 2004)) (the section of the Act that sets forth factors that the circuit court is to consider when making a just division of marital property) already reflect elements that constitute personal goodwill, to consider personal goodwill in addition to these other factors would result in an impermissible double-counting. *In re Marriage of Talty,* 166 Ill.2d at 240, 209 Ill.Dec. 790, 652 N.E.2d 330. In sum, for purposes of a dissolution proceeding, enterprise goodwill is to be treated as a marital asset and personal goodwill is not. We now turn to the admissibility of Wood's opinion.

On appeal, James does not challenge Wood's qualifications as an expert. James also does not contend that Wood's testimony would not aid the trier of fact in understanding the evidence. See *In re Marriage of Jawad,* 326 Ill.App.3d 141, 152, 259 Ill.Dec. 941, 759 N.E.2d 1002 (2001) (expert testimony is generally admissible if the testimony aids the trier of fact in understanding the evidence before it). James's argument is simply that Wood's methodology, the multiattribute utility theory, which Wood used to determine that approximately two-thirds of the total goodwill in James's medical practice consists of enterprise goodwill, is a novel scientific methodology not accepted by the relevant scientific community and that therefore his opinion derived from this methodology is inadmissible under *Frye.*

Illinois has adopted the *Frye* standard for use when courts are faced with a question of the admissibility of novel scientific evidence. *People v. Basler,* 193 Ill.2d 545, 251 Ill.Dec. 171, 740 N.E.2d 1 (2000). The *Frye* test is also known as the general-acceptance test. *Agnew v. Shaw,* 355 Ill.App.3d 981, 988, 291 Ill.Dec. 460, 823 N.E.2d 1046 (2005). The test is conducted to determine whether novel scientific evidence sought to be admitted by a party has gained general acceptance in the particular field to which it belongs. *Agnew,* 355 Ill.App.3d at 988, 291 Ill.Dec. 460, 823 N.E.2d 1046. Because scientific evidence generally carries with it a heightened degree of reliability, a *Frye* hearing is conducted to weed out unreliable evidence that may fall under the guise of

Page 770

scientific evidence. If the novel scientific evidence has gained general acceptance in the particular field to which it belongs, then the evidence is presumed reliable and will be deemed admissible under *Frye. Agnew,* 355 Ill.App.3d at 988, 291 Ill.Dec. 460, 823 N.E.2d 1046. By subjecting novel scientific evidence to the general-acceptance test, the risk of relying on invalid evidence is reduced. *Donaldson v. Central Illinois Public Service Co.,* 199 Ill.2d 63, 78, 262 Ill.Dec. 854, 767 N.E.2d 314 (2002), *overruled on other grounds by In re Commitment of Simons,* 213 Ill.2d 523, 290 Ill.Dec. 610, 821 N.E.2d 1184 (2004).

It is important to remember that the *Frye* test only applies to evidence that is both novel and scientific. *In re K.T.,* 361 Ill.App.3d 187, 202, 297 Ill.Dec. 38, 836 N.E.2d 769 (2005). If an expert's opinion is not novel or scientific, it is not subject to the *Frye* test but still remains subject to the general admissibility test applied to all expert testimony. *In re Commitment of Field,* 349 Ill.App.3d 830, 831, 286 Ill.Dec. 262, 813 N.E.2d 319 (2004); *In re Marriage of Jawad,* 326 Ill.App.3d at 154, 259 Ill.Dec. 941, 759

fastcase

N.E.2d 1002. Unfortunately, there is no clear line that distinguishes scientific evidence from nonscientific evidence. However, the appellate court has noted that when a court examines whether evidence is scientific, the focus is to be on the methodology employed by the expert in reaching his or her conclusion and not on the conclusion itself. *Agnew,* 355 Ill.App.3d at 989, 291 Ill.Dec. 460, 823 N.E.2d 1046. The court is to focus on *how* the expert reached his or her conclusion and not on *what* the conclusion is. *Harris v. Cropmate Co.,* 302 Ill.App.3d 364, 371, 235 Ill.Dec. 795, 706 N.E.2d 55 (1999).

If an expert's opinion is derived solely from his or her observations and experiences, the opinion is generally not considered scientific evidence. *In re Marriage of Jawad,* 326 Ill.App.3d at 153-54, 259 Ill.Dec. 941, 759 N.E.2d 1002. On the other hand, if the expert's opinion is derived from a particular scientific methodology, such as the application of scientific principles or the use of other literature or studies, then the opinion is generally considered scientific. *In re Marriage of Jawad,* 326 Ill.App.3d at 153-54, 259 Ill.Dec. 941, 759 N.E.2d 1002. Again, the line that separates scientific evidence from nonscientific evidence is not always clear. *Harris,* 302 Ill.App.3d at 371, 235 Ill.Dec. 795, 706 N.E.2d 55.

In *Harris,*[1] the appellate court was faced with the question of whether the opinions of three expert witnesses constituted scientific evidence. These witnesses testified that the herbicide 2,4-D had caused damage to the plaintiffs' crops. *Harris,* 302 Ill.App.3d at 371, 235 Ill.Dec. 795, 706 N.E.2d 55. One expert was a seed sales agent with several years of experience applying 2,4-D. Another expert was an extension specialist and a doctoral student in weed science who had read literature and conducted field research on the effects of 2,4-D. The third expert was a research biologist who had become acquainted during the course of his work as an extension specialist with the effects of phenoxy-type herbicides, including 2,4-D, on cucurbits. *Harris,* 302 Ill.App.3d at 371, 235 Ill.Dec. 795, 706 N.E.2d 55.

Page 771

In concluding that the opinions of these three experts did not constitute scientific evidence, the appellate court noted that although botany and chemistry were undisputedly implicated in the testimony of these witnesses, none of the witnesses relied on some particular scientific principle or methodology in determining whether 2,4-D had caused damage to the plaintiffs' crops. *Harris,* 302 Ill.App.3d at 371, 235 Ill.Dec. 795, 706 N.E.2d 55. Instead, the court found that the witnesses derived their opinion from their generalized knowledge of agriculture, their firsthand experience with and observations of the effects of 2,4-D on cucurbits, and the type of deductive process that is common to everyone. *Harris,* 302 Ill.App.3d at 371, 235 Ill.Dec. 795, 706 N.E.2d 55. Accordingly, because the expert opinions were derived from their observations and experience as opposed to the application of scientific principles, the appellate court in *Harris* concluded that the evidence tendered was not scientific.

In the instant case, Wood testified that in reaching his conclusion on what portion of the total goodwill in James's medical practice constituted enterprise goodwill and what portion constituted personal goodwill, he employed the multiattribute utility theory.[2] Wood testified that he believed he was the first to use this approach in reaching his conclusion. Wood also testified that his approach was scientific. According to Wood, the multiattribute utility theory works as follows.

First, the valuator (Wood in this case) sets forth an objective. In the instant case, the objective set forth by Wood was to form a conclusion on the value of the elements of total goodwill in James's medical practice that

fastcase

represent personal goodwill and enterprise goodwill.

Next, the valuator establishes "alternatives." An alternative is a "range of percentages" that will define the choices "in which the method will result." Wood chose five alternatives but acknowledged that there is no set rule for the number of alternatives that a valuator must choose.

Each alternative is then assigned a "range." Wood assigned a range of 20% for each alternative. To illustrate, Wood created a graph containing five rows and two columns. The rows were labeled "alternative 1" to "alternative 5," and the two columns were labeled "[personal] goodwill" and "enterprise goodwill." Where the rows and columns intersect, Wood inserted the range. For example, where personal goodwill and row 1 intersect, Wood inserted a range of "0 to 20 percent." Where enterprise goodwill and row 1 intersect, Wood inserted a range of "80 to 100 percent." Where personal goodwill and row 2 intersect, Wood inserted a range of "20 to 40 percent." Where enterprise goodwill and row 2 intersect, Wood inserted a range of "60 to 80 percent." This continued to row 5, where the range for personal goodwill was "80 to 100 percent" and the range for enterprise goodwill was "0 to 20 percent."

After the objective and the alternatives are set, the valuator must then define the "attributes." An attribute is an element of goodwill to which the valuator must assign a value. Examples of attributes are personal reputation and business location. Attributes are categorized as either personal or enterprise. Wood does not contend that there are universal attributes that must be defined in every situation. Wood also does not contend that there is a set number of attributes that must be defined. Instead, Wood leaves the creation

Page 772

and categorization of attributes to the discretion of the valuator.

In the instant case, Wood created the following personal attributes: (1) lacks transferability, (2) specialized knowledge, (3) personalized name, (4) inbound referrals, (5) personal reputation, (6) personal staff, (7) age, health, and work habits, and (8) knowledge of end user. Wood created the following enterprise attributes: (1) number of offices, (2) business location, (3) multiple service providers, (4) enterprise staff, (5) systems, (6) years in business, (7) outbound referrals, and (8) marketing. Wood acknowledged that the attributes could be described as "opposite sides of the same coin" and testified that "if one valuator placed an attribute into the [personal] category and another valuator [placed the same attribute] into the enterprise category, the model would correct for this during the measuring process."

After defining the attributes, the valuator is then to assign a value to each attribute. This involves a two-step process. First, the valuator assigns a value known as an attribute's "utility of importance." The utility of importance is a value placed on an attribute based on how important the valuator feels the attribute is to the value of goodwill. The value assigned is taken from a range created by the valuator. Wood created a utility-of-importance range of 1 to 5, with 5 being most important and 1 being least important. Wood then assigned a utility-of-importance value to each attribute he defined.

Next, the valuator assigns a value known as an attribute's "utility of existence." The utility of existence is a value placed on an attribute based on the valuator's determination of the presence of that attribute in the business that the valuator is analyzing. The value is also taken from a range created by the valuator. Wood created a range of 0 to 4, assigning 0 to an attribute that has a weak presence and 4 to an attribute

fastcase

that has a strong presence. The values that Wood assigns to the utility of importance and the utility of existence are derived solely from his subjective opinion.

After assigning each attribute two values (a utility-of-importance value and a utility-of-existence value), the valuator then "aggregates the results." Aggregating the results simply involves multiplying the values assigned to an attribute to come up with a final value for that attribute. For example, in the instant case, for the personal-reputation attribute Wood assigned a utility-of-importance value of 5 and a utility-of-existence value of 3, to give it a final value, or "multiplicative utility" as Wood calls it, of 15. Once each attribute has a final value, the valuator then takes the sum of the final values for each attribute from its assigned category (personal or enterprise) and derives a "total multiplicative utility" for that category. Wood calls the total value for the personal attributes the "total multiplicative (PGA) utility" and the total value for the enterprise attributes the "total multiplicative (EGA) utility." The valuator then adds the total multiplicative (PGA) utility to the total multiplicative (EGA) utility and comes up with a "total multiplicative (TMU) utility." The valuator then employs simple division to determine what percentage of the total multiplicative (TMU) utility consists of the total multiplicative (PGA) utility and what percentage consists of the total multiplicative (EGA) utility. At this point, the valuator has before him or her what percentage of the total goodwill is personal goodwill and what percentage is enterprise goodwill.

In the instant case, Wood calculated the total multiplicative (PGA) utility for the personal attributes at 52 and the total multiplicative (EGA) utility for the enterprise attributes at 114. Accordingly, he

Page 773

found a total multiplicative (TMU) utility of 166 (52 plus 114). Employing the simple division set forth above, Wood concluded that the personal goodwill attributes constitute 31% of the total goodwill (52 divided by 166) and that the enterprise goodwill attributes constitute 69% of the total goodwill (114 divided by 166).

According to Wood, once these figures are reached, the valuator is then to "evaluate the alternatives" by examining where the final results fit into the range of alternatives that was established at the beginning of this methodology. The valuator also must analyze his or her conclusions by looking at each attribute individually in light of the attribute's total contribution to the total utility, and the valuator must ask himself or herself if certain attributes should be "driving the results." After performing this analysis, the valuator then reaches his or her ultimate opinion.

Wood testified that although a valuator would most likely find it tempting to simply use the final percentage that is derived from the math above (in this case, 69% for enterprise goodwill and 31% for personal goodwill), he believes that "it is more effective and proper" to select the midpoint of the range that exists in the appropriate alternative. Accordingly, if the percentage for enterprise goodwill fell anywhere within the 20-to-40% range, Wood believes that the figure 30% should be used for the final percentage of enterprise goodwill. In the instant case, because Wood calculated 69% for enterprise goodwill, for his conclusion he used 70%, which is located at the midpoint of his 60%-to-80% range. As noted above, the circuit court did not use 70% as suggested by Wood but instead used a two-thirds ratio.

After conducting a thorough examination of Wood's multiattribute utility theory, we are convinced that this method does not constitute scientific evidence subject to a *Frye* hearing. The methodology employed by Wood does not rely on the application of scientific

fastcase

principles but incorporates basic math with the observations and experience of the valuators. As Wood points out, the creation of the alternatives, the creation of the ranges, the creation of the attributes, and the values assigned to the attributes are all derived from the subjective determinations of the valuator. Wood never contends that there are universal alternatives, attributes, utility values, or ranges that must be applied in each and every situation. Furthermore, he does not allege that there are constant or universal values that must be assigned. Wood leaves just about everything to the sole discretion of the valuator.

Although Wood repeatedly describes his approach as "scientific," this does not make it so for purposes of subjecting it to a *Frye* hearing. Wood acknowledged that the "whole process" is "subjective" and that the methodology he uses simply attempts to make a "precise decision from imprecise and subjective criteria." In addition, to the extent that mathematics is employed in Wood's methodology, the types of mathematics employed by Wood (addition, multiplication, and division) are certainly not novel. Most people are at least familiar with these basic mathematical principles, although certainly some are more versed at applying them than others. But suffice it to say, to the extent that mathematics is employed in Wood's methodology, this does not make it a scientific methodology subject to *Frye*. However, even if it were sufficiently scientific to trigger a *Frye* hearing, the evidence would pass the general-acceptance test because elementary mathematics has gained general acceptance in all fields of science and engineering. *Southern Energy Homes, Inc. v. Washington,* 774 So.2d 505, 518 (Ala.2000).

Page 774

On appeal, James argues that the methodology employed by Wood relies on literature and the expertise of others. We disagree. Although Wood may be using an equation or a process utilized by others in other fields, how Wood reached his opinion is no different from how the experts in *Harris* reached their opinion. Wood's opinion was derived from his own observations and experience. Wood's methodology involved assigning a value, as determined by Wood, to certain attributes of James's practice that Wood subjectively determined, based on his experience and observations, to be attributes that relate to the enterprise or personal goodwill value of James's medical practice. Wood then relied on simple math to quantify his opinion. We do not believe that Wood's approach is scientific for purposes of a *Frye* hearing. See *Harris,* 302 Ill.App.3d at 369-70, 235 Ill.Dec. 795, 706 N.E.2d 55 (if one's conclusion is based on experience and observations, combined with a deductive process familiar to the average trier of fact, it is generally not scientific). Wood does not employ a methodology that is beyond the realm of an average juror's understanding. Again, essentially "how" Wood reached his opinion was derived from his observation and experience.

James relies heavily on *In re Marriage of Jawad* to support his position that Wood's testimony is subject to *Frye*. *In re Marriage of Jawad* is readily distinguishable. In *In re Marriage of Jawad,* the respondent sought an order requiring all visitation between the parties' children and the petitioner to be supervised. The respondent claimed that the petitioner was an abduction risk and that the petitioner might abduct the parties' three minor children to Iraq. *In re Marriage of Jawad,* 326 Ill.App.3d at 142, 259 Ill.Dec. 941, 759 N.E.2d 1002. In support of her claim, the respondent tendered Maureen Dabbagh as an expert to testify regarding whether the petitioner possessed the characteristics of a person who posed an abduction risk. *In re Marriage of Jawad,* 326 Ill.App.3d at 148, 259 Ill.Dec. 941, 759 N.E.2d 1002. The petitioner objected to Dabbagh's testimony, claiming that Dabbagh's opinion was inadmissible under *Frye*. The trial court

fastcase

found that her opinion was not scientific and allowed her to testify as a nonscientific expert. *In re Marriage of Jawad,* 326 Ill.App.3d at 148, 259 Ill.Dec. 941, 759 N.E.2d 1002.

Dabbagh then testified that in making her decision regarding whether the petitioner was a risk to abduct the children, she considered six risk factors that had been identified as the result of research performed by the American Bar Association's Center on Children and the Law on actual cases of abduction. Dabbagh testified that the petitioner possessed three of these factors that had been identified as common to all abductors. *In re Marriage of Jawad,* 326 Ill.App.3d at 148-49, 259 Ill.Dec. 941, 759 N.E.2d 1002. Dabbagh further indicated that if a person possesses only one of the six risk factors, that person would be considered at risk to abduct. *In re Marriage of Jawad,* 326 Ill.App.3d at 149, 259 Ill.Dec. 941, 759 N.E.2d 1002. Regardless of Dabbagh's testimony, the trial court denied the request for a preliminary injunction, finding that the respondent failed to demonstrate that there was a risk that the petitioner would abduct the children. *In re Marriage of Jawad,* 326 Ill.App.3d at 150, 259 Ill.Dec. 941, 759 N.E.2d 1002.

On appeal, the Second District Appellate Court considered the issue of the admissibility of Dabbagh's testimony. *In re Marriage of Jawad,* 326 Ill.App.3d at 152, 259 Ill.Dec. 941, 759 N.E.2d 1002. The Second District held that because Dabbagh's opinions were "not derived solely from her observations and experience" but were "predicated upon factors identified in studies

Page 775

and literature authored by certain psychologists," her opinions did in fact constitute scientific evidence. *In re Marriage of Jawad,* 326 Ill.App.3d at 153-54, 259 Ill. Dec. 941, 759 N.E.2d 1002. The Second District concluded that because Dabbagh's opinions constituted scientific evidence, the trial court was obligated to conduct a *Frye* hearing to determine whether the scientific theory upon which her evidence was based was novel and, if so, whether it had gained general acceptance in the relevant scientific community. *In re Marriage of Jawad,* 326 Ill.App.3d at 154, 259 Ill.Dec. 941, 759 N.E.2d 1002. Without this determination, the court held that her testimony lacked the necessary foundation to be admitted into evidence and should not have been considered by the trial court. *In re Marriage of Jawad,* 326 Ill.App.3d at 154, 259 Ill.Dec. 941, 759 N.E.2d 1002.

The instant case is distinguishable from *In re Marriage of Jawad* because in *In re Marriage of Jawad* the expert clearly turned to and relied upon another source to provide a basis for her opinion. Wood no more turned to other sources to provide a basis for his opinion than did the experts in *Harris*. Wood's reliance on other sources only assisted Wood in creating the basic mathematical formula that he would use to quantify his opinion. Again, the basis for Wood's opinion was derived through his observations and experience, and therefore, this case is distinguishable from *In re Marriage of Jawad* and other cases cited by James wherein the expert's opinion clearly relied on another source. See *In re Commitment of Simons,* 213 Ill.2d 523, 533, 290 Ill.Dec. 610, 821 N.E.2d 1184 (2004) (the use of actuarial instruments such as the Minnesota Sex Offender Screening Tool-Revised and the Static-99 constitutes a scientific methodology for predicting sexual offender recidivism); *Whiting v. Coultrip,* 324 Ill.App.3d 161, 166, 258 Ill.Dec. 111, 755 N.E.2d 494 (2001) (evidence that involved mathematical calculations using various types of computer programs and used test studies correlating force to injury in the biomedical literature constituted scientific evidence). Because we agree with the circuit court that Wood's opinion does not constitute scientific

fastcase

evidence, we find no error in the circuit court's failure to conduct a *Frye* hearing. We therefore reject the arguments in the first issue raised by James on appeal.

Note: Text omitted pursuant to Supreme Court Rule 23.

The next issue raised by James on appeal challenges the circuit court's valuation of two Vanguard accounts. The circuit court awarded Valery two Vanguard accounts that the circuit court valued at $10,804. This included a 21% reduction in value imposed by the circuit court on these accounts. The evidence presented at the dissolution hearing showed that the accounts were actually worth $13,792.97. James argues on appeal that there is no indication in the record why a 21% reduction in value was imposed, but James speculates it was to take into account the effect of taxes. James argues that this is improper and that the valuation should be reversed.

In response, Valery concedes that the reduction is related to taxes and argues that a 21% reduction is low, because her taxes will probably be 30% when the accounts are liquidated. Valery contends that it is appropriate for the circuit court to consider the tax implications of property, pursuant to section 503(d)(12) of the Act (750 ILCS 5/503(d)(12) (West 2004)). Furthermore, Valery contends that her retirement benefits were valued the same way. However, Valery concedes that her retirement was cashed out prior to the divorce and that the funds had been used for the parties' living expenses. In any event, Valery contends that the valuation

Page 776

is not contrary to the statute and hence did not constitute an abuse of discretion.

Section 503(d)(12) of the Act provides that the trial court shall divide the marital property in just proportions, considering relevant factors including "the tax consequences of the property division upon the respective economic circumstances of the parties." 750 ILCS 5/503(d)(12) (West 2004). However, in *In re Marriage of Emken,* 86 Ill.2d 164, 167, 56 Ill.Dec. 45, 427 N.E.2d 125 (1981), the supreme court found that a circuit court erred when it reduced the value of certificates of deposit in the respondent's possession by the amounts that he would be required to pay in taxes and penalties if he were to surrender the assets. The supreme court held that there was no evidence in the record that the respondent would surrender the assets and that therefore it was improper to reduce the value of the assets in anticipation of losses which might arise as a result of the respondent's voluntary action. *In re Marriage of Emken,* 86 Ill.2d at 167, 56 Ill.Dec. 45, 427 N.E.2d 125.

James also cites *In re Marriage of Hawkins,* 160 Ill.App.3d 71, 111 Ill.Dec. 897, 513 N.E.2d 143 (1987), and *In re Marriage of Perino,* 224 Ill.App.3d 605, 167 Ill.Dec. 172, 587 N.E.2d 54 (1992), to further support his position. In *In re Marriage of Hawkins,* this court held that the circuit court did not err in failing to consider, in its valuation of certain property, the tax implications resulting from a subsequent sale of that property. We noted that the circuit court should not speculate about the existence and amount of future tax implications when no such sale is contemplated by the parties or required by the court's division of property. *In re Marriage of Hawkins,* 160 Ill.App.3d at 79, 111 Ill.Dec. 897, 513 N.E.2d 143. In *In re Marriage of Perino,* the appellant argued that the trial court erred in failing to consider the tax consequences of a sale of a business. The appellate court found that the tax consequences were not a proper factor for consideration where the party did not have to sell any assets in order to meet the court's order, because the suggested consequences were purely hypothetical. *In re Marriage of Perino,* 224 Ill.App.3d at 609, 167 Ill. Dec. 172, 587 N.E.2d 54.

fastcase

In light of the precedent set forth above, we believe that the circuit court abused its discretion in its valuation of the Vanguard funds. The circuit court should not have reduced the value of the funds by 21%. However, because an appropriate valuation only marginally impacts the entire valuation and subsequent distribution of marital property, we find that any error is *de minimis* and that a reversal is not required. The circuit court valued all the marital property at approximately $1 million. A proper valuation of the Vanguard accounts would merely increase the total value of the parties' marital property by less than one half of one percent of its current figure. James does not contend that the division of marital property was inequitable (apart from his argument that his medical practice was overvalued), and we do not believe that inserting a proper valuation of the Vanguard accounts significantly affects the division of marital property to mandate a reversal and remand for the redistribution of marital property. Furthermore, James failed to raise this argument in a posttrial motion to allow the circuit court to address and correct the error. Pursuant to our powers provided by Supreme Court Rule 366 (155 Ill.2d R. 23), we modify the circuit court's order to reflect the proper value of the Vanguard accounts ($13,792.97). However, we in no way alter the distribution of marital property.

Note: Text omitted pursuant to Supreme Court Rule 23.

Page 777

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

GOLDENHERSH and McGLYNN, JJ., concur.

Notes:

1. We acknowledge that the appellate court's decision in *Harris* has been abrogated by the supreme court's decision in *Donaldson v. Central Illinois Public Service Co.,* 199 Ill.2d 63, 262 Ill.Dec. 854, 767 N.E.2d 314 (2002). In *Harris,* the appellate court applied the "*Frye* plus-reliability" standard, and the supreme court clarified that is not the standard used in Illinois. *Donaldson,* 199 Ill.2d at 80-81, 262 Ill.Dec. 854, 767 N.E.2d 314. However, we believe that *Harris* is still helpful for its analysis of what constitutes scientific evidence.

2. Although Wood and others interchange the terms "professional goodwill" and "personal goodwill," we shall use the term "personal goodwill" throughout to maintain consistency.

----

778 N.E.2d 762
334 Ill. App.3d 731
268 Ill.Dec. 496

In re MARRIAGE OF Susan CUTLER, Petitioner-Appellee, and David E. Cutler, Respondent-Appellant.

No. 5-01-0347.

Appellate Court of Illinois, Fifth District.

October 22, 2002.

[778 N.E.2d 763]

John J. Kurowski, William D. Shultz, Jr., Kurowski, Bailey & Shultz, Swansea, for Appellant.

Rhonda D. Fiss, Belleville, for Appellee.

Justice CHAPMAN delivered the opinion of the court:

Susan Cutler filed an action for dissolution of marriage against her husband of approximately 20 years, David E. Cutler. After a trial, the court entered a judgment on all remaining issues. One issue was the determination of the value of David's business, the Cutler Insurance Agency (Cutler). The court valued the business at $243,000 by applying a form of the "income approach" method of valuation. This figure was then used in determining the equitable distribution of marital property. David now appeals, arguing that (1) the court's valuation of the business was against the manifest weight of the evidence and (2) this error in valuation substantially and materially affected the equitable distribution of marital property. We reverse the decision of the trial court and remand the cause with directions that $32,000 be used as the valuation of the business in the redistribution of marital property between David and Susan.

I. FACTS

Susan filed a petition for dissolution on May 20, 1998. She and David had been married since 1979 and had one child. Grounds for the dissolution were found on February 9, 2000. At the trial on October

[778 N.E.2d 764]

12, 2000, the witnesses included both of the parties, Charles Tzinberg as Susan's valuation expert, and Frank J. Reedy, Jr., as David's valuation expert. David also: offered the evidence depositions of Larry McKenzie and Richard G. Eitzel, both of whom were former owners of insurance agencies tied to Geico Insurance Company (Geico).

Susan testified that she was 44 years old and worked as a regional account manager with Roche Labs. She has a bachelor of science degree in nursing. In 2000, she was expected to make approximately $97,000, which was consistent with her recent past earnings.

David testified that he was 48 years old and was employed by Cutler, earning a gross income of slightly more than $5,000 per month. The court found that his net income for the purpose of child support was $3,637 per month. David graduated from high school but never finished college. In 1973, David became a licensed insurance sales agent. He started Cutler as a proprietorship in 1988 and incorporated it in 1994. From 1988 to 2000, Cutler sold exclusively Geico insurance under an agency contract with Geico. Geico's principal product is automobile liability and comprehensive coverage. This agreement prohibited David from representing any other company without Geico's written permission. In the trade, this business relationship is known as a captive agency because of the agency's exclusive arrangement with a single

fastcase

carrier. The contract also contained a one-year noncompetition clause prohibiting David from soliciting former Geico clients in the event of a termination of the agency contract.

David testified that he was familiar with the agreement and understood the way it worked. He added that he had discussed aspects of the agreement with a number of other Geico insurance agents throughout the country. In these discussions he learned that because of the contract terms these agencies were not marketable. He identified several agents who closed their agencies for various reasons, and none of them received funds as a result of the termination.

David also explained that under the agreement with Geico he did not own his renewals in the agency, which meant that if he left, retired, or terminated the agency for some other reason, he would not receive any commissions for ongoing business from his customers. In contrast, an agent with an independent agency would expect to own his renewals when he left.

Charles Tzinberg testified for Susan on the issue of valuation. He received a bachelor's degree from the University of Denver and has been a certified public accountant since 1988, He works for a small accounting firm and spends most of his time doing accounting work that does not involve business valuations. He admitted that there are rigorous programs where an accountant can get certifications in business valuation but that he had not taken any of those courses or obtained any of those certifications. Tzinberg testified that under the "market approach" of valuation the agency had a value of $270,000.

Tzinberg did not provide an opinion of what the fair market value of the agency would be. He also did not analyze the agreement David had with Geico, explaining that he was not qualified to determine whether the contract foreclosed the possibility of the sale of the agency. While Tzinberg agreed that Cutler is a captive agency, restricted from selling other insurance products, he determined that the agreement itself was not material to the valuation of the business.

In establishing a market value in this case, Tzinberg used a multiplier of gross

[778 N.E.2d 765]

revenues as a rule of thumb. After researching a variety of sources for what he considered to be comparative sales of insurance agencies, Tzinberg found multiples ranging between 1 and 1.7. He decided to apply 1.3 times gross revenues to make a conservative estimate of the value. Tzinberg admitted that this rule of thumb was based on multiline agencies, which Cutler was not. Further, one source that Tzinberg relied on specifically indicated that the business valuation should weigh the risk of losing a carrier contract with whether there was a good mix of national, regional, and specialty-line carriers, allowing no more than 25 to 30% of a "book of business" to be with any one carrier. Tzinberg admitted that he did not factor these considerations into the valuation. He also admitted that the fact that the agency did not own its own renewals would be relevant if the business were being sold to an outside third-party buyer.

Frank J. Reedy, Jr., David's valuation expert, was then called to testify at the trial. He is both a certified public accountant and a certified valuation analyst. He spends about two-thirds of his time doing business valuations and damage measurements in legal situations and has been doing this work for more than 10 years. Additionally, he attends 40 to 60 hours of classroom instruction each year in the areas of business valuation, general accounting, and tax matters on both a local basis and a national basis. As a certified valuation analyst, he can provide business valuations for small, closely held businesses and professional practices. In

fastcase

order to achieve that designation, Reedy attended courses and training and passed a 48-hour examination. Reedy explained that he had performed between 100 and 200 business valuations, approximately two to four per month.

Reedy indicated that there were three commonly accepted methods used to value a closely held business such as Cutler: (1) the market approach, (2) the income approach, and (3) the "asset approach." Reedy explained that he had used detailed financial information in forming his opinion and had specifically reviewed the agreement between David and Geico because of the restrictions it imposed upon the business. After considering all three methods, Reedy concluded that the asset approach was the appropriate method for this situation. Under this method, the value of the agency was determined by subtracting the value of the business's liabilities from that of the assets. When Reedy applied this approach, he valued the agency at $32,000.

Reedy emphasized that it was significant that Cutler did not own its own book of business—the list of accounts that are expected to be renewed and be a source of future commissions. If Cutler were terminated, Geico could either place someone else in David's position or take the business directly back. David could not take that book of business to another agency or combine it with another agency because it would revert to Geico. Reedy also searched databases for comparable sales transactions for captive insurance agencies, but he did not find any that were analogous. Additionally, he explained that because future cash flow was not within the control of the agency, the income approach was not an appropriate method of valuation.

Reedy concluded that Tzinberg's market approach valuation was improper because he did not first determine a fair market value but instead arrived at a value based upon "fair value," which is a more generalized approach. Fair value is a theoretically equitable amount rather than one derived via negotiations between two actual parties; thus, it would not consider factors

[778 N.E.2d 766]

such as the restrictions imposed by the Geico contract.

Both Larry McKenzie and Richard G. Eitzel testified by way of evidence deposition. McKenzie lives in Elizabethtown, Kentucky, and worked as an independent captive agent for Geico from March 1987 until July 2000. His contract with Geico was identical to David's. After he terminated his contract with Geico, he was not able to retain or own his own business or solicit or contact his former customers. McKenzie did not receive any money when he disposed of his business in 2000. He was only paid the commissions on existing renewals up to the date of his termination. He understood that, upon terminating, he had no vested rights and was unable to sell to another agent.

Richard G. Eitzel lives in Fairfax, Virginia, and worked for a captive Geico insurance agency from March 1992 until June 2000. He also worked under an agreement identical to David's agreement with Geico. He took over his business from his father. His father was not able to do anything with the business once Eitzel began handling it. When Eitzel later terminated his arrangement with Geico, he was unable to receive anything for his business.

The trial court found Cutler's value to be $243,000 and specifically stated it its order as follows: "The value of [David]'s business is determined by the capitalized[-]returns method, which the court finds reflects the most accurate value based on the continuing operation of the business by [David] with no need to sell or abandon said business in the foreseeable future." The "capitalized returns"

fastcase

method is one form of the income approach. The court found the total of marital assets to be $680,738. Susan got $206,802 in marital assets. The court distributed the marital home and several deferred pension assets, IRAs, and more than $25,000 in personal property to Susan and assigned her both the mortgage on the home and a $6,000 credit card debt. David got $261,936 in marital assets. The court distributed to David the value of the business, a small SEP pension, and approximately $7,300 in personal property. He was also assigned a $16,000 credit card debt. David appeals.

II. ANALYSIS

David argues on appeal that we must remand this cause because the trial court's finding that the value of Cutler was $243,000 is against the manifest weight of the evidence and that this error in valuation substantially and materially affected the equitable distribution of the marital property in this case. We agree and remand for a redistribution of the marital property using $32,000 as the valuation of the agency.

Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/503(d) (West 2000)) states that the court shall divide marital property in "just proportions." The first step, therefore, is to establish the value of such assets. *In re Marriage of Grunsten,* 304 Ill.App.3d 12, 17, 237 Ill.Dec. 342, 709 N.E.2d 597, 601 (1999). A trial court's determination of value will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Grunsten,* 304 Ill.App.3d at 17, 237 Ill.Dec. 342, 709 N.E.2d at 601.

Cutler is a closely held corporation, with David as its only shareholder and principal. This agency is what is known as a captive agency—which means that it can sell no line of insurance other than that of its principal, Geico—as opposed to a multiline insurance agency. David's exclusive agreement with Geico restricts the business in many ways. Under the agreement, David is limited to selling only Geico

[778 N.E.2d 767]

automobile insurance. If he were to terminate this agency agreement, David would not own his renewals, which means that he could not obtain future commissions. Additionally, David cannot solicit his former customers for up to a year. If David were to dispose of his business, he could only transfer the Geico agency agreement with Geico's written permission. At the trial, David presented undisputed evidence, by way of his testimony and two evidence depositions, that there is simply no market for Geico insurance agencies once an agent decides to terminate the agency agreement or Geico decides to terminate the agent.

The experts who testified at the trial applied two different methods of valuation and arrived at widely divergent values for the agency. Susan's expert, Tzinberg, used the market approach method and found the agency value to be $270,000. David's expert, Reedy, used the asset approach method and found the agency value to be $32,000. The trial court, however, rejected both of those opinions and found the value to be $243,000 based on a capitalized returns method-a form of the income approach method. The only reference in the record to this amount was a passing statement made by Tzinberg, when he indicated that after determining that the value was $270,000 based on the market approach, he did a "sanity check" and applied a capitalized returns analysis, under which he found the value to be $243,000.

Courts of review have found it acceptable for a trial court to select a valuation between opposing values in evidence when a record contains conflicting evidence on the valuation. See *In re Marriage of Head,* 273 Ill.App.3d 404, 410, 210 Ill.Dec. 270, 652 N.E.2d 1246, 1251 (1995). In this instance,

fastcase

however, the court's decision of a valuation between $270,000 and $32,000 was both arbitrary and against the manifest weight of the evidence, because one of the conflicting values was not based on evidence supported by a proper foundation. See *In re Marriage of Head,* 273 Ill.App.3d at 410-11, 210 Ill.Dec. 270, 652 N.E.2d at 1251. Tzinberg's valuation of $270,000 lacked a proper foundation. He based his valuation amount on the market approach, yet he failed to determine the fair market value of the agency. He relied instead on a rule of thumb, which was clearly inapplicable to this situation. Fair market value is generally "measured by what a willing buyer would pay a willing seller in a voluntary transaction." *In re Marriage of Grunsten,* 304 Ill.App.3d at 17, 237 Ill.Dec. 342, 709 N.E.2d at 601. This approach is based on the assumption of a hypothetical sale of the business. Tzinberg, however, admitted that he did not consider a sale of Cutler. Under his method, he valued the business without taking into consideration factors that would significantly affect the sale, such as the restrictions in the Geico contract. These restrictions clearly have a significant negative impact on the fair market value of the agency. Because Tzinberg used this rule of thumb (which applied to multiline or independent agencies), rather than actually determining the fair market value of the agency, we find that his valuation was not supported by proper evidence. Thus, it was improper for the court to select a valuation between Tzinberg's and Reedy's.

The Illinois Marriage and Dissolution of Marriage Act clearly stipulates that all marital assets must be valued as of the date of the dissolution of the marriage. 750 ILCS 5/503 (West 2000). In *In re Marriage of Frazier,* 125 Ill.App.3d 473, 80 Ill.Dec. 838, 466 N.E.2d 290 (1984), we specifically concluded that the application of the "capitalization of earnings" method was an improper way to value a business

[778 N.E.2d 768]

as a marital asset, because the calculation would necessarily include as marital property labor which would be performed subsequent to the dissolution. The inclusion of expected future earnings of Cutler is improper in the consideration of the distribution of marital assets in this case, and this error has produced a "grossly excessive valuation" (*In re Marriage of Frazier,* 125 Ill.App.3d at 477, 80 Ill.Dec. 838, 466 N.E.2d at 293). Based on our decision in *In re Marriage of Frazier,* we find that the court's reliance on the valuation determined by the capitalized returns method was error.

Assuming, *arguendo,* that the method the court applied was proper, the court's reliance on a single cursory reference to the value of the agency, absent any evidentiary basis for the determination, was also against the manifest weight of the evidence. There is simply no basis in the record to support a valuation based upon capitalized returns. Even Susan's expert, Tzinberg, stated that such a method does not apply to captive agencies and that he would not use it in this instance.

In contrast to both the court's valuation and Tzinberg's valuation, Reedy's valuation, determined by applying the asset approach, was supported by proper evidence. While the trial court expressly rejected $32,000 as the valuation of the agency, neither Susan nor the court disputed that figure as the asset value of the agency. We find that this was the only properly proven value of the business, and we therefore accept that as the valuation for use in the distribution of the marital property.

The net value of the marital assets involved in this dissolution case was $452,557, which included the valuation of the agency at $243,000. Because the value assigned to Cutler was over half of the net value of the marital assets, there is no doubt that the use of the erroneous valuation of the agency both substantially and materially affected the equitable distribution of marital

property between Susan and David. Therefore, we remand this cause for a redistribution of the marital property.

III. CONCLUSION

For the foregoing reasons, we reverse the decision of the trial court and remand the cause with directions that $32,000 be used as the valuation of the agency in the redistribution of marital property.

Reversed; cause remanded with directions.

WELCH and HOPKINS, JJ., concur.

874 N.E.2d 916
In re MARRIAGE OF Theresa A. JOYNT, Petitioner-Appellant, and
v.
Michael J. Joynt, Respondent-Appellee.
No. 3-06-0919.
Appellate Court of Illinois, Third District.
August 16, 2007.

[874 N.E.2d 917]

David M. Lynch, Lynch & Bloom, Peoria, for Theresa A. Joynt.

David H. McCarthy, Peoria, for Michael J. Joynt.

Presiding Justice LYTTON delivered the opinion of the court:

Plaintiff, Theresa Joynt, appeals the trial court's judgment dissolving her 12-year marriage to defendant, Michael Joynt. Theresa argues that the trial court erred in characterizing the retained earnings of a closely held corporation as non-marital property. Alternatively, she claims that the trial court's distribution of marital assets was inequitable. We affirm.

Theresa filed a petition for dissolution of marriage on August 20, 2004. At trial, the parties stipulated that Michael owned 41 shares of stock in Mississippi Value Stihl, Inc. (MVS), worth approximately $94,000 and that the stock was nonmarital property.

James Carey, an accountant for MVS, testified that the company was closely held and designated as a subchapter S corporation. Michael served as the company's president and owned 33% of the corporate stock. Michael's sister owned 19.4% of the stock, and Michael's father owned 47.6%. Carey testified that Michael's gross pay from the company, approximately $240,000 to $250,000 per year, was fair compensation in the industry. In 2004, Michael's total net income from the corporation after the payment of taxes was $162,545.

Carey stated that based on the company's balance sheet, the retained earnings of the business in 2004 were $3,750,929. Those earnings were held by MVS for future operating expenses. The company did not pay dividends to its stockholders from the retained earnings account. However, if the company chose to do so, it could pay retained earnings dividends through liquidation of the business or declaration of the corporate board of directors. Michael would not be able to receive a retained earnings dividend individually unless an equal dividend were paid to and agreed upon by a majority of the shareholders. Michael's 33% ownership in the corporation entitled him to one-third of the retained earnings. The estimated value of Michael's retained earnings ownership at the time of the trial was $1,250,309.

Carey further testified that Michael had a buyout contract with his father. The contract provided that, upon his father's death, Michael would become the majority stockholder of the company by purchasing his father's stock. At that time, as the majority shareholder, Michael would be able to determine distribution payments from the retained earnings without approval from the remaining shareholder.

Carey further testified that the retained earnings are not reported as an asset. He

[874 N.E.2d 918]

explained that the corporation's stock would be an asset and "then the stock has to be valued." If you wanted to value the company's stock at book value, "in essence your [sic] valuing the retained earnings." Carey stated that a company's book value is the assets minus the debts, which equals the stockholders' equity.

fastcase

The trial court concluded that the retained earnings of the closely held corporation should be classified as nonmarital property. In so doing, the court emphasized "this is not to suggest that under no circumstances would retained earnings of a nonmarital interest in a subchapter S corporation be classified as marital." The court noted that Michael was the president of the company and that the value of the retained earnings account had increased significantly in recent years. However, in reaching its determination in this case, the court placed "considerable weight on the significant amount of cash distributed by the company to its officers over the last three years versus the amount it has retained, along with the evidence in its entirety on the issue of control."

In addition to the division of property, the trial court ordered Michael to pay temporary maintenance and child support, and awarded Theresa approximately 60% of the marital estate.

ANALYSIS

I. Retained Earnings

On appeal, Theresa contends that the trial court erred in failing to classify Michael's interest in the retained earnings account of the closely held corporation as marital property.

Generally, we will not disturb a court's determination that an asset is nonmarital unless that finding is against the manifest weight of the evidence. *In re Marriage of Hegge,* 285 Ill.App.3d 138, 220 Ill.Dec. 853, 674 N.E.2d 124 (1996). However, that standard of review is based on the presumption that determining whether an asset is marital involves weighing the credibility of the witnesses. *In re Marriage of Werries,* 247 Ill.App.3d 639, 186 Ill.Dec. 747, 616 N.E.2d 1379 (1993). In this case, the parties have asked us to rule on the legal effect of certain facts. Those facts are not in dispute, and the witnesses' credibility is not an issue. Accordingly, our review is *de novo*. *In re Marriage of Peters,* 326 Ill.App.3d 364, 260 Ill.Dec. 169, 760 N.E.2d 586 (2001).

Whether retained earnings should be classified as marital property is an issue of first impression in Illinois. As noted by both parties, however, other states have generally held that retained earnings are nonmarital. Those jurisdictions have reached that conclusion based on the evaluation of two primary factors: (1) the nature and extent of the stock holdings, i.e., is a majority of the stock held by a single shareholder spouse with the power to distribute the retained earnings; and (2) to what extent are retained earnings considered in the value of the corporation. See 1 H. Gitlin, Gitlin on Divorce § 8-13(j), at 8-172.2 (3rd ed.2007).

In *Allen v. Allen,* 168 N.C.App. 368, 607 S.E.2d 331 (2005), the court concluded that the retained earnings in a subchapter S corporation in which the husband was a 25% shareholder was properly characterized as a nonmarital asset where the earnings were a component of the book value of the corporation. In *In re Marriage of Robert,* 652 N.W.2d 537 (Minn.App.2002), the court ruled that the wife's interest in a subchapter S corporation's retained earnings account was not a marital asset since the wife was a minority shareholder who did not have authority to distribute the earnings to herself or other shareholders and earnings were not attributable to her

[874 N.E.2d 919]

entrepreneurial efforts during the marriage.

Other jurisdictions have also classified retained earnings accounts as nonmarital. See *Swope v. Swope,* 122 Idaho 296, 834 P.2d 298 (1992) (marital estate has no interest in retained earnings of corporation, the stock of which is held as separate property, unless the spouse stockholder has sufficient control of

fastcase

the corporation to be able to cause the earnings to be retained); *In re Marriage of Hoffmann,* 676 S.W.2d 817 (Mo.1984) (retained earnings of closely held corporation in which husband's ownership interest was 35% did not constitute marital property).

On the other hand, when 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. In *Metz-Keener v. Keener,* 215 Wis.2d 626, 573 N.W.2d 865 (1997), the court determined that the retained earnings fund of a corporation inherited by the wife was income separate from the corporation and should be included in the marital estate. The court reached that conclusion because the wife had "full ownership and possession of all the corporate shares and that she [was] the sole managing force behind the corporation." *Metz-Keener,* 573 N.W.2d at 869; see also *Heineman v. Heineman,* 768 S.W.2d 130 (Mo.App. W.D.1989) (retained earnings account in wife's previously unincorporated art studio corporation was marital property because wife was sole shareholder and earnings were retained in lieu of salary). Thus, if the shareholder spouse controls the corporate distribution, the retained earnings are marital property.

Here, MVS's retained earnings are nonmarital. The company's stock was held in unequal shares by three individuals. Michael possessed only a minority percentage of those shares and was not a controlling shareholder. As only one of three board members, he could not have unilaterally declared or withheld dividends.

Although Theresa acknowledges the opposing authority, she maintains that the retained earnings should be classified as a marital asset because they are not corporate assets but rather income available to the shareholder.

A subchapter S corporation is a pass-through entity utilized for federal tax purposes. See *Metz,* 215 Wis.2d 626, 573 N.W.2d 865. Unlike a subchapter C corporation, MVS does not pay corporate-level taxes on its income. Instead, the corporation's income is taxed directly to its shareholders based on their ownership of corporate stock, whether or not the income is actually distributed to the shareholders. See I.R.C. §§ 1361-1379 (2000) (defining and explaining subchapter S and subchapter C corporations). A subchapter S corporation monitors its retained corporate earnings using an account which is then used to determine each shareholder's basis for taxed but undistributed corporate income. However, retained earnings and profits of a subchapter S corporation are a corporate asset and remain the corporation's property until severed from the other corporate assets and distributed as dividends. See *Robert,* 652 N.W.2d at 543; *Hoffmann,* 676 S.W.2d at 827.

In this case, the retained earnings were part of the corporate assets. The expert witness testified that the earnings were held by the corporation to pay expenses. Although, under the pass-through provisions for subchapter S corporations, these undistributed earnings were taxed to Michael and Theresa as "income" on their individual income tax return, MVS paid the tax through year-end designated payments

[874 N.E.2d 920]

made to Michael. Further, as the president of the company, Michael received a salary, plus biannual bonuses, as compensation for managing the daily operations. The only expert testimony found in the record indicates that Michael's compensation during the marriage was reasonable and fair for the services he provided.

While the trial court expressed its concern that MVS's retained earnings account

fastcase smarter legal research

may have been used to "shelter" marital income, the court found insufficient evidence to support that conclusion. See *Speer v. Quinlan,* 96 Idaho 119, 525 P.2d 314 (1974) (although shareholder spouse was president of closely held corporation, no evidence that corporate earnings were retained to defraud marital estate). We agree with the trial court's assessment of the record.

Because, Michael was unable to authorize a payment of the retained earnings as a dividend without shareholder approval and because the earnings were a corporate asset, we hold that the retained earnings account of the corporation is a nonmarital asset.

II. Division of Marital Assets

Alternatively, Theresa claims that the trial court abused its discretion in its division of marital assets.

The touchstone of whether apportionment of marital property was proper is whether it is equitable in nature; each case resting on its own facts. *In re Marriage of Scoville,* 233 Ill.App.3d 746, 174 Ill.Dec. 394, 598 N.E.2d 1026 (1992). An equitable division of property does not require mathematical equality. *In re Marriage of Gentry,* 188 Ill.App.3d 372, 135 Ill.Dec. 939, 544 N.E.2d 435 (1989). Section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/101 *et seq.* 2004) lists certain factors to consider, including: (1) the value of the property assigned to each spouse; (2) the duration of the marriage; (3) the relevant economic circumstances of each spouse; (4) the age, health, station and occupation of each spouse; (5) the custodial provision for any children; and (6) the reasonable opportunity of each spouse for future acquisition of capital assets and income. 750 ILCS 5/503 (d) (West 2004). Absent an abuse of discretion, this court will not disturb the trial court's distribution of assets. *In re Marriage of Kerber,* 215 Ill.App.3d 248, 158 Ill.Dec. 717, 574 N.E.2d 830 (1991).

The court specifically considered Michael's ownership of substantial nonmarital assets and made its award of marital property at 60% to Theresa and 40% to Michael. In addition to the division of marital property, the trial court also awarded Theresa temporary maintenance, required Michael to maintain medical insurance coverage for her and the children, and ordered Michael to pay 75% of her uncovered medical expenses and 90% of the uncovered health related expenses for the children. The court adequately considered all the factors of section 503(d) in making its distribution of marital property, including the value of the nonmarital assets, Theresa's health, and her relative inability to acquire capital assets and income. In light of these factors, we find that the court did not abuse its discretion in awarding Theresa 60% of the marital estate.

CONCLUSION

The judgment of the circuit court of Peoria County is affirmed.

Affirmed.

CARTER and SCHMIDT, JJ., concurring.

fastcase smarter legal research

919 N.E.2d 480
In re MARRIAGE OF Daniel W. LUNDAHL, Petitioner-Appellant, and Susan Lundahl, n/k/a Susan Hopper, Respondent-Appellee.
No. 1-08-3541.
Appellate Court of Illinois, First District, Fifth Division.
November 25, 2009.

[919 N.E.2d 482]

R. Stephen Polachek, Polachek & Polachek, Barrington, IL, for Appellant.

Phillip J. Nathanson, The Nathanson Law Firm, Chicago, IL, for Appellee.

Justice FITZGERALD SMITH delivered the opinion of the court:

This action was for dissolution of marriage. The trial court granted the parties, Daniel W. Lundahl (Lundahl) and Susan Hopper (Hopper), a dissolution of their marriage and awarded Hopper 100% of her nonmarital assets and 100% of the marital assets, while awarding Lundahl 100% of his nonmarital assets. Thereafter, both parties filed motions to reconsider, and the trial court subsequently reclassified the retained earnings of Lundahl's company from nonmarital property to marital property. Lundahl filed a motion to reconsider, which was denied. Lundahl now appeals arguing that (1) the trial court's original classification of his retained earning as nonmarital property was correct, (2) the amount of retained earnings found was incorrect, and (3) the trial court erred in awarding attorney fees to Hopper. For the following reasons, we affirm in part and remand for further proceedings in accordance with this Opinion.

I. BACKGROUND

Lundahl and Hopper met in early 2004 and were married on July 3, 2004. At the time of their marriage, Lundahl owned two businesses: APS Corporation USA and American Internet Services Network Corporation (AIS). Lundahl was the sole shareholder of each corporation, and each corporation was taxed as a subchapter S corporation for federal income tax purposes. The parties were married for approximately two years.

During the marriage, APS Corporation USA reported no income for the calendar years of 2004 and 2005, and it conducted no business in those years. AIS, on the other hand, produced income, which was reported on Lundahl and Hopper's joint income tax return for the calendar year of 2004 in the amount of $139,688. On Lundahl's individual income tax return for the calendar year of 2005, AIS produced $260,754.

Lundahl was paid a salary by AIS in the amount of $52,047 in 2004, $50,962 in 2005, and approximately $50,000 in 2006. In addition, Lundahl took disbursements from AIS's earnings and assets in the amount of $147,000 in 2004, $218,500 in 2005, and $411,500 in 2006. All of Lundahl's salary and disbursements were deposited into the parties' joint checking account, or were used to pay the parties' taxes.

During the parties' marriage, Hopper began working outside the marital home in August of 2005. For three months of the marriage, she deposited $1,000 each month from her employment income into the parties' joint checking account. Other than that, she maintained her own bank account, into which she deposited her own wages. Lundahl did not have access to such account.

[919 N.E.2d 483]

Lundahl filed his petition for dissolution of marriage in March of 2006. Hopper filed a counterpetition for dissolution of marriage on July 18, 2006. Prior to trial, Lundahl was granted exclusive possession of the marital residence, which was his nonmarital property.

Hopper was provided $4,000 per month for temporary maintenance from August 2006 through the date of the trial court's memorandum opinion and judgment for dissolution of marriage on April 24, 2007.

In its memorandum opinion and judgment for dissolution of marriage, the trial court found that the testimony of Hopper was neither credible nor reasonable, but that testimony of Lundahl was both credible and reasonable. The trial court classified the parties' assets and awarded Hopper 100% of the marital assets, and 100% of her nonmarital assets. The trial court awarded Lundahl 100% of his nonmarital assets, which included his retained earnings from AIS.

In its reasoning, the trial court noted that the statute which governs marital property (750 ILCS 5/503(a) (West 2006)), states in pertinent part, "`marital property' means all property acquired by either spouse." The trial court found that this definition focused on which spouse, if any received the retained earnings. The trial court noted that in the instant case, neither party acquired the retained earnings because the earnings were the property of AIS and were located in AIS's corporate account. Because the parties agreed that AIS was Lundahl's nonmarital asset, the trial court found that the retained earnings constituted nonmarital property.

Thereafter, both parties filed motions to reconsider the trial court's decision. Prior to ruling on the parties' posttrial motions, the Third District of the Illinois Appellate Court issued a relevant case, titled *In re Marriage of Joynt,* 375 Ill.App.3d 817, 314 Ill.Dec. 551, 874 N.E.2d 916 (2007). The trial court requested that the parties brief the issue of classification of retained earnings in light of *Joynt*.

On December 10, 2007, the trial court issued its judgment order reclassifying the retained earnings from AIS as marital property. The trial court determined that the retained earnings amounted to $730,000. Hopper was awarded $305,900, which represented 40% of the marital estate. In its reasoning, the trial court applied *Joynt* and found that because Lundahl was the sole shareholder, officer, and director of AIS, and because he had sole discretion over how much of the retained earnings should be distributed to him, the retained earnings were marital property. The trial court further relied on the fact that AIS was a successful entity solely through his efforts, his expertise, and his marketing abilities.

Hopper's attorney, Michael Kalcheim, filed his petition for interim fees and costs on February 6, 2008. After hearing arguments from both parties and after reviewing billing invoices, the trial court awarded Kalcheim $14,500 for fees and costs. Lundahl now appeals.

II. ANALYSIS

On appeal, Lundahl argues that (1) the trial court's original decision classifying AIS's retained earnings as his nonmarital property was correct, (2) the amount of retained earnings found by the trial court was incorrect, and (3) the trial court erred when it awarded Hopper attorney fees.

A. Classification of a Subchapter S Corporation's Retained Earnings

Lundahl's first contention on appeal is that the trial court erred in finding that the retained earnings of AIS constituted marital property. Lundahl relies on section

[919 N.E.2d 484]

503 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/503 (West 2006)) to support his position and urges this court not to follow the recent decision of *Joynt*. Hopper, on the other hand, maintains that according to *Joynt,* retained earnings of a subchapter S corporation

fastcase smarter legal research

constitute income, and because such income was attributable to Lundahl's personal efforts, such earnings were marital property. We begin by looking at the statute, which states in pertinent part:

> "(a) For purposes of this Act, `marital property' means all property acquired by either spouse subsequent to the marriage, except the following, which is known as `non-marital property':
>
> * * *
>
> (6) property acquired before the marriage;
>
> (7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section; and
>
> (8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse.
>
> * * *
>
> (c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:
>
> * * *
>
> (2) * * * 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. * * * Personal effort of a spouse shall be deemed a contribution by the marital estate." 750 ILCS 5/503 (West 2006).

In the trial court, Hopper argued that section 503(a)(8) applied in this case because the retained earnings constituted income, and that because such income was attributable to Lundahl's personal efforts, that income must therefore be classified as marital property. The trial court found that Hopper misconstrued section 503. It noted that if the retained earnings belonged to AIS, they would be Lundahl's nonmarital property via his stock ownership in AIS. On the other hand, if the retained earnings belonged to Lundahl personally, they would be marital property subject to division. The trial court reiterated that marital property means all property acquired by either spouse, and then noted that here, neither spouse received the retained earnings. Accordingly, the trial court found that the retained earnings were the property of AIS and located in AIS's corporate account and were therefore Lundahl's nonmarital property.

Additionally, the court found that Hopper had completely ignored sections 503(a)(7) and 503(c)(2) of the Act, which provide for the possible reimbursement to the marital estate for a spouse's personal efforts that increase the value and retained earnings of property. The trial court noted that Hopper's argument would render sections 503(a)(7) and 503(c)(2) meaningless because she defined AIS's retained earnings as marital property simply because Lundahl's personal efforts increased the value of the retained earnings. The trial court stated, "[i]f this were

fastcase

the correct definition of marital property, `reimbursement' of the marital estate under

[919 N.E.2d 485]

503(a)(7) and 503(c)(2) would be unnecessary in every case and there would be no need for the inclusion of 503(a)(7) and 503(c)(2) in the 503 statute." The trial court found that looking at the Act as a whole, and recognizing the common rule of law that it is not appropriate to construe a statute in such a way as to render some of its parts meaningless, AIS's retained earnings constituted Lundahl's nonmarital property.

After the parties filed motions to reconsider, the *Joynt* case was issued by the Third District of the Illinois Appellate Court. In *Joynt,* the husband, Michael, owned 41 shares of stock in Mississippi Value Stihl, Inc. (MVS). *Joynt,* 375 Ill. App.3d at 818, 314 Ill.Dec. 551, 874 N.E.2d 916. MVS was a closely held business designated as a subchapter S corporation. Michael served as the company's president and owned 33% of the corporate stock. *Joynt,* 375 Ill.App.3d at 818, 314 Ill.Dec. 551, 874 N.E.2d 916. The retained earnings of MVS in 2004 were $3,750,929 and were held by MVS for "future operating expenses." *Joynt,* 375 Ill.App.3d at 818, 314 Ill.Dec. 551, 874 N.E.2d 916. MVS did not pay dividends to its stockholders from the retained earnings account. However, if the company so chose, it could pay retained earnings dividends through liquidations of the business or a declaration of the corporate board of directors. *Joynt,* 375 Ill.App.3d at 818, 314 Ill.Dec. 551, 874 N.E.2d 916. Michael was unable to receive a retained earnings dividend individually unless an equal dividend was paid to and agreed upon by a majority of the shareholders. Michael's 33% ownership in the corporation entitled him to one-third of the retained earnings. *Joynt,* 375 Ill. App.3d at 818, 314 Ill.Dec. 551, 874 N.E.2d 916. The trial court found that in this case, the retained earnings were nonmarital property, but noted that "`this is not to suggest that under no circumstances would retained earnings of a nonmarital interest in a subchapter S corporation be classified as marital.'" *Joynt,* 375 Ill.App.3d at 818, 314 Ill.Dec. 551, 874 N.E.2d 916. On appeal, Michael's wife contended that the trial court erred in failing to classify Michael's interest in the retained earnings as marital property.

The Third District noted that other jurisdictions have generally held that retained earnings are nonmarital based on the evaluation of two primary factors: "(1) the nature and extent of the stock holdings, *i.e.,* is a majority of the stock held by a single shareholder spouse with the power to distributed the retained earnings; and (2) to what extend are retained earnings considered in the value of the corporation." *Joynt,* 375 Ill.App.3d at 819, 314 Ill.Dec. 551, 874 N.E.2d 916. The court, relying in part on *Metz v. Keener,* 215 Wis.2d 626, 573 N.W.2d 865 (1997), noted that "when a shareholder spouse has a majority of stock or otherwise has a 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, 314 Ill.Dec. 551, 874 N.E.2d 916. The *Joynt* court stated that in *Metz,* the court found that retained earnings fund of a corporation inherited by the wife was income separate from the corporation and could be included in the marital estate because the wife had "`full ownership and possession of all the corporate shares and that she [was] the sole managing force behind the corporation.'" *Joynt,* 375 Ill.App.3d at 820, 314 Ill.Dec. 551, 874 N.E.2d 916, quoting *Metz,* 215 Wis.2d at 634, 573 N.W.2d at 869. The *Joynt* court therefore concluded that "if the shareholder spouse controls the corporate distribution, the retained earnings are marital property." *Joynt,* 375 Ill.App.3d at 820, 314 Ill.Dec. 551, 874 N.E.2d 916.

[919 N.E.2d 486]

fastcase

Based in part on such propositions, the *Joynt* court found that MVS's retained earnings were nonmarital because the company's stock was held in three unequal shares by three individuals; Michael possessed only a minority percentage of those shares and was not a controlling shareholder; and as one of three board members, he could not have unilaterally declared or withheld dividends. *Joynt,* 375 Ill.App.3d at 820, 314 Ill.Dec. 551, 874 N.E.2d 916.

The wife in *Joynt,* however, went on to argue that the retained earnings should be classified as a marital asset because they were not corporate assets but rather income available to the shareholder. The court found that the retained earnings were part of the corporate assets and were held by the corporation to pay expenses. The court noted that although the undistributed earnings were taxed to Michael and his wife as their "income" on their individual income tax returns, MVS paid the tax through year-end designated payments made to Michael. Finally, the court concluded, "[b]ecause Michael was unable to authorize a payment of the retained earnings as a dividend without shareholder approval and because the earnings were a corporate asset, we hold that the retained earnings account of the corporation is a nonmarital asset." *Joynt,* 375 Ill.App.3d at 821, 314 Ill.Dec. 551, 874 N.E.2d 916.

Based upon the above law set out in *Joynt,* the trial court in the case at bar reclassified AIS's retained earnings as marital property. The court noted that while the *Joynt* decision was "not directly applicable to this case, as the facts herein differ from the facts presented in *Joynt,*" because Lundahl was a sole shareholder, sole officer, and sole director of AIS; had sole discretion over how much of the retained earnings should be distributed to him; and that the corporation was a successful entity "solely through his efforts, and his expertise, and his marketing abilities," the retained earnings of AIS constituted marital property.

Lundahl now appeals arguing that the *Joynt* court's reliance on other jurisdictions was misplaced, and that the trial court's original ruling, whereupon it relied on the Act rather than *Joynt,* was correct.

We first note that a trial court's classification of property will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *In re Marriage of Jelinek,* 244 Ill.App.3d 496, 503, 184 Ill.Dec. 692, 613 N.E.2d 1284 (1993). The disposition of property is governed by section 503 of the Act. *Jelinek,* 244 Ill.App.3d at 503, 184 Ill.Dec. 692, 613 N.E.2d 1284.

Lundahl argues that the Act, combined with Illinois case law precedent, reveals that AIS's retained earnings should have been classified as nonmarital property. Lundahl first points to a string of cases which holds that a business property interest owned by one spouse prior to the parties' marriage is nonmarital property and retains its nonmarital classification despite a significant increase in its value attributable to personal efforts of a spouse; and that if the husband makes a reasonable salary during the marriage, the marital estate is not entitled to reimbursement. See *In re Marriage of Kennedy,* 94 Ill. App.3d 537, 49 Ill.Dec. 927, 418 N.E.2d 947 (1981) (music stores owned by husband prior to marriage were his nonmarital property and increase in value of those nonmarital businesses was also his nonmarital property); *In re Marriage of Kamp,* 199 Ill.App.3d 1080, 146 Ill.Dec. 57, 557 N.E.2d 999 (1990) (finding that the Act leaves no doubt but that a business property interest owned by one spouse prior to the parties' marriage is nonmarital property and retains its nonmarital classification

[919 N.E.2d 487]

fastcase

despite a significant increase in its value during marriage); *In re Marriage of Landfield,* 209 Ill.App.3d 678, 153 Ill.Dec. 834, 567 N.E.2d 1061 (1991) (a business property interest owned by one spouse prior to the parties' marriage is nonmarital and retains its nonmarital classification despite a significant increase in its value during marriage, and if a contributing spouse's salary is found to be reasonable for the efforts contributed, the nonmarital business need not reimburse the marital estate because the contributing spouse's salary during marriage is marital property and thus the marital estate has already been compensated); *In re Marriage of Perlmutter,* 225 Ill.App.3d 362, 167 Ill.Dec. 340, 587 N.E.2d 609 (1992) (if husband's salary is found to be a reasonable compensation for his efforts, the nonmarital business need not reimburse the marital estate because husband's salary during marriage is marital property); *In re Marriage of Steinberg,* 299 Ill.App.3d 603, 233 Ill.Dec. 611, 701 N.E.2d 254 (1998) (marital estate not entitled to reimbursement from the accounts receivable of a nonmarital corporation because the annual income received by the husband during the course of the marriage adequately compensated the marital estate).

Lundahl argues, based on the above-cited cases and section 503(a)(7) of the Act (750 ILCS 5/503(a)(7) (West 2006)), that because AIS was acquired before his marriage to Hopper, despite its increase in value due to his personal efforts, the retained earnings of the corporation remained nonmarital as part of AIS's property. Hopper argues, however, relying on *Joynt,* that the retained earnings constituted Lundahl's income. She further notes, relying on section 503(a)(8) of the Act rather than section 503(a)(7), that income from previously acquired property becomes marital if it is a result of a spouse's personal efforts. 750 ILCS 5/503(a)(8) (West 2006). Thus, Hopper maintains that because AIS's retained earnings were attributable to Lundahl's personal efforts, the retained earnings were marital. We agree with Hopper.

As the Third District noted in *Joynt,* other states have generally held that retained earnings are nonmarital by evaluating two primary factors: "(1) the nature and extent of the stock holdings, *i.e.,* is a majority of the stock held by a single shareholder spouse with the power to distribute the retained earnings; and (2) to what extent are retained earnings considered in the value of the corporation." *Joynt,* 375 Ill.App.3d at 819, 314 Ill.Dec. 551, 874 N.E.2d 916. Contrary to the parties' interpretation of the case, we do not believe that the *Joynt* court has set forth a "two-part" test. Rather, the Third District acknowledged that these were two primary factors that other jurisdictions relied upon. Some jurisdictions, as Lundahl noted, relied on only one of those two factors. Nonetheless, we will evaluate both factors in light of the facts of the case at bar.

In *Joynt,* the court found that MVS's retained earnings were nonmarital because the company's stock was held in unequal shares by three individuals; Michael possessed only a minority percentage of those shares and was not a controlling shareholder, and as only one of three board members, he could not have unilaterally declared or withheld dividends. *Joynt,* 375 Ill.App.3d at 820, 314 Ill.Dec. 551, 874 N.E.2d 916. Contrarily in this case, Lundahl wholly owned AIS, was the sole shareholder of AIS, and could have unilaterally declared or withheld dividends. In fact, Lundahl unilaterally took disbursements from AIS's retained earnings in the amount of $147,000 in 2004, $218,000 in 2005, and $411,500 in 2006 without requiring

[919 N.E.2d 488]

approval from anyone else. Accordingly, we find that the retained earnings were not in fact an asset of the corporation but, rather, constituted Lundahl's income.

The *Joynt* court found that the retained earnings of MVS, the subchapter S

fastcase

corporation in question, were a corporate asset, and thus nonmarital. The court based this decision on the fact that the retained earnings were held by the corporation to pay expenses and the fact that although the retained earnings were taxed to the husband and wife as "income" on their individual income tax return, MVS paid the tax through year-end designed payments made to Michael. *Joynt,* 375 Ill.App.3d at 821, 314 Ill.Dec. 551, 874 N.E.2d 916. Contrarily in the case at bar, the retained earnings of AIS 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 Lundahl who paid the income tax on the earnings. Accordingly, we find that the retained earnings constituted Lundahl's income, rather than an asset of AIS. See *Ramon v. Ramon,* 963 A.2d 128, 133 (Del.2008), quoting *J.D.P. v. F.J.H.,* 399 A.2d 207, 210 n. 1 (Del.1979) (retained earnings are "`corporate net income which would be available for distribution as dividends, for payment of wages, salaries and bonus, and other proper corporate purposes'"; they are active earnings generated and retained during the marriage that add to the value of a premarital asset, in contrast to the passive increase in value of premarital earnings which is protected by the statute).

We therefore find that section 503(a)(8) of the Act applies. Section 503(a)(8) states that income from property acquired prior to marriage is nonmarital property if it is not attributable to the personal effort of a spouse. See 750 ILCS 5/503(a)(8) (West 2006). Lundahl was the sole owner and shareholder of AIS, and thus the income of AIS during the marriage was attributable to Lundahl, making such income marital property. Accordingly, pursuant to both *Joynt* and the statute, the retained earnings of AIS were properly classified as marital property by the trial court.

B. Amount of Retained Earnings

Lundahl's next contention on appeal is that the trial court's valuation of the retained earnings in the amount of $730,000 was against the manifest weight of the evidence and the trial court's award to Hopper of 40% of that amount was an abuse of discretion.

Section 503(d) of the Act states that the court shall divide marital property in "just proportions." 750 ILCS 5/503(d) (West 2006). The first step, therefore, is to establish the value of such assets. *In re Marriage of Grunsten,* 304 Ill.App.3d 12, 17, 237 Ill.Dec. 342, 709 N.E.2d 597 (1999). Once a trial court has classified property as either marital or nonmarital, that decision will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *In re Marriage of Jelinek,* 244 Ill.App.3d 496, 503, 184 Ill.Dec. 692, 613 N.E.2d 1284 (1993). The manifest weight of the evidence standard is used when assigning value to an asset after classification because valuation of marital assets is generally a factual determination. *In re Marriage of Hubbs,* 363 Ill.App.3d 696, 700, 300 Ill.Dec. 220, 843 N.E.2d 478 (2006). Both parties cite *In re Marriage of Cutler,* 334 Ill.App.3d 731, 268 Ill.Dec. 496, 778 N.E.2d 762 (2002), in support of their positions.

In *Cutler,* the husband David was the only shareholder and principal of a closely held corporation. *Cutler,* 334 Ill.App.3d at 736, 268 Ill.Dec. 496, 778 N.E.2d 762. The agency was a "captive agency" — which means it could not sell insurance other than that of its principal, Geico. *Cutler,*

[919 N.E.2d 489]

334 Ill.App.3d at 736, 268 Ill.Dec. 496, 778 N.E.2d 762. The experts who testified at trial applied two different methods of valuation and arrived at divergent values for the agency. The wife's expert used the market approach method and found the agency value to be $270,000. David's expert used the asset approach method and found the agency value

fastcase smarter legal research

to be $32,000. The trial court, however, rejected both opinions and found the value to be $243,000 based on a capitalized returns method — a form of the income approach method. *Cutler,* 334 Ill.App.3d at 736, 268 Ill.Dec. 496, 778 N.E.2d 762. The only reference in the record to such amount was a passing statement made by the wife's expert when he indicated that after determining the value was $270,000 based on the market approach, he applied the capitalized returns analysis under which he found the value to be $243,000. *Cutler,* 334 Ill.App.3d at 736, 268 Ill.Dec. 496, 778 N.E.2d 762. On appeal, the *Cutler* court found that the trial court's reliance on a single cursory reference to the value of the agency, absent any evidentiary basis for the determination, was against the manifest weight of the evidence. *Cutler,* 334 Ill.App.3d at 737, 268 Ill.Dec. 496, 778 N.E.2d 762.

In the case at bar, no expert testimony was offered as to the value of the retained earnings. In its first memorandum opinion, issued April 24, 2007, the trial court found that AIS had approximately $900,000 in retained earnings. After the parties both filed motions to reconsider the trial court's judgment on other grounds, the *Joynt* case was issued.

On September 24, 2007, Hopper filed a supplemental brief in reference to the applicability of *In re Joynt.* In the last paragraph of such brief Hopper stated that the "amount of retained earnings in dispute is approximately $730,000." She did not indicate from where she got such number. In his reply brief, Lundahl denied that the retained earnings were $730,000. Rather, he noted that the only evidence in the record relating to retained earnings was the corporate federal income tax returns for the years 2004 and 2005, which reflected that the retained earnings as of December 31, 2005, were $493,130.

Thereafter, on October 16, 2007, Lundahl filed a motion to reopen proofs. In his motion, Lundahl claimed that at the time of trial, the 2006 corporate tax returns were not available, but that they were currently available. Lundahl stated that if the trial court was going to reverse itself and find the retained earnings to be marital, it needed to have evidence of the amount of retained earnings. The trial court denied Lundahl's motion.

On November 19, 2007, Lundahl filed a motion to clarify the record, in which he stated that the trial court needed to accurately value the retained earnings and offered two different ways for the court to do so. The first option was for the trial court to use the Fidelity account records that were admitted at trial. Lundahl claims that such records reveal that the net profits of AIS, for the duration of the marriage, amounted to $913,620.25. Lundahl further claims that $685,000 was distributed to the marital estate during that time, leaving $228,620.25 to be classified as retained earnings. The second option Lundahl proposed in his motion to clarify the record was for the trial court to use the 2006 corporate tax returns, which he requested to be admitted into evidence. Lundahl claimed that such tax return would show that the amount of the retained earnings was $338,046 as of December 31, 2006.

On December 10, 2007, the trial court entered its final judgment order. In finding that the retained earnings were income, the curt noted that it must redistribute

[919 N.E.2d 490]

the marital estate. It noted that "[a]t the time of trial, based on the evidence presented by both sides, the Court found that there were in excess of $900,000 in retained income and earnings. The Court will use the figure argued in [Hopper's] brief that the corrected amount of income and retained earnings was $730,000."

fastcase

Lundahl now argues that such figure was against the manifest weight of the evidence because no evidence was presented to support the figure of $730,000. We agree. As in *Cutler,* we find that the trial court's reliance on a single cursory reference to the value of the agency, absent any evidentiary basis for the determination, was against the manifest weight of the evidence. See *Cutler,* 334 Ill.App.3d at 737, 268 Ill.Dec. 496, 778 N.E.2d 762. Moreover, Hopper points to no evidence in her brief to support the figure of $730,000. Accordingly, we remand this cause to the trial court for a specific finding of the amount of retained earnings.

Lundahl also argues that Hopper's award of 40% of the marital estate was an abuse of the trial court's discretion. In its original judgment, the trial court awarded Hopper 100% of the marital estate, which consisted of various monies from bank accounts, a tax refund, and furniture. Upon the trial court's second and final judgment, the trial court reclassified the retained earnings as marital property and then converted Hopper's award from 100% of the marital property to 40%, stating, "[a]fter careful review of the factors set forth in Section 750 ILCS 5/503(d) of the [Act], the Court awards [Hopper] forty percent (40%) of the marital estate and awards [Lundahl] sixty percent (60%) of the marital estate." Because we remand for a specific valuation of the retained earnings, which made up the majority of the marital estate, we remand for reconsideration of the distribution of the marital estate as well.

C. Attorney Fees

Lundahl's final argument on appeal is that the trial court's award of Hopper's attorney fees was an abuse of discretion. Specifically, Lundahl contends that the trial court should have held an evidentiary hearing on Hopper's fee petition because he had raised numerous supported objections against a fee award showing that Hopper's attorney filed incorrect and irrelevant pleadings. Hopper responds that Lundahl did not object to the attorney fees and that the trial court did not abuse its discretion when it awarded Hopper attorney fees. We agree with Hopper.

A court's decision to award fees in a particular case "rests in the sound discretion of the trial court, and exercise thereof will not be interfered with unless such discretion is clearly abused." *Gasperini v. Gasperini,* 57 Ill.App.3d 578, 582, 15 Ill.Dec. 230, 373 N.E.2d 576 (1978). The amount of fees to be allowed in a divorce proceeding depends on the consideration of the relative financial abilities of the parties, the nature of the controversy, the question at issue, the significance or importance of the subject matter, the degree of responsibility involved, the standing or skill of the person employed, and the time and labor involved. *Gasperini,* 57 Ill.App.3d at 582, 15 Ill.Dec. 230, 373 N.E.2d 576. "The allowance should be only in such amount as will compensate for the services rendered, and must be fair and just to all parties concerned; namely, the attorney to be compensated, the client, and the person required to make the payment." *Gasperini,* 57 Ill.App.3d at 582, 15 Ill.Dec. 230, 373 N.E.2d 576. "Furthermore, it should appear that the work being compensated for was reasonably required and necessary for the proper performance of the legal services in the case." *Gasperini,*

[919 N.E.2d 491]

57 Ill.App.3d at 582, 15 Ill.Dec. 230, 373 N.E.2d 576.

In this case, Hopper filed her petition for interim attorneys fees and costs incurred and for prospective attorney fees and costs, pursuant to 750 ILCS 5/501(c)(1) (West 2006), which states in pertinent part that "[e]xcept for good cause shown, a proceeding for (or relating to) interim attorney's fees and costs shall be nonevidentiary, summary in nature, and expeditious." The Act further

fastcase

states that in assessing an interim award, the court shall consider all relevant factors as presented, that appear reasonable and necessary, including: the income of each party, the needs of each party, the realist earning capacity of each party, any impairment to present earning capacity of either party, the standard of living established during the marriage, the degree of complexity of the issues, each party's access to relevant information, the amount of payments made or reasonably expected to be made to the attorney for the other party, and any other factor that the court finds to be just and equitable. See 750 ILCS 5/501(c)(1) (West 2006).

Lundahl then filed his response, citing several objections including that the rates charged by Hopper's counsel were in excess of reasonable and normal rates, and that Hopper failed to attach any supporting documentation reflecting the amount of attorney fees and costs.

On April 11, 2008, a hearing was held. Hopper's attorney noted that in an interim fee petition hearing, it was unnecessary to attach his billing invoices because the hearing is summary in nature. However, he did bring his invoices to court and the trial court took time to review them. The trial court then asked Hopper's attorney several questions concerning the invoices and then stated, "All right. Anybody else have anything to say before I rule on the petition for interim fees?" Lundahl's attorney responded, "No, Judge." The trial court then stated that it had heard the argument of counsel and had read the various briefs and invoices. The trial court further stated that it had considered the factors set forth in sections 501 and 508 of the Act, and found that Hopper did not have the ability to pay and that Lundahl did have the ability to pay. The trial court found that the time expended and the hourly rates charged by Hopper's attorney were reasonable and necessary. The trial court awarded Hopper $14,500 in attorney fees.

Based on careful review of the record, we find that the trial court did not abuse its discretion in awarding Hopper attorney fees. The amount of fees were based on the consideration of the factors set forth in the statute, and the work being compensated for was reasonably required and necessary for the proper performance of legal services in this case. See *Gasperini,* 57 Ill.App.3d at 582, 15 Ill.Dec. 230, 373 N.E.2d 576. Accordingly, we find that the trial court did not abuse its discretion in awarding Hopper attorney fees in the amount of $14,500.

III. CONCLUSION

For the foregoing reasons, we affirm in part the judgment of the circuit court of Cook County and remand for a finding of the specific amount of retained earnings, as well as a reconsideration of the distribution of the marital estate based on such finding.

Affirmed in part; cause remanded for further proceedings in accordance with this Opinion.

TOOMIN, P.J., and HOWSE, J., concur.

fastcase

913 N.E.2d 1077
393 Ill. App. 3d 641
In re The MARRIAGE OF Elena SANFRATELLO, Petitioner-Appellee, and
Michael Sanfratello, Respondent-Appellant (Joseph Sanfratello, and Sharon Sanfratello, Third-Party Respondents-Appellants).
No. 1-07-1438.
No. 1-07-1473.
Appellate Court of Illinois, First District, First Division.
July 27, 2009.

[913 N.E.2d 1080]

Paul S. Braun, Lauren A. Dropkin, Thomas C. Edwards, Braun & Edwards, Chartered, Flossmoor, for Plaintiff-Appellee.

Paul L. Feinstein, Ltd., Chicago, for Third Party Respondents/Appellants.

Bruggeman, Hurst & Associates, P.C., Mokena, for Defendant-Appellant.

Justice GARCIA delivered the opinion of the court:

This consolidated appeal and cross-appeal concerns marital dissolution proceedings and a foreclosure action on the marital home. Michael Sanfratello appeals contending Judge Brewer erred in setting his child support obligations, finding he dissipated marital assets, classifying certain assets as marital property, and apportioning those assets. Elena Sanfratello cross-appeals, contending all of Michael's interests in his family's pizza businesses constitute marital assets. She also "cross-appeals" from Judge Boyd's order confirming the sheriff's sale of the marital home in the foreclosure action. Michael's parents, Joseph and Sharon Sanfratello, as putative third-party defendants, appeal from Judge Brewer's judgment holding them jointly and severally

[913 N.E.2d 1081]

liable to Elena for $320,000, the value of the marital home.

We find merit in Joseph and Sharon's claim that the statutory proceedings were not followed in converting third-party respondents in discovery to third-party defendants. Thus, we vacate the judgment entered against them. Regarding Michael's appeal, we remand for clarification on whether the dissipation award wrongly included the amount Michael paid in support. We dismiss Elena's "cross-appeal" in the foreclosure action because the appeal was untimely. We do not consider Elena's cross-appeal in the dissolution action because her notice of appeal did not raise the issue she raises in her brief. We affirm the judgments below in all other respects.

BACKGROUND

Michael and Elena Sanfratello were married in 1989 and had three children. Elena, who had been a homemaker for the majority of the marriage, filed a petition for dissolution in July 2003, citing irreconcilable differences. Highly contentious proceedings followed.

One area of contention involved Michael's employment with, and ownership interests in, three family businesses: Sanfratello Pizza, Inc. (Pizza, Inc.); Sanfratello Pizza Factory, Inc. (Pizza Factory); and Sanfratello Pizza Cart, L.L.C. (Pizza Cart). Joseph founded Pizza, Inc., in 1961. Joseph founded the other two restaurants during the parties' marriage.

The other area of contention involved the parties' home. The home was a single-family home in Chicago Heights. Joseph and Sharon purchased the lot and paid for the construction of the home prior to the parties' marriage. Because Michael and Elena took out several home equity loans, they paid a

fastcase

monthly mortgage to Heritage Bank. Joseph had been a director of Heritage Bank, but was not at the time the mortgage was taken or during the dissolution and foreclosure proceedings. Joseph also had a $100,000 lien upon the property.

While the dissolution action was pending, the trial court ordered Michael to pay the home's mortgage. Michael did not pay, and Heritage Bank brought a foreclosure action.

In the foreclosure action, Judge Boyd ordered the sale of the marital home, which Joseph and Sharon purchased at the sheriff's sale. They then filed an eviction action against Elena and the children. Elena unsuccessfully sought to vacate the sheriff's sale on the basis that Joseph, Sharon, and their attorney (the same attorney who represented Michael in the dissolution proceedings) allegedly engaged in fraud. Judge Boyd entered an order approving the sheriff's report of the sale and an order of possession on April 4, 2006.

The dissolution trial began in September 2006. The record reflects proceedings in which Judge Brewer found Michael and his witnesses testified untruthfully and in collusion with each other in an effort to deprive Elena of her share of the marital estate. Judge Brewer made findings that Joseph, Sharon, and others testified incredibly regarding Michael's income, his interests in the family restaurants, and the restaurants' profits.

On April 27, 2007, Judge Brewer entered a judgment dissolving the parties' marriage. The judgment granted custody of the parties' children to Elena. Judge Brewer ordered Michael to pay $3,446 in monthly child support. She based this amount on an annual net income of $130,000, which she imputed to Michael when he failed to present credible evidence regarding his income. Michael was also

[913 N.E.2d 1082]

ordered to pay the children's full parochial school tuition.

Judge Brewer rejected Michael's contention that he had no interests in the family restaurants. She classified his interests in Pizza, Inc., as nonmarital property and his interests in Pizza Factory and Pizza Cart as marital property. Because Elena's expert was unable to give an opinion as to the value of the businesses in the absence of certain financial documents not provided by Michael and Joseph, Judge Brewer could only conclude the businesses were "quite valuable." She awarded those interests to Michael.

Judge Brewer also concluded the parties' home was marital property, valued it at $320,000, and awarded it to Elena. Judge Brewer ordered Joseph and Sharon jointly and severally liable with Michael for the value of the home.

Judge Brewer found that Michael had dissipated numerous marital assets, including his entire salary since the breakdown of the marriage, $16,496 he had withdrawn from the Nationwide Life Insurance Company, and $19,106.82 he had withdrawn from the children's bank accounts. The court found Michael liable to Elena for one-half of the dissipated amount, an award Judge Brewer calculated to be $266,946.90. The court also ordered Michael to pay Elena's attorney fees and other marital debts.

No one is satisfied with the results of the dissolution and foreclosure proceedings, with all parties appealing. Further facts are discussed as necessary.

ANALYSIS

Michael asserts Judge Brewer erred in her marital dissolution judgment in four ways: (1) setting his child support obligation without determining his net income or issuing findings to explain her deviation from

the statutory child support guidelines; (2) classifying certain of his assets as marital property and awarding the value of those assets to Elena; (3) finding Michael dissipated marital assets; and (4) ordering Michael to pay all debts and attorney and expert fees for Elena.

Elena, in her cross-appeal, contends Judge Brewer wrongly classified a portion of Michael's business interests as nonmarital property. She also appeals Judge Boyd's order approving the sheriff's sale of the marital home.

Joseph and Sharon appeal Judge Brewer's judgment finding them jointly liable with Michael for $320,000, the value of the marital home lost to foreclosure.

Michael's Contentions

Each of the four errors Michael alleges is reviewed under an abuse of discretion standard. See, *e.g., In re Marriage of Charles,* 284 Ill.App.3d 339, 342, 219 Ill. Dec. 742, 672 N.E.2d 57 (1996) (collecting cases). The abuse of discretion standard "is the most deferential standard of review — next to no review at all." *In re D.T.,* 212 Ill.2d 347, 356, 289 Ill.Dec. 11, 818 N.E.2d 1214 (2004). "An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court." *Schwartz v. Cortelloni,* 177 Ill.2d 166, 176, 226 Ill.Dec. 416, 685 N.E.2d 871 (1997). The trial court "cannot be said to have abused its discretion if reasonable persons could differ as to its decision." *In re Adoption of D.,* 317 Ill. App.3d 155, 160, 250 Ill.Dec. 648, 739 N.E.2d 109 (2000).

1. *Child Support*

Michael contends Judge Brewer erred when she ordered him to pay $3,446 per month in child support, which she based on an imputed annual income of $130,000. He claims Judge Brewer erred in requiring him to pay the children's full parochial

[913 N.E.2d 1083]

school tuition in light of his substantial child support obligation.

Where three children are involved, section 505(a)(1) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/505(a)(1) (West 2006)) sets the minimum amount of support at 32% of the noncustodial parent's statutorily defined "net income." 750 ILCS 5/505 (a)(1) (West 2006). Section 505(a)(3) of the Marriage Act defines net income as "the total of all income from all sources," minus certain statutory deductions. 750 ILCS 5/505 (a)(3) (West 2006). Where the net income cannot be determined, "the court shall order support in an amount considered reasonable in the particular case." 750 ILCS 5/505(a)(5) (West 2006); *In re Marriage of Severino,* 298 Ill.App.3d 224, 230, 232 Ill.Dec. 355, 698 N.E.2d 193 (1998).

In this case, it is an understatement to say the evidence conflicted as to Michael's annual income from the various pizza restaurants. Michael testified he received a paycheck of $2,200 every two weeks for the past 20 years, an amount duly reflected in his income tax returns. However, Michael admitted at trial that he lied about his income to the Internal Revenue Service, as evidenced by his bank statements showing he had made large cash deposits, including $52,605 in 2001, and $72,894 in 2002, cash which was in addition to his paychecks. Also, Elena testified that numerous family expenses, including expensive dinners, designer clothing, and groceries, were all paid in cash. Michael and Joseph attempted to convince the court that the cash amounts were stolen by Michael from the pizza restaurants to pay in part for illegal drugs; Judge Brewer rejected as incredible Michael's and Joseph's explanation for the large amount of cash available to Michael. Instead, Judge Brewer

fastcase smarter legal research

concluded Michael's income was "substantially higher than $2,200 every two weeks," concluding that Joseph paid Michael by check and in cash. Referencing Michael's "vague and evasive statements" and his "alleged failure to recall" certain facts, Judge Brewer determined that she was unable to confirm Michael's net income to apply the statutory support guidelines. In the absence of credible evidence from Michael regarding his net income, Judge Brewer imputed a $130,000 annual net income to Michael, based on the uncontested evidence that Michael had a steady flow of cash available to him. Michael now contends the support award is not reasonable under the circumstances because the $130,000 figure was "random, or a mystery." We disagree with Michael's characterization of Judge Brewer's calculations.

Once Judge Brewer concluded she could not determine Michael's annual income, she was required to "order support in an amount considered reasonable in the particular case." 750 ILCS 5/505(a)(5) (West 2006). Judge Brewer acted reasonably in drawing the inference that Michael earned substantially more than his declared income. It was based on this inference that Judge Brewer set support in an amount she determined was reasonable for the benefit of the children. Michael, having been less than candid as to what he truly earned in his business ventures before Judge Brewer, is in no position to claim before us that Judge Brewer went outside her discretion in arriving at a child support obligation based on the clear and convincing evidence that Michael enjoyed a standard of living during the marriage that far exceeded his reported income. We find no fault in the support obligation Judge Brewer set.

Michael also argues that the order requiring that he pay 100% of the children's parochial school tuition, in light of

[913 N.E.2d 1084]

the substantial child support award, constituted a deviation from the guidelines without the requisite factual findings. See 750 ILCS 5/505(a)(2) (West 2006) (trial courts may deviate from the guidelines set forth in section 505(a)(1) after considering relevant factors, and requiring the court to "include the reason or reasons for the variance from the guidelines"); see also *In re Marriage of Sweet,* 316 Ill.App.3d 101, 108, 249 Ill.Dec. 212, 735 N.E.2d 1037 (2000) ("The court must make express findings if it deviates from the guidelines"). We reject this contention as well.

The child support award here was based not on a deviation pursuant to section 505(a)(2), but on an amount found to be reasonable where Michael's net income could not be determined in accordance with section 505(a)(5). We note that Michael does not point to any evidence in the record that credibly explains his living standard, which might otherwise have led Judge Brewer to make different calculations. See *In re Marriage of Severino,* 298 Ill.App.3d at 231, 232 Ill.Dec. 355, 698 N.E.2d 193 ("In cases where the trial court is unable to determine the net income of the party, it is illogical to assert that the trial court must make express findings for varying the child support award from a percentage recommended by the statute"). Under the particularities of this case, Judge Brewer determined the child support and Michael's obligation to pay the parochial school tuition based on the substantial evidence that Michael had a true income far in excess of the income he claimed. We reject the bases Michael offers to overturn Judge Brewer's findings.

2. *Division of the Marital Estate*

Michael challenges Judge Brewer's division of property on four grounds: (1) Judge Brewer erred in classifying his interest in Pizza Factory and Pizza Cart as marital property; (2) Judge Brewer improperly based her division of the marital estate on the pizza

businesses being "quite valuable;" (3) Judge Brewer improperly classified the home as marital property; and (4) Judge Brewer inequitably awarded "all of the marital estate to Elena."

Some courts apply the manifest weight of the evidence standard upon review of property distribution awards. See, *e.g., In re Marriage of Didier,* 318 Ill.App.3d 253, 258, 252 Ill.Dec. 270, 742 N.E.2d 808 (2000). As we noted above, we apply an abuse of discretion standard to the distribution of property award. *In re Marriage of Swanson,* 275 Ill.App.3d 519, 528, 212 Ill.Dec. 62, 656 N.E.2d 215 (1995) ("A trial court's distribution of marital property should not be reversed absent a showing that the trial court abused its discretion"). Under either standard, the same result obtains.

a. Michael's Interests in the Family Restaurants

At trial, Michael attempted to establish that he no longer had any interests in the family's three restaurants. Michael claimed his interest in Pizza, Inc., which he acquired from his father prior to the marriage, was transferred to his mother after the commencement of the dissolution proceedings. Michael denies ever knowing that he had an interest in Pizza Cart. In any event, he contends any interest he had in Pizza Factory and Pizza Cart, acquired during the marriage, he lost when his drug use came to light in 2004.

Judge Brewer rejected each of Michael's contentions, finding his testimony incredible and characterizing his alleged transfers as "sham transactions," which were intended to "defraud" Elena from her share of the marital estate. We find no basis to overturn Judge Brewer's rejection of Michael's testimony that he lost ownership in the family business. Nor are we presented with a credible argument that the aim

[913 N.E.2d 1085]

of Michael's testimony was anything other than to deprive Elena of her share of the marital property.

Even in the face of this outrageous conduct, Judge Brewer objectively assessed each business entity to determine whether each was marital or nonmarital property. Judge Brewer determined Michael's interests in Pizza, Inc., to be nonmarital property; his interests in Pizza Factory and Pizza Cart were deemed marital property. Notably, Judge Brewer concluded that Michael should retain his interests in all three pizza restaurants, with Elena being apportioned only the value of the businesses found to be marital property.

Michael contends on appeal that the trial court erred in classifying his interests in Pizza Factory and Pizza Cart as marital property because those interests were gifts from his parents. He argues that any attempt to "defraud" Elena has no bearing on whether those interests were acquired by gift.

Section 503(a) of the Marriage Act (750 ILCS 5/503(a) (West 2006)) presumes that all property obtained by a spouse subsequent to the marriage is marital property. This presumption may be overcome where a party establishes the property was acquired by gift, legacy or descent. 750 ILCS 5/503(a)(1) (West 2006). Another presumption is that a transfer from a parent to a child is a gift. *In re Marriage of Hagshenas,* 234 Ill.App.3d 178, 186, 175 Ill.Dec. 506, 600 N.E.2d 437 (1992). In sorting through these presumptions, "the trial court is free to determine * * * whether the asset in question was marital or nonmarital property." *In re Marriage of Hagshenas,* 234 Ill.App.3d at 187, 175 Ill.Dec. 506, 600 N.E.2d 437.

We are unpersuaded that the gift presumption should trump the presumption of marital property in Michael's case. The

fastcase

interests in Pizza Factory and Pizza Cart that Michael acquired during the course of the marriage provided Michael with a means of supporting his family. We see no reason to find that the very means of support for Michael's family during the marriage should now be considered outside of the marital estate, a portion of which Elena is entitled to receive to give her any hope of approaching a standard of living she had during the marriage. Nor do we take Judge Brewer's discussion of sham transactions and fraudulent attempts to hide marital assets as driving her decision to classify the interests, gifted to Michael, as marital property. Judge Brewer's comments were certainly relevant to her assessments of the credibility of the witnesses. That Michael and his witnesses, including Joseph and Sharon, testified with the aim of depriving Elena of her share of the marital assets, even though their testimony was at odds with the facts, is almost beyond dispute. Whether as a matter of her discretion or consistent with the manifest weight of the evidence, we find Judge Brewer properly classified Michael's interests in Pizza Factory and Pizza Cart as marital property.

b. Valuation of the Businesses

Michael contends Judge Brewer erred in determining the value of his interests in Pizza Factory and Pizza Cart (marital property), and his interests in Pizza, Inc. (nonmarital property).

Section 503(d) of the Marriage Act requires the trial court to divide marital property in "just proportions." 750 ILCS 5/503(d) (West 2006). Before doing so, the value of the marital and nonmarital assets must be established. *In re Marriage of Grunsten,* 304 Ill.App.3d 12, 17, 237 Ill. Dec. 342, 709 N.E.2d 597 (1999).

At trial, Elena presented expert testimony from David Rogers, a certified public

[913 N.E.2d 1086]

accountant and a certified valuation analyst. In her discovery disclosures, Elena confused the names of the three pizza businesses, and, in doing so, failed to disclose that Rogers was to provide a valuation of Pizza Cart. Based on Elena's failure to disclose this proposed expert testimony, the court allowed Rogers to testify only about the value of Pizza, Inc., and Pizza Factory. Further, Rogers' valuation testimony as to Pizza, Inc., and Pizza Factory amounted to only "an indication" of value as distinguished from "an opinion" of value because Michael and Joseph did not disclose critical financial documents.

Rogers's testimony established a large gap between the two businesses' indication of value as reported by the companies, and the indication of value Rogers expected to see by a statistical comparison of businesses showing similar customer volume. Rogers's indication of value reflected a gap between Pizza, Inc.'s gross receipts and the income reported on its federal tax returns, a gap to which Michael also testified. Rogers's valuation testimony also undercut Joseph's testimony that Pizza, Inc., had not made a profit in 12 years and that Pizza Factory and Pizza Cart had never been profitable.

Judge Brewer, as the trier of fact, found Rogers credible and Joseph and Michael incredible as to the value of each business. However, because necessary financial documents were not provided by Michael and Joseph to Rogers to allow him to give an expert opinion on value, based on the evidence before her, Judge Brewer could only determine that the businesses were "quite valuable."

Once again Michael seeks to use the gap in the evidence to his benefit. He contends Judge Brewer's "quite valuable" conclusion is unsupported by any "specific determination of value." The gap, which Michael could very well have filled at trial, cannot now be used as

fastcase

a sword to cut down Judge Brewer's finding. This contention, similar to the one he asserted to challenge the child support award, is no more persuasive to challenge Judge Brewer's valuation finding.

The Marriage Act does not require the court to place a specific value on each item of property. *In re Marriage of Hagshenas,* 234 Ill.App.3d at 200, 175 Ill. Dec. 506, 600 N.E.2d 437. The record demonstrates that it was Michael's failure to disclose financial information that prevented not only Rogers, but Judge Brewer, from ascertaining the true value of the businesses. Judge Brewer's factual findings are reasonable given that the party in possession of the hard facts deprived the court of the very facts Michael now contends are absent in the record. *In the best of circumstances,* a trial court has difficulty in determining the value of closely-held private corporations. *In re Marriage of Grunsten,* 304 Ill.App.3d at 17, 237 Ill.Dec. 342, 709 N.E.2d 597 (the process for determining the market value of a closely-held business is "inherently subjective"). Where a party, his witnesses, and, as Judge Brewer found, the party's own attorney refuse to cooperate in the valuation process, the process approaches the impossible. We will not hear Michael complain of circumstances he created. Judge Brewer acted within her discretion in assessing the value of the businesses.

c. Marital Home

Generally, property acquired before the marriage (750 ILCS 5/503(a)(6) (West 2006)), or property acquired by gift (750 ILCS 5/503(a)(1) (West 2006)), is nonmarital property. See *In re Marriage of Philips,* 200 Ill.App.3d 395, 400, 146 Ill. Dec. 191, 558 N.E.2d 154 (1990). However, an asset acquired "in contemplation of marriage" is marital property. *In re Marriage*

[913 N.E.2d 1087]

of Olbrecht, 232 Ill.App.3d 358, 363, 173 Ill.Dec. 661, 597 N.E.2d 635 (1992) (citing cases).

Judge Brewer first determined that the home was marital property as a result of a "gift in contemplation of marriage" from Michael's parents. Michael contends, as he emphasized at oral argument, that marital property may only be found based on a gift in contemplation of marriage when such a gift is made by one would-be spouse to the other. See *In re Marriage of Philips,* 200 Ill.App.3d at 400-01, 146 Ill.Dec. 191, 558 N.E.2d 154. Michael argues that because the home was purchased and gifted by his parents, the home retains its nonmarital character. While we question whether the rule Michael advocates has such clear application in this case because Joseph and Sharon were free to gift the home, built as the home for the newlyweds, to both Michael and Elena, a claim testified to by Elena, we need not resolve whether the gift from Michael's parents was meant for Michael only or meant for both Michael and Elena. See *In re Marriage of Malters,* 133 Ill. App.3d 168, 88 Ill.Dec. 460, 478 N.E.2d 1068 (1985) (home found to be marital even though it was funded in part by monies provided by the wife's father). As an alternative basis for finding the home to be marital property, Judge Brewer found the circumstances in this case transmuted what might well have been Michael's nonmarital property into marital property. "[E]ven if Joseph and Sharon intended to give the house only to Michael, Michael's actions during the marriage transmuted the house into a marital asset." Thus, even if Elena's testimony that Michael's parents intended to gift the home to both Michael and her is insufficient to establish a gift to both, Judge Brewer's transmutation finding provides an independent basis for classifying the home as marital property.

"[N]onmarital property may be presumptively transmuted to marital property" where "the owner of the nonmarital

fastcase smarter legal research

property intended to make a gift of the property to the marital estate." *In re Marriage of Olson,* 96 Ill.2d 432, 438-39, 71 Ill.Dec. 671, 451 N.E.2d 825 (1983). Judge Brewer's finding of transmutation is amply supported by the record evidence that Michael and Elena, initially alone, and then with their children, shared the home as a family until the marriage deteriorated, that marital funds paid for the upkeep of the home, and that loans on the equity in the home were taken out jointly by Michael and Elena. In light of the deference we must give, under an abuse of discretion standard, to Judge Brewer's considered finding that the home was marital property, we find no basis to overturn that finding.

Michael next argues Judge Brewer erred when she found the equity in the marital home to be $320,000. We reject this claim out of hand where this value is consistent with the testimony of Joseph, who acquired the home through foreclosure.

Michael finally contends Judge Brewer erred when she awarded Elena what he calculates to be 100% of the marital estate. Suffice it to say, Michael received both "quite valuable" businesses found to be marital property. Michael's contention is rebutted by the record.

3. *Dissipation of Marital Assets*

Michael attacks Judge Brewer's finding that he dissipated marital assets as "overbroad" in that the dissipation included what he claims to be legitimate expenses.

In allocating property pursuant to section 503 of the Marriage Act, the trial court must consider any "dissipation

[913 N.E.2d 1088]

by each party." 750 ILCS 5/503(d)(2) (West 2006). "Dissipation has been defined as `"the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown"' [Citation] * * *." *In re Marriage of Petrovich,* 154 Ill.App.3d 881, 886, 107 Ill.Dec. 543, 507 N.E.2d 207 (1987). The person charged with dissipation bears the burden of establishing by clear and convincing evidence how the funds were spent. *In re Marriage of Petrovich,* 154 Ill.App.3d at 886, 107 Ill.Dec. 543, 507 N.E.2d 207.

Here, Judge Brewer found Michael dissipated $533,892 of the marital estate: $498,290 of his income from July 1, 2003, to the time the judgment was entered, $19,106 from the children's bank accounts, and $16,496 from the Nationwide Life Insurance Company.

Michael complains that Elena did not disclose the full extent of her dissipation claim. Michael concedes he received notice on May 4, 2004, that Elena claimed he dissipated the funds in the children's bank accounts; he further concedes he received notice on August 29, 2005, that Elena claimed he dissipated other marital assets on his vacations, girlfriends, and illegal drugs while the mortgage on the marital home went unpaid. Michael's claim of a "requirement" that the notice be provided is overly broad; courts have properly found dissipation *sua sponte.* See, *e.g., In re Marriage of Henke,* 313 Ill.App.3d 159, 178, 245 Ill.Dec. 780, 728 N.E.2d 1137 (2000). Notice here was adequate.

Michael complains that Judge Brewer's finding that he dissipated all of his income during the period in question is unjust. He contends the funds he used to pay necessary living expenses and what he provided the family while the dissolution proceedings were pending cannot fall under the dissipation claim. At oral argument, Michael raised the claim that the payments he made for his children's parochial education should also be excluded from the dissipation claim. Under

fastcase

his calculations, he spent $65,340 on his legitimate expenses and $87,500 on court-ordered child support payments. He does not calculate how much he spent on his children's parochial education.

While his complaints are not without some merit, our resolution turns on Michael's failure to carry the burden to defeat the dissipation claim. Michael provided no documentary support of his "legitimate" living expenses, which should have been excluded from the dissipation claim. It was Michael's burden to make this showing by clear and convincing evidence, a burden he did not carry. See, *e.g., In re Marriage of Hahin,* 266 Ill.App.3d 168, 171, 205 Ill. Dec. 788, 644 N.E.2d 4 (1994) ("General and vague statements" to account for how marital funds are used "are insufficient to defeat a charge of dissipation"). Nor has Michael pointed to a place in the record where he presented evidence of the amounts he claims to have paid in tuition. The credible trial evidence discloses that it was Joseph and Sharon, rather than Michael, that paid the educational costs.

However, there is clear and convincing evidence that Michael paid child support during the dissolution proceedings, which must be excluded from a dissipation award. *In re Marriage of Hagshenas,* 234 Ill.App.3d at 197, 175 Ill.Dec. 506, 600 N.E.2d 437 ("the expenditure of marital funds by one spouse for necessary, appropriate and legitimate expenses at a time when the marriage is undergoing an irreconcilable breakdown will not be considered

[913 N.E.2d 1089]

to be dissipation"). It is unclear whether these support payments were excluded from the amount Judge Brewer found to be dissipation. Michael argues he paid $500 weekly to Elena and the children, for a total of $87,500. Elena does not dispute that Michael paid support in this amount, although, at times, the support he eventually provided was prompted by the filing of a rule to show cause. Based on the record before us, we remand to clarify whether the $87,500 paid in child support was wrongly included in the dissipation amount.

Finally, Michael argues he could not have dissipated the children's bank accounts because the accounts were not part of the marital estate. It is true that an account created pursuant to the Illinois Uniform Transfers to Minors Act (Transfers to Minors Act) (760 ILCS 20/1 *et seq.* (West 2006)) becomes "custodial property [that] is indefeasibly vested" in the minor beneficiary (760 ILCS 20/12(b) (West 2006); *Pope v. First of America, N.A.,* 298 Ill.App.3d 565, 567, 232 Ill.Dec. 731, 699 N.E.2d 178 (1998)), and is not considered part of the marital estate (*In re Marriage of Agostinelli,* 250 Ill.App.3d 492, 189 Ill. Dec. 898, 620 N.E.2d 1215 (1993)). It was Michael's burden to establish that the accounts fell under the Transfers to Minors Act.[1] Because we find insufficient evidence that the accounts were not part of the marital estate, we reject his contention.

4. *Allocation of Debts, Expert and Attorney Fees*

Michael claims Judge Brewer required him to shoulder "all of the marital debt," plus Elena's expert and attorney fees. He contends this is unfair.

Michael points to the bankruptcy relief Elena sought in July 2005, to argue that Elena should be estopped from shifting any marital debts that she failed to include in her bankruptcy petition. However, Michael cites no relevant authority to support this proposition; it is thus waived. *In re Marriage of De Bates,* 212 Ill.2d 489, 517, 289 Ill.Dec. 218, 819 N.E.2d 714 (2004) (a reviewing court may reject a party's contention where the party fails to provide "an adequate basis to grant * * * relief" by citing relevant authority).

fastcase

Michael challenges the trial court's order that he pay $111,135.50 in Elena's attorney fees, pointing to errors in arithmetic, the absence of supporting documentation, and the failure to hold an evidentiary hearing.

The fee petition at issue was filed by Elena after trial pursuant to section 503(j) of the Marriage Act (750 ILCS 5/503(j) (West 2006)). Section 503(j) permits the trial court to grant a petition seeking contribution to cover fees and expenses incurred by the other party, so long as the amount is reasonable. *In re Marriage of Nesbitt,* 377 Ill.App.3d 649, 657, 316 Ill. Dec. 378, 879 N.E.2d 445 (2007). Section 503(j) provides:

> "After proofs have closed in the final hearing on all other issues between the parties (or in conjunction with the final hearing, if all parties so stipulate) and before judgment is entered, a party's petition for contribution to fees and costs incurred in the proceeding shall be

[913 N.E.2d 1090]

> heard and decided * * *." 750 ILCS 5/503(j) (West 2006).

The provisions of section 503(j), including the right to a contribution hearing, must be asserted by the party against whom the contribution is sought. 750 ILCS 5/508(c)(2)(iii) (West 2006) (a final hearing under section 508(c) of the Marriage Act is not permitted unless, among others, "judgment in any contribution hearing on behalf of the client has been entered or the right to a contribution hearing under subsection (j) of Section 503 has been waived"); *In re Marriage of King,* 208 Ill.2d 332, 341, 280 Ill.Dec. 695, 802 N.E.2d 1216 (2003) (citing section 508(c)(2)(iii) and noting the right to a section 503(j) contribution hearing may be waived); see also *In re Marriage of Lindsey-Robinson,* 331 Ill.App.3d 261, 268-69, 265 Ill.Dec. 17, 771 N.E.2d 976 (2002) (requirement under section 503(j) that a contribution petition be filed prior to the entry of the dissolution judgment may be waived).

Elena contends Michael failed to request a hearing in response to her contribution petition, thus waiving his right to one. In response, Michael cites Judge Boyd's September 7, 2006, order postponing until trial Elena's then-pending petition for interim attorney fees under section 501(c-1) (750 ILCS 5/501(c-1) (West 2006)) and Michael's then-pending petition to set final attorney fees and costs. Michael's position is that Judge Boyd's order that fees were to be determined at trial made it unnecessary for him to thereafter assert his right to a hearing. Michael's position is untenable.

Upon the conclusion of the trial, Judge Brewer did not address fees, but ordered "the appropriate motions" be filed regarding fees within 30 days, stating, "we're going to have a hearing on [the] attorney's fees issue or you're going to submit petitions, and I'll look at them and decipher whether a hearing is warranted." In accordance with Judge Brewer's order, on October 16, 2006, Elena filed the section 503(j) contribution petition now at issue. In the face of such a petition, Michael, at no time thereafter, objected to Elena's contribution or demanded a hearing on the issue of fees. On the record before us, the issue of Michael's waiver was before Judge Brewer. It was well within her discretion to find that Michael did not dispute the fees Elena was seeking by failing to file a response.

Because Michael did not request a hearing before Judge Brewer on the very fee petition he now seeks to attack on appeal, he forfeited the opportunity to demonstrate the errors he contends are present in Judge Brewer's calculations of fees and costs

fastcase

actually existed. In other words, he waived this issue.

Elena's Contentions

In what is designated a "cross-appeal," Elena contends Judge Boyd abused his discretion when he approved the sheriff's sale in the foreclosure action. She alleges that Michael's attorney and Michael's parents engaged in fraudulent actions in the course of the foreclosure action, which she contends are made clear by their action to evict Elena and the children from the home. In her cross-appeal from the dissolution judgment, Elena contends Judge Brewer erred when she failed to award Elena a share of Michael's interest in Pizza Factory or Pizza Cart. In a motion taken with the case, Joseph and Sharon assert two bases to bar our consideration of Elena's contentions.

1. *Foreclosure Appeal*

Joseph and Sharon argue that Elena's notice of cross-appeal, in which she challenges Judge Boyd's order, is untimely. The notice was filed on June 4, 2007, more than a year after the entry of the order

[913 N.E.2d 1091]

confirming the sheriff's sale on April 4, 2006.

Elena responds that the order of December 5, 2005, staying the order confirming the report of sale until the trial of the dissolution cause, delayed the legal effect of the sheriff's sale. Elena argues that because the December 5, 2005, order addressed both the foreclosure and the dissolution cases, the order did not dispose of all of the rights and liabilities of all of the parties involved. Therefore, without a finding pursuant to Supreme Court Rule 304(a) (210 Ill.2d R. 304(a)), the order of April 4, 2006, confirming the sale of the home was not final and appealable. In her view, the foreclosure order was not appealable until the dissolution order was entered on April 27, 2007. Elena contends that because she filed her notice of cross-appeal within 10 days of Joseph and Sharon's May 25, 2007, notice of appeal, appellate jurisdiction was properly invoked to review her claim as to the foreclosure order. Official Reports Advance Sheet No. 15 (July 16, 2008), R. 303(a)(3) eff. May 30, 2008 (a notice of cross-appeal may be timely filed within 10 days of service of another party's notice of appeal).

We agree with Joseph and Sharon. Where, as here, consolidation of two actions is for purposes of convenience and economy only, the causes do not merge into a single suit; rather, they retain their distinct identities. Elena's position fails to take into account that her challenge to the foreclosure sale was independent of any appeal Joseph and Sharon might pursue in the dissolution action. Elena's challenge in the foreclosure sale was not in the nature of a cross-appeal, a notice dependent on the appeal of another party. Elena was not a successful party in the foreclosure action. If she sought to challenge the foreclosure ruling, she was required to file a notice of appeal in the first instance. Accordingly, Rule 304(a) language was not required to render the foreclosure judgment appealable; thus, Elena's appeal in the foreclosure action was untimely where it was filed more than 30 days after the foreclosure order was entered. *Nationwide Mutual Insurance Co. v. Filos,* 285 Ill.App.3d 528, 532, 220 Ill.Dec. 678, 673 N.E.2d 1099 (1996).

2. *Dissolution Appeal*

Joseph and Sharon also argue that we should not consider Elena's challenge to Judge Brewer's decision not to grant Elena, as part of her share of the marital estate, an interest in the businesses Joseph and Sharon operate with Michael, because she failed to raise this issue in her notice of cross-appeal. Again, we agree. "When an appeal is taken from a specified judgment, the appellate court

fastcase

acquires no jurisdiction to review other judgments or parts of judgments not specified or fairly inferred from the notice." *In re J.P.,* 331 Ill.App.3d 220, 234, 264 Ill.Dec. 464, 770 N.E.2d 1160 (2002). Here, Elena's notice of cross-appeal requested that we affirm the dissolution judgment; she did not challenge any portion of the judgment.

Accordingly, we dismiss Elena's cross-appeal in which she seeks to challenge the apportionment of the marital estate.

Joseph and Sharon's Contentions

Joseph and Sharon contend that Judge Brewer lacked authority to treat them as substantive third-party respondents in the dissolution action. They assert they were injected into the dissolution action as third-party respondents in discovery pursuant to section 2-402 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-402 (West 2006)). They contend that at no time during the proceedings below were they converted from third-party respondents in discovery to substantive third-party

[913 N.E.2d 1092]

respondents. Because they were never before Judge Brewer as additional parties in interest, Judge Brewer had "no basis" to hold them jointly and severally liable with Michael for the value of the marital home of $320,000.

Section 2-402 of the Code provides in relevant part that a "plaintiff in any civil action may designate as respondents in discovery * * * those individuals * * * believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action." 735 ILCS 5/2-402 (West 2006). Section 2-402 also permits the plaintiff to request of the court that the respondents in discovery "be added as defendants if the evidence discloses the existence of probable cause for such action." 735 ILCS 5/2-402 (West 2006). Generally stated, the plaintiff has six months to make such a request. 735 ILCS 5/2-402 (West 2006). This court has explained:

> "The plain meaning of section 2-402 and its interpretation in the case law establish a simple regime for converting a respondent in discovery into a defendant * * *. First, to be timely and have proper form, *Clark* [*v. Brokaw Hospital,* 126 Ill.App.3d 779, 81 Ill.Dec. 781, 467 N.E.2d 652 (1984)] teaches that a plaintiff's motion to amend a complaint to convert respondents in discovery into defendants must be filed within six months after naming a respondent in discovery, and the motion must indicate this purpose on its face or by the attachment of the amended complaint when the motion is filed or presented to the court. Next, as *Browning* [*v. Jackson Park Hospital,* 163 Ill.App.3d 543, 114 Ill.Dec. 642, 516 N.E.2d 797 (1987),] holds, section 2-402 motions cannot properly be filed as routine motions, so a plaintiff must request a probable cause hearing because, as *Torley* [*v. Foster G. McGaw Hospital,* 116 Ill.App.3d 19, 72 Ill.Dec. 75, 452 N.E.2d 7 (1983),] explains, only a court may decide this evidentiary question." *Froehlich v. Sheehan,* 240 Ill.App.3d 93, 103, 181 Ill.Dec. 638, 608 N.E.2d 889 (1992).

Because section 2-402 encompasses a statutory right unknown at common law, the statute's requirements must be "scrupulously observe[d]" (*Robinson v. Johnson,* 346 Ill.App.3d 895, 903, 284 Ill. Dec. 1, 809

fastcase

N.E.2d 123 (2004)); the requirements are neither "`hoop-jumping'" nor "empty formalism" (*Froehlich,* 240 Ill. App.3d at 103, 181 Ill.Dec. 638, 608 N.E.2d 889).

In this case, the record demonstrates that Elena filed a motion to add Joseph and other parties, but not Sharon, as third-party respondents on May 10, 2004. That motion did not cite section 2-402. Instead, it cited sections 2-405, 2-406, and 2-407 of the Code, which address joining additional parties. 735 ILCS 5/2-405, 2-406, 2-407 (West 2004). While a hearing was pending on that motion, Elena filed a motion to add Joseph, Sharon, and Heritage Bank as third-party respondents on June 29, 2004. Like the May 10 motion, the June 29 motion cited sections 2-405, 2-406, and 2-407. In an order entered on July 13, 2004, Judge Boyd granted Elena leave of court to add Joseph, Sharon, and other parties, as "additional [third-] party respondents for purposes of obtaining information relative to business interests/concerns." We take this order to mean that Joseph and Sharon were added as third-party respondents in discovery only. No mention of an evidentiary finding of "probable cause," pursuant to a hearing, was made in the order to support adding Joseph and Sharon as substantive third-party respondents.

[913 N.E.2d 1093]

Elena does not challenge the procedural history as we have set out above. Instead, she contends that the actions of Joseph and Sharon in effect made a conversion under section 2-402 unnecessary:

> "Joseph and Sharon were not converted from third-party respondents in discovery to substantive third-party defendants, because doing so was unnecessary because Joseph and Elena voluntarily submitted themselves to the jurisdiction of the court and consented to the court's jurisdiction by filing an Appearance and asking affirmatively for relief and filing a substantive motion on their own behalf."

We disagree.[2]

Conversion does not involve the issue of personal jurisdiction, as there is no dispute summons was in fact served. See *Coyne v. OSF Healthcare System,* 332 Ill.App.3d 717, 719, 265 Ill.Dec. 968, 773 N.E.2d 732 (2002) ("Once a party has been named a respondent in discovery and service of summons has been properly executed upon him, the court acquires *in personam* jurisdiction over that party for all purposes"). Rather, the issue in this case is whether Elena adhered to the procedural requirements of section 2-402 by timely seeking to convert Joseph and Sharon's status from third-party respondents in discovery to substantive third-party respondents by requesting a probable cause hearing to allow the court to answer the evidentiary question. *Froehlich,* 240 Ill.App.3d at 103, 181 Ill.Dec. 638, 608 N.E.2d 889 ("only a court may decide this evidentiary question" of probable cause).

Because Joseph and Sharon were not properly added as substantive third-party respondents, we must agree that the trial court had "no basis" to hold Joseph and Sharon jointly and severally liable to Elena for $320,000. See, *e.g., Delestowicz v. Labinsky,* 288 Ill.App.3d 637, 639, 224 Ill. Dec. 387, 681 N.E.2d 1008 (1997) ("[A] lawsuit naming an individual as a respondent in discovery is not an action against that individual and the individual is not a party to that action"). Accordingly, we vacate that portion of the dissolution judgment.

CONCLUSION

fastcase

Although we are mindful of "`fanning the undying flame of this litigation'" (*In re Marriage of Adler,* 271 Ill.App.3d 469, 478, 208 Ill.Dec. 31, 648 N.E.2d 953 (1995), quoting *In re Marriage of Pitulla,* 202 Ill.App.3d 103, 116, 147 Ill.Dec. 479, 559 N.E.2d 819 (1990)), we must remand for further proceedings. Because Joseph and Sharon were never converted to substantive third-party respondents in the dissolution action, the judgment of dissolution of marriage must be modified to reflect that the judgment against Joseph and Sharon is vacated. Because it is unclear from Judge Brewer's findings that the $500 per week Michael paid in support to Elena was excluded from the amount he was otherwise found to have dissipated, we remand for clarification. If the $87,500 paid by Michael in support was not excluded from the dissipation, the dissipation amount of $533,892 should be reduced by $87,500, lowering Elena's award to $223,196.90 ($266,946.90-$43,750). Of course, if the dissipation award excludes the support Michael paid during the relevant period, then no adjustment is required. Elena's "cross-appeal"

[913 N.E.2d 1094]

in the foreclosure action is dismissed for lack of jurisdiction because her appeal was untimely. We do not consider Elena's cross-appeal in the dissolution action because her notice of cross-appeal does not raise the issue she urges before us.

No. 1-07-1438: Affirmed in part and vacated in part; cause remanded.

No. 1-07-1473: Dismissed.

R.E. GORDON, P.J., and WOLFSON, J., concur.

Notes:

1. During trial, Michael was asked about any "UGMA" (Uniform Gift to Minors Accounts) set up for his children. After Michael gave inherently contradictory testimony, Judge Brewer had Joseph removed from the courtroom because, in the court's words, Joseph was "shaking his head" and "making noises" in response to Michael's testimony in an attempt to influence it.

2. During oral argument, we invited counsel for Elena to file any additional case law that provides direct support for the judgment against Joseph and Sharon. A "Supplemental Brief with Submission of Case Law" was filed. Joseph and Sharon filed a response. We do not consider the Supplemental Brief properly before us; nor do we find the case law cited in the brief to provide support for Elena's claim before us.

----

909 N.E.2d 221
In re MARRIAGE OF Sandra L. SCHMITT, Petitioner-Appellant, and Kim A. Schmitt, Respondent-Appellee.
No. 2-07-0623.
Appellate Court of Illinois, Second District.
April 30, 2009.
Rehearing Denied July 14, 2009.

[909 N.E.2d 223]

Randy K. Johnson, Ariano Hardy Nyuli Johnson Richmond & Goettel, PC, South Elgin, Theodore L. Kuzniar, Bochte & Kuzniar, P.C., St. Charles, for Sandra L. Schmitt.

Michael C. Doyen, Law Office of Robert A. Chapski, Ltd., Elgin, for Kim A. Schmitt.

Justice McLAREN delivered the opinion of the court:

Petitioner, Sandra Schmitt, appeals from the trial court's judgment of dissolution of her marriage to respondent, Kim Schmitt. On appeal, Sandra argues that: (1) "[T]he trial court's `non-marital' classification of all parcels of real estate purchased by [Kim] during [the] marriage was against the manifest weight of the evidence and must be reversed"; (2) "The trial court's non-marital classification of Bricks, Inc., a corporation created by [Kim] during [the] marriage, was against the manifest weight of the evidence and must be reversed"; and (3) "When the trial court errs in its classification of property and consequently errs in its distribution of marital property, all interrelated support and fee contribution issues must also be reversed and remanded for redetermination and redistribution." We reverse and remand for further proceedings consistent with this opinion.

[909 N.E.2d 224]

FACTS

Sandra and Kim were married on October 13, 1974. Two children were born to the parties during the marriage: Brent, born February 11, 1980, and Samantha, born December 21, 1981. Both children are emancipated. The marriage broke down in 1995 when Kim told Sandra that he wanted a divorce. The grounds of irreconcilable differences were established.

Sandra, age 59, is in good health and earned a college degree prior to the marriage. Early in the marriage, she was employed as an elementary school teacher, working until the parties' first child was born, and then she became a stay-at-home mother. Kim, age 60, is also in good health and earned a college degree prior to the marriage. At the time of trial in February through June 2006 he was the president and sole shareholder of Bricks, Inc., a subchapter S corporation. See 26 U.S.C. § 1366(2006).

Kim testified that he began working at Colonial Brick Company (Colonial), a subchapter S corporation, in 1969. In 1970 he was given partial ownership of Colonial. In 1972, he was given a 49% ownership interest in Colonial by Phillip Mumford, who owned the remaining 51% of the corporation. Before the parties were married, a Colonial balance sheet labeled "February 1974" showed that Kim had an accumulated earnings and savings account in the sum of $5,661.82, which represented his share of the business.

Kim testified that in 1977, Kim and his partner, Mumford, bought two parcels of property on Kedzie Avenue in Chicago.[1] The titles to the properties were not held in the name of Colonial, but individually, by Kim and Mumford. The down payments and mortgages for these properties, $17,500 and $100,000, respectively, were paid out of Colonial's retained earnings account. At the end of the year, these payments, made on behalf of Kim and Mumford, were reflected on Colonial's books as distributions to Kim and Mumford in their respective ownership

percentages. In addition to the Kedzie properties, between 1974 and 1978 Kim and Mumford bought real estate in Kentucky and on Cermak Road in Chicago. They also formed the following companies or business interests: Aggressive Leasing, Emergency Demolition Contractors, Appalachian Hardwood Products, and a saw mill.

Kim testified that in 1976 Kim and Mumford formed a partnership, Aggressive Leasing, for the purpose of maintaining and leasing heavy equipment. In 1978 Kim and Mumford formed a Missouri corporation, CBC Bricks, Inc., for the purpose of reselling used brick, demolishing and developing real estate, and selling off the assets. Kim and Mumford owned CBC Bricks equally. In 1978 Kim and Mumford ended their business relationship, and as part of their separation agreement Kim received, among other things, 100% of the CBC Bricks stock.

The trial court admitted into evidence the June 1978 agreement that dissolved all business interests between Kim and Mumford. Kim testified that the agreement provided that Kim was to receive both Kedzie properties, a partnership interest in Aggressive Leasing, and a percentage interest in Emergency Demolition Contractors. Deeds to the Kedzie properties were placed in a land trust with Kim as sole beneficiary, agent, and nominee of the trust. Between 1974 and 1978, Sandra and Kim paid tax on income distributions received from Colonial.

[909 N.E.2d 225]

Kim testified that in June 1978 he incorporated a new company, Bricks, Inc., a subchapter S corporation. Bricks received the assets from Colonial when Kim and Mumford dissolved their business interests. Bricks continued to make the mortgage payments on the two Kedzie properties.

Kim stated in an affidavit that in 1978 he and Mumford, each as individuals (Kim, d/b/a Schmitt Farms), bought 160 acres in Sublette, Illinois (Schmitt Farms). Colonial paid the down payment for the property in the percentages of ownership held by Kim and Mumford (*i.e.,* 49% and 51% respectively). Subsequently, Mumford withdrew from the contract, and Kim's parents were substituted and given a one-third interest with Kim retaining a two-thirds interest. Kim stated that his interest was paid for by Bricks, through a joint checking account held in the parties' names. Kim's parents gave Sandra a check for their portion. Sandra consolidated the mortgage payments, issuing checks from Sandra and Kim's joint checking account from 1979 through 1989. Sandra submitted copies of cancelled checks showing that she paid the mortgage payments on Schmitt Farms from the parties' joint checking account for the subject period. Sandra testified that the payments were made using funds from Bricks, which Kim deposited into the joint checking account. Kim stated in his affidavit that he subsequently bought an additional 80 acres, for $1,100 an acre. Bricks paid the down payment and the mortgage payments for the additional 80 acres. Title to the additional 80 acres was held in the land trust of which Kim was the sole beneficiary. In 2003 Kim sold to his mother his entire interest in Schmitt Farms for approximately $160,000. Kim testified that Bricks had no interest in Schmitt Farms.

In 1980 the parties bought a home in Woodstock, Illinois, for $160,000 to $170,000, with the title held jointly by the parties. It was sold in 1988 for $258,000. In 1982 the parties bought a home in Batavia, Illinois, for $210,000. The family continued to live in the Woodstock home until extensive renovations were completed at the Batavia home in 1988. The mortgage for the Woodstock home was paid by Bricks until 1988, and title was held by Bricks. Sandra testified that the mortgage payments were paid from the parties' joint checking account, using funds that Kim received from Bricks.

fastcase

According to Sandra, in 1992 Kim told her that he would pay the mortgage from that point forward using Bricks' funds only.

Kim also testified that in December 1986 he bought 22.3 acres of land in Geneva, Illinois, for $188,887. The price was paid in full in February 1989. The Geneva land was titled in Kim's name, solely. Kim testified that the payment was charged against his capital account and that he assumed that Bricks paid for the land, but he was unsure if the payment was charged against him personally at year end, against his retained earnings account. Then Kim testified that he did not know how the purchase was addressed on Bricks' accounting books. The Geneva land was subdivided into 60 lots, and homes were built on them by CBC Bricks, the Missouri corporation completely assigned to Kim in 1978 when he and Mumford ended their business relationship.

An affidavit submitted by Kim stated that in the 1980s he bought 289 acres of land in Pontiac, Illinois, for $400,000. Kim testified that the funds used to buy this property came from the Bricks operating checking account. He also testified that he had no idea if the funds were charged against his retained earnings account. Title to the property was held by a land

[909 N.E.2d 226]

trust in which Kim was the sole beneficial interest holder. Bricks made all of the mortgage payments on the property and satisfied the mortgage prior to its sale in 2004, for $604,548.

Kim's affidavit also stated that in the 1980s Kim bought 149 acres of land on Randall and Orchard Roads in Batavia, Illinois, directly west of Mooseheart, for approximately $400,000. Title to the property was held by a land trust in which Kim held sole beneficial interest. The down payment and all mortgage payments were made by Bricks. Kim did not know if these payments were "adjusted" as charges against his retained earnings account.

Kim's affidavit stated that in the early 1990s he purchased 50 acres of land at Interstate 88 and Orchard Road in Batavia, Illinois, for $1 million. The mortgage payments were paid by Bricks, and title to the property was held by a land trust in which Kim was the sole beneficial interest holder. This property has been cross-collateralized with a business loan. However, only interest, not principal, on the note has been paid. Kim did not know if these payments were adjusted to charge his retained earnings account.

Kim testified that in the mid- to late-1990s he bought property on LaSalle Street in Aurora, Illinois. Kim testified that he bought other real estate in Aurora at the same time he bought the LaSalle properties. This constituted a "bulk deal" for a $60,000 payment.[2] Bricks paid for the property; the titles were held in Kim's land trust, which named him as sole beneficiary, agent, and nominee. Bricks used the property as an extension of its business but did not pay rent to the trust or to Kim. Kim testified that he did not know whether the payment for the property was charged in Bricks' books as a personal distribution to him at the end of the year.

Kim submitted a summary document, along with supporting documentation, showing that from 2000 through 2006 he paid a total of $895,000 from the Bricks account for expenses for Sandra and the parties' children. The $895,000 included $191,000 in maintenance; $220,016 distributed per court order; $320,565 in mortgage interest; and $95,553 in property taxes for the Batavia home.

Steven Albert, a certified appraiser, testified on behalf of Sandra as an expert in appraising the fair market value of real property. Albert testified that he used

fastcase

comparable properties to arrive at his estimate of the fair market value of each property at issue. Albert conducted site visits for the appraisals, though he did not personally view all the properties because he had only two weeks to prepare his report.

Robert J. Gross, a business evaluator, testified as an expert in business valuation. Gross opined that Bricks, as a subchapter S corporation, had a net fair market value of $2,654,000. The trial court accepted Gross's valuation opinion. Gross testified that if a check is paid out of a business for the benefit of the sole shareholder and is not booked as an income expense, it would have to be booked as a distribution of previously taxed but undistributed income or as a repayment of a loan from a shareholder. Gross stated that, if Sandra wrote a check from Bricks' account to buy real estate that was titled in Kim's name, it would be Kim's own property. The only way to track distributions to the shareholder(s) of a subchapter S corporation

[909 N.E.2d 227]

over time is by calculating the difference in the corporation's retained earnings account. The retained earnings account reflects the amount of previously taxed income carried forward from year to year minus the amount that has been distributed to the shareholder(s). For Bricks, that would apply to a 27-year period.

Sandra's counsel attempted to show Gross a document that showed retained earnings from 1980 through 1998, so that Gross could offer an analysis of the document. However, the document was barred by the trial court because it contained tax returns that the trial court had previously barred.

John O'Dwyer, also a certified appraiser, testified on behalf of Kim as an expert in appraising the fair market value of real property. O'Dwyer appraised four properties: the Kedzie properties ($830,000); 718 Hamilton, Aurora ($120,000); Schmitt Farms ($552,000); and the LaSalle properties ($460,000).

The trial court found that Kim's ownership interest in Colonial was acquired prior to the marriage and was nonmarital property. Because the Colonial funds were nonmarital, the trial court ruled that Kim sustained his burden of proving by clear and convincing evidence that all of the properties and businesses purchased with Colonial funds were nonmarital property.[3] The trial court also found that Kim sustained his burden of proving by clear and convincing evidence that the properties and businesses purchased with Bricks' funds were nonmarital, because Bricks' was nonmarital.[4] However, the trial court found that Kim's "personal efforts contributed significantly to the growth and value of Bricks, Inc." The trial court found that Kim's yearly salary was only approximately $20,000 throughout the marriage. The trial court found that Kim did not need to reimburse the marital estate with his nonmarital assets because from 2000 through 2006 he adequately compensated the marital estate with his salary and "other payments made by Bricks, Inc., for the benefit of [Sandra] and the children [in the amount of $895,000]."

However, because Kim deposited Bricks' funds into the parties' joint checking account to pay for part of the mortgages and real estate taxes for the Batavia residence and Schmitt Farms, Kim had to reimburse the marital estate $121,794 and $78,928, respectively.

The trial court found that the gross value of Kim's nonmarital property was $11,591,000 and the net value of Kim's nonmarital property was $6,091,000. The trial court found that the value of the marital property was $350,722. The trial court awarded Sandra 100% of the marital property minus $150,000 for her dissipation of the

fastcase

marital assets, for a total award of $200,722. The trial court ordered Kim to pay Sandra $1 million in gross maintenance and arrearage. Each party was ordered to pay his or her own attorney fees. This timely appeal followed.

ANALYSIS

A. Motions to Strike

Initially, we must address Sandra's motion to strike a portion of Kim's reply brief which cites an unpublished Supreme Court Rule 23 order (*In re Marriage of Mugnolo,* No. 1-05-2839 (May 4, 2007) (unpublished order under Supreme Court Rule 23)) and discusses it at length to

[909 N.E.2d 228]

support Kim's arguments. Supreme Court Rule 23(e) provides in pertinent part:

"Effect of Orders. An unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata,* collateral estoppel or law of the case." 166 Ill.2d R. 23(e).

Because Kim does not cite *Mugnolo* for any of the proper bases listed in Rule 23, we grant Sandra's motion to strike.

Next, we address Kim's motion to strike portions of Sandra's reply brief that refer to an article written by B. Greenstein in December 1992 and published on July 5, 2002, in the "CPA Journal" by the New York State Society of CPAs, and to a Federal Internal Revenue Service audit report regarding subchapter S corporation officer compensation. Kim urges this court to strike these references because they constitute evidence not contained in the record on appeal. Sandra correctly argues that these references are not evidence, but citations to secondary authorities that have been properly cited by litigants and reviewing courts to support arguments and holdings, respectively. See, *e.g., People v. McKown,* 226 Ill.2d 245, 273-74, 314 Ill.Dec. 742, 875 N.E.2d 1029 (2007) (citing numerous articles); *Tobias v. Autore,* 182 N.J.Super. 328, 333, 440 A.2d 1171, 1174 (1982) (citing the CPA Journal). Therefore, Kim's motion to strike the references to the article and report is denied. We now address the merits of this appeal.

B. Standard of Review

Before a trial court may dispose of property upon dissolution of marriage, the property must be classified as either marital or nonmarital. *In re Marriage of Didier,* 318 Ill.App.3d 253, 258, 252 Ill.Dec. 270, 742 N.E.2d 808 (2000). The trial court's classification will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Heroy,* 385 Ill.App.3d 640, 663, 324 Ill.Dec. 310, 895 N.E.2d 1025 (2008). There is a rebuttable presumption that all property acquired by either spouse after the date of marriage but before the entry of judgment of dissolution is marital property, regardless of how title is held. 750 ILCS 5/503(b) (West 2006). A party can overcome this presumption only by a showing of clear and convincing evidence that the property falls within one of the exceptions listed in section 503(a) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/503(a) (West 2006)). *Didier,* 318 Ill.App.3d at 258, 252 Ill.Dec. 270, 742 N.E.2d 808. The party claiming that the property is nonmarital has the burden of proof, and any doubts as to the nature of the property are resolved in favor of finding that the property is marital. 750 ILCS 5/503(a) (West 2006); *Didier,* 318 Ill.App.3d at 258, 252 Ill.Dec. 270, 742 N.E.2d 808.

C. The Trial Court's Classification of All Parcels and Businesses Purchased By Kim During the Marriage Is Against the Manifest Weight of the Evidence

fastcase smarter legal research

On appeal, Sandra first argues that the down payments and mortgage payments for the properties were paid from income because they derived from distributions from either Colonial or Bricks. Further, that income was attributable to the personal efforts of Kim Therefore, according to Sandra, the funds used to purchase the properties at issue were marital property, which renders the properties marital as well.

1. Real Properties and Businesses Purchased by Colonial

Kim argues that his testimony, corroborated by Mumford, established that funds

[909 N.E.2d 229]

were drawn from the operating account of Colonial to purchase these real properties and businesses, and, therefore, the properties and business at issue should be classified as nonmarital.

Section 503(a)(8) of the Act provides that income from nonmarital property of a spouse becomes marital income unless the spouse claiming that it is nonmarital proves by clear and convincing evidence that the income is "not attributable to the personal efforts of [the] spouse." 750 ILCS 5/503(a)(8) (West 2006); see *In re Marriage of Dunlap,* 294 Ill.App.3d 768, 779, 228 Ill.Dec. 948, 690 N.E.2d 1023 (1998).

In this case, it is undisputed that Kim worked for Colonial and that he was given distributions to make the down payments and mortgage payments for the Kedzie properties. Kim testified that the payments for the properties, made on behalf of himself and Mumford, were reflected on Colonial's books at the end of the year as distributions to Kim and Mumford in their respective ownership percentages. Thus, the distributions were income to Kim. Kim also testified that he purchased the Kedzie properties as an individual. We find nothing in the record sufficient to rebut the presumption that the distributions were attributable to Kim's personal efforts. Therefore, the trial court's finding that the Kedzie properties were purchased with nonmarital funds, and were thus nonmarital, is against the manifest weight of the evidence.

Regarding the remaining real properties (the property in Kentucky and the property on Cermak Road in Chicago) and businesses (Aggressive Leasing, Emergency Demolition Contractors, Appalachian Hardwood Products, and the saw mill) purchased by Colonial, Kim testified that funds from Colonial were used to purchase them. Kim could not recall, specifically, what funds, if any, were charged against his retained earnings account for these real estate and business interests.

"A subchapter S corporation monitors its retained corporate earnings using an account which is then used to determine each shareholder's basis for taxed but undistributed corporate income. However, retained earnings and profits of a subchapter S corporation are a corporate asset and remain the corporation's property until severed from the other corporate assets and distributed as dividends." *In re Marriage of Joynt,* 375 Ill.App.3d 817, 821, 314 Ill.Dec. 551, 874 N.E.2d 916 (2007).

Accordingly, Kim failed to establish by clear and convincing evidence that the funds used to purchase these assets were not distributions ("dividends," see *Joynt,* 375 Ill.App.3d at 821, 314 Ill.Dec. 551, 874 N.E.2d 916) and, thus, income attributable to his personal efforts. Therefore, the trial court's finding that they were purchased with nonmarital funds is against the manifest weight of the evidence.

Kim notes that both he and Mumford testified that the funds used to purchase the real properties and businesses were drawn

fastcase

from Colonial's operating account. However, this does not negate the fact that Kim could not recall whether these withdrawals were later charged against Kim's retained earnings account, thus constituting a distribution to Kim. Accordingly, Kim's and Mumford's testimony does not change the outcome here.

2. Bricks

Sandra also argues that the trial court's classification of Bricks, Inc., a corporation created by Kim during the marriage, as nonmarital property is against the manifest weight of the evidence.

The Act creates a rebuttable presumption that all property acquired after

[909 N.E.2d 230]

marriage is marital property. See 750 ILCS 5/503(a) (West 2006). "The business interest of a spouse acquired subsequent to marriage constitutes `marital property' subject to equitable distribution upon dissolution." *In re Marriage of Schneider,* 343 Ill.App.3d 628, 634, 278 Ill.Dec. 485, 798 N.E.2d 1242 (2003) (citing *In re Marriage of Stone,* 155 Ill.App.3d 62, 72, 107 Ill.Dec. 747, 507 N.E.2d 900 (1987)), *rev'd in part on other grounds, In re Marriage of Schneider,* 214 Ill.2d 152, 291 Ill.Dec. 601, 824 N.E.2d 177 (2005). Real property and business interests acquired after marriage are presumed to be marital property unless they were purchased with nonmarital funds. *In re Marriage of Eddy,* 210 Ill.App.3d 450, 456-57, 155 Ill.Dec. 174, 569 N.E.2d 174 (1991).

The trial court found that Bricks was nonmarital property because it was "formed with funds from [Kim's] non-marital interest in Colonial." It is undisputed that Bricks was acquired after the marriage and, therefore, is presumed to be marital property. Further, because Kim failed to show that the funds from his interest in Colonial were not attributable to his personal efforts, these funds are presumed to be marital property. 750 ILCS 5/503(a)(8) (West 2006); *Dunlap,* 294 Ill.App.3d at 779, 228 Ill.Dec. 948, 690 N.E.2d 1023. Thus, the trial court's finding that Bricks was nonmarital property is against the manifest weight of the evidence.

Further, although retained earnings in subchapter S corporations are generally considered nonmarital, they are considered marital if the spouse has control over the decision to disburse the retained earnings. See *Joynt,* 375 Ill.App.3d at 819, 314 Ill.Dec. 551, 874 N.E.2d 916.

In this case, Kim testified that he did not know whether the money from Bricks was credited to his retained earnings account. Kim, as sole shareholder of Bricks, had complete control of and access to the retained earnings. Thus, the inference to be drawn from the evidence is that the funds were attributed to his personal efforts. Accordingly, the retained earnings of Bricks, and all assets Kim purchased with them, are presumed to be marital, and the record does not show that Kim rebutted with sufficient evidence either the inference or the presumption. Thus, the trial court's finding that Bricks and the assets purchased by Bricks were nonmarital is against the manifest weight of the evidence.

Kim notes that he testified that the funds used to purchase the assets were drawn from Bricks' operating account. However, this does not negate the fact that Kim could not recall whether these withdrawals were later charged against his retained earnings account, thus constituting a distribution to Kim. Accordingly, Kim's testimony does not change the outcome here.

D. The Trial Court's Finding Regarding Reimbursement Is Against the Manifest Weight of the Evidence

We note that the trial court also erroneously found that Kim's yearly salary of $20,000 and expenses paid for Sandra and

fastcase

the parties' children for the years 2000 though 2006 from his nonmarital estate adequately compensated them so that he did not need to reimburse the marital estate. This finding is against the manifest weight of the evidence. Kim did not present evidence sufficient to show that Bricks and the properties purchased by Bricks were nonmarital property.

Kim relies on *In re Marriage of Kennedy,* 94 Ill.App.3d 537, 49 Ill.Dec. 927, 418 N.E.2d 947 (1981), to support his argument that Bricks was nonmarital property. In *Kennedy,* the appellate court held that

[909 N.E.2d 231]

record stores established by the husband before the marriage were nonmarital property but that record stores he established during the marriage were marital property, even though for the new stores he used money borrowed on credit from the nonmarital record stores. *Kennedy,* 94 Ill. App.3d at 548, 49 Ill.Dec. 927, 418 N.E.2d 947. The appellate court held that the new stores were marital and "[did] not come under any exception to the rule that property acquired during the marriage is marital." *Kennedy,* 94 Ill.App.3d at 548, 49 Ill.Dec. 927, 418 N.E.2d 947. In this case, like *Kennedy,* Kim established Bricks after the marriage and he failed to establish that Bricks came under any exception to the general rule stated by the court. Therefore, we believe that *Kennedy* supports Sandra's position rather than Kim's.

Kim also cites *In re Marriage of Werries,* 247 Ill.App.3d 639, 186 Ill.Dec. 747, 616 N.E.2d 1379 (1993), *In re Marriage of Phillips,* 244 Ill.App.3d 577, 186 Ill.Dec. 108, 615 N.E.2d 1165 (1993), *In re Marriage of Jelinek,* 244 Ill.App.3d 496, 184 Ill.Dec. 692, 613 N.E.2d 1284 (1993), *In re Marriage of Eddy,* 210 Ill.App.3d 450, 155 Ill.Dec. 174, 569 N.E.2d 174 (1991), *In re Marriage of Thacker,* 185 Ill.App.3d 465, 133 Ill.Dec. 573, 541 N.E.2d 784 (1989), and *In re Marriage of Kamp,* 199 Ill. App.3d 1080, 146 Ill.Dec. 57, 557 N.E.2d 999 (1990), to support his argument that the real properties and Bricks were not marital property. These cases are all distinguishable from the case at bar.

Werries is distinguishable because the husband sustained his burden of proof that a partnership property was nonmarital. *Werries,* 247 Ill.App.3d at 644, 186 Ill.Dec. 747, 616 N.E.2d 1379. The wife did not establish the amount of marital funds paid to retire a portion of a loan, and she had the burden to establish the amount in order to establish the amount of reimbursement to which the marital estate was entitled. *Werries,* 247 Ill.App.3d at 644, 186 Ill.Dec. 747, 616 N.E.2d 1379. It also appeared that the farmer in *Werries* was a minor partner who did not have the ability to control his distributions (*Werries,* 247 Ill.App.3d at 643, 186 Ill.Dec. 747, 616 N.E.2d 1379), unlike the husband in *Joynt* (see *Joynt,* 375 Ill.App.3d at 819, 314 Ill. Dec. 551, 874 N.E.2d 916).

Phillips, 244 Ill.App.3d 577, 186 Ill.Dec. 108, 615 N.E.2d 1165, is distinguishable from this case because it does not discuss the personal efforts of the husband that transformed the income from the nonmarital property into marital property. See 750 ILCS 5/503(a)(8) (West 2006). Further, there is nothing in *Phillips* to indicate that the husband drew cash out of the business to purchase real property and title it in his own name, as Kim did in this case. Thus, *Phillips* is not applicable here.

Jelinek is distinguishable from this case because class B stock of a publically traded corporation the husband received was due to appreciation under section 503(a)(7) and was not considered compensation. *Jelinek,* 244 Ill.App.3d at 505, 184 Ill.Dec. 692, 613 N.E.2d 1284. In this case, Kim had sole control over the decision to make distributions from Bricks, and he received distributions, or "income," from Colonial and Bricks. Therefore, *Jelinek* is not applicable here.

fastcase

In *Eddy,* the property at issue was all traced back to property that was nonmarital because it was gifted to the husband by his father. *Eddy,* 210 Ill.App.3d at 453, 457-58, 155 Ill.Dec. 174, 569 N.E.2d 174. In this case, the funds used to buy the real properties presumably came from income distributed to Kim. Again, we note that Kim had complete control over whether to distribute the funds from Bricks; thus, the funds were marital property. See *Joynt,*

[909 N.E.2d 232]

375 Ill.App.3d at 819, 314 Ill.Dec. 551, 874 N.E.2d 916. Accordingly, *Eddy* does not apply.

Thacker, 185 Ill.App.3d 465, 133 Ill.Dec. 573, 541 N.E.2d 784, is distinguishable from the case at bar because *Thacker* does not discuss the husband's personal efforts that transformed the income from nonmarital property into marital property. See 750 ILCS 5/503(a)(8) (West 2006). Thus, *Thacker* is not applicable here.

Kamp is distinguishable because the appellate court determined that the property at issue remained nonmarital because it increased in value pursuant to section 503(a)(7) of the Act. *Kamp,* 199 Ill.App.3d at 1083, 146 Ill.Dec. 57, 557 N.E.2d 999. In this case, Kim purchased properties with income acquired through his personal efforts. Thus, *Kamp* is not controlling.

We find erroneous the trial court's classification and distribution of the marital property. Therefore, we remand to the trial court for redetermination and redistribution.

E. Distribution Of Marital Property, Maintenance, and Attorney Fees

Sandra argues that, when the trial court errs in its classification of property and consequently errs in its distribution of marital property, all interrelated support and fee contribution awards must be reversed and the cause remanded for redetermination and redistribution based on all of the marital property. We agree with Sandra and direct the trial court to reconsider these issues on remand. See *In re Marriage of Feldman,* 199 Ill.App.3d 1002, 1006-08, 146 Ill.Dec. 62, 557 N.E.2d 1004 (1990).

Based on the foregoing, we reverse the judgment of the circuit court of Kane County and remand the cause for further proceedings consistent with this opinion.

Reversed and remanded.

ZENOFF, P.J., and HUTCHINSON, J., concur.

Notes:

1. 3415 and 3425 Kedzie Avenue.

2. The bulk deal included 716 S. LaSalle, 723 LaSalle, and lots 14 and 16 on LaSalle, all in Aurora, Illinois.

3. Including the Kedzie properties.

4. Including Schmitt Farms; 718 Hamilton; the LaSalle properties; the 149 acres at Randall and Orchard Roads; and the 50 acres at I-88 and Orchard Road.

----

824 N.E.2d 177
214 Ill.2d 152
291 Ill.Dec. 601

In re MARRIAGE OF Earl M. SCHNEIDER, Appellant, and Jodi Ann Schneider, Appellee.

No. 97430.

Supreme Court of Illinois.

January 21, 2005.

[824 N.E.2d 179]

Rosenfeld, Hafron, Shapiro & Farmer, Chicago (Joel S. Ostrow and Brian Hurst, of counsel), for appellant.

Marshal P. Morris, Park Ridge, for appellee.

Justice THOMAS delivered the opinion of the court:

Appellant, Earl Schneider, filed a petition in the circuit court of Lake County seeking the dissolution of his marriage to appellee, Jodi Ann Schneider. The circuit court entered a judgment for dissolution of marriage incorporating its findings and decisions. Among the contested issues at trial was the value of Earl's dental practice. In valuing Earl's dental practice, the circuit court excluded personal goodwill and accounts receivable from the fair market value of the practice. The circuit court also allocated 67% of the marital assets to Jodi, noting the duration of the marriage, the reasonable opportunity of each spouse for the future acquisition of capital assets and income, and that the apportionment of assets was in lieu of maintenance. The circuit court also determined that each party would be responsible for his or her own attorney fees.

The appellate court affirmed the circuit court in part and reversed in part. 343 Ill.App.3d 628, 278 Ill.Dec. 485, 798 N.E.2d 1242. The appellate court affirmed the circuit court's holding that each party should be responsible for his or her own attorney fees. However, the appellate court held that personal goodwill and accounts receivable should have been included in the valuation of Earl's dental practice. The appellate court therefore reversed the circuit court's valuation of the dental practice and remanded for a redistribution including those assets. This court then allowed Earl's petition for leave to appeal the appellate court's holding that personal goodwill and accounts receivable should have been included in the valuation of the dental practice. 177 Ill.2d R. 315.

BACKGROUND

Earl and Jodi were married in August 1985. The parties had three children during their marriage: Ashley, born in 1986; Justin, born in 1989; and Jordan, born in 1991. Earl filed a petition for dissolution of marriage on September 15, 2000. Prior to trial on the petition for dissolution, the parties stipulated that Earl's gross income as a self-employed dentist was $325,000, with a net income of $195,000. In addition, each party waived maintenance, although Jodi later indicated that she had reserved the right to seek a disproportionate share of the assets in light of her waiver of maintenance. Child support was set at $5,400 a month until Ashley attained majority or graduated high school. Thereafter, child support was set at $4,062.25 until Justin attained majority or graduated high school. Child support then was reduced to $3,250 per month until Jordan attained majority or graduated high school. The tax exemptions for the children were allocated to Earl, and Earl agreed to pay the children's health insurance. Jodi was awarded sole custody of the children.

fastcase

[824 N.E.2d 180]

At trial, Jodi testified that she graduated from college in 1981 with a B.S. in accounting. She became a CPA in 1983. After graduating, Jodi began working full time as a staff accountant for Warady and Davis. Jodi was promoted to supervisor when she was pregnant with Ashley. Jodi continued to work full time until Ashley was born in 1986. Over Earl's objections, Jodi then worked part-time until Justin was born. After Justin was born, Jodi stopped working at Warady and Davis pursuant to Earl's request, although she continued to do bookkeeping and payroll taxes for one client, working approximately four hours every three months. In addition, Jodi did the receivables, accounting, payables, bills and insurance for Earl's dental practice from the time he graduated from dental school until approximately the summer of 2000. Jodi testified that had she continued to work full time for Warady and Davis, she would have been promoted to manager and then to partner. Managers earn from $75,000 to $100,000 a year, while partners earn more than $100,000 a year.

Jodi went back to work part-time for Warady and Davis in September 1998, when her youngest child began school. She currently has three clients. Jodi earned a gross income of $4,385.25 in 2000. From January through October 2001, Jodi had grossed approximately $5,800. Jodi testified that she earns $30 an hour at Warady and Davis.

Earl testified that on March 24, 1987, he entered into an employment agreement with Jack E. Taub, D.D.S., Ltd., an Illinois professional corporation. Pursuant to the employment agreement, Earl was to receive a monthly salary equal to 40% of the net collections of his monthly billings. On August 24, 1987, Earl entered into a second employment agreement with Jack E. Taub, D.D.S., Ltd., which provided for a monthly draw of $4,000 through January 31, 1988, and on a year-to-year basis thereafter, provided Earl had purchased certain shares of Jack E. Taub, D.D.S., Ltd. Also on August 24, 1987, Earl entered into a stock purchase and redemption agreement with Dr. Taub and Jack E. Taub, D.D.S., Ltd. Earl testified that he purchased the dental practice from Dr. Taub in 1987 for $350,000, although agreed interest payments brought the total cost to $550,000. Dr. Taub agreed to stay at the practice for 30 months, and also agreed to a five-mile radius noncompete provision. Earl testified that he did not lose any of Dr. Taub's patients following the transition, and that the practice's current gross income was approximately $800,000 a year. Jodi claimed that the total purchase price for the business was $650,000.

As noted, at trial on the petition for dissolution, the parties contested the valuation of Earl's dental practice and the allocation of marital property. Earl's expert witness, Stephen Mareta, testified that the fair market value of the dental practice was $346,300. Of this amount, Mareta attributed $311,300 to personal goodwill and $35,000 to fixed assets. The fixed assets included property and equipment, but did not include cash on hand, accounts receivable, cash surrender value of life insurance, and loans due from officers. Mareta testified that the accounts receivable were merely a reflection of future income.

Jodi's expert witness, Bruce Richman, testified that the fair market value of the dental practice was $481,000. Richman attributed $144,413 to tangible assets, including accounts receivable, furniture and equipment, cash surrender value of insurance, and inventory. Richman attributed the remaining $336,587 to intangible assets, although Richman stated that those intangible assets did not include personal

[824 N.E.2d 181]

fastcase smarter legal research

goodwill. Richman described the intangible assets as including dental records, the leasehold interest, a trained workforce, intellectual property, trade names and enterprise goodwill.

On January 23, 2002, the circuit court entered its findings and decision. The circuit court valued Earl's dental practice at $38,300. This amount included $8,000 in inventory and $30,330 in furniture and equipment. The circuit court did not include accounts receivable, cash on hand, cash surrender value of life insurance, and loans due from officers in the valuation, accepting Earl's argument that including those items in the valuation would result in a double counting of those assets. In addition, the circuit court held that any goodwill that existed in the practice was personal goodwill that should not be included in determining the fair market value of the dental practice. The circuit court stated that Jodi's expert witness had failed to establish the existence of any enterprise goodwill in the practice.

The circuit court next addressed each party's request for contribution toward attorney fees. The circuit court noted that both parties had been extremely litigious and "quarrelsome" during the entire process, and that each had been unreasonable from time to time, resulting in an unnecessarily expensive divorce. The circuit court held that legal fees would not be based upon the misconduct or litigiousness of the other party because both parties were equally guilty of such conduct. The circuit court then considered the factors set forth in section 503 of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (750 ILCS 5/503 (West 2000)), as well as the allocation of marital property and debt, and held that each party should be responsible for his or her own legal fees and costs.

The circuit court then allocated 67% of the marital assets to Jodi and 33% to Earl, for an approximate distribution of $326,000 to Jodi and $161,000 to Earl. The circuit court stated that in determining the allocation of marital assets, it found that the following factors weighed heavily in favor of a disproportionate allocation: the duration of the marriage (750 ILCS 5/503(d)(4) (West 2000)); whether the apportionment of assets was in lieu of or in addition to maintenance (750 ILCS 5/503(d)(10) (West 2000)); and the reasonable opportunity of each spouse for future acquisition of capital assets and income (750 ILCS 5/503(d)(11) (West 2000)). The circuit court then entered a judgment for dissolution of marriage on March 4, 2002, incorporating its findings and decision. The circuit court subsequently denied Earl's motion for reconsideration.

Earl then appealed the circuit court's judgment and Jodi filed a cross-appeal. Earl later filed a motion to dismiss his appeal, so that only Jodi's cross-appeal remained pending. Relevant to the instant case, Jodi argued on appeal that the circuit court had erred in its valuation of Earl's dental practice and thus in its ultimate distribution of the marital property. Jodi argued that the circuit court should have included goodwill, accounts receivable, loans due from officers, cash surrender value of insurance policies, and cash on hand in its valuation of the dental practice. Jodi also argued that the circuit court should have ordered Earl to contribute to her attorney fees.

The appellate court, with one justice dissenting, reversed the circuit court in part. 343 Ill.App.3d 628, 278 Ill.Dec. 485, 798 N.E.2d 1242. The appellate court found that the circuit court erred in excluding personal goodwill from the valuation of Earl's dental practice. 343 Ill.App.3d at 636, 278 Ill.Dec. 485, 798 N.E.2d 1242.

[824 N.E.2d 182]

The appellate court acknowledged that this court, in *In re Marriage of Zells,* 143 Ill.2d 251, 157 Ill.Dec. 480, 572 N.E.2d 944 (1991),

fastcase

held that personal goodwill is not to be considered a divisible marital asset. 343 Ill.App.3d at 635, 278 Ill.Dec. 485, 798 N.E.2d 1242. The appellate court concluded, however, that if goodwill is not considered as part of a spouse's income-generating ability relative to a maintenance award, it may be considered in the valuation of a professional practice as a divisible marital asset. 343 Ill.App.3d at 636, 278 Ill.Dec. 485, 798 N.E.2d 1242. In addition, the appellate court held that accounts receivable are business assets and should have been included in the valuation of the dental practice. 343 Ill.App.3d at 637, 278 Ill.Dec. 485, 798 N.E.2d 1242. Likewise, the appellate court found that the circuit court erred in not including the cash on hand, cash surrender value of insurance policies and loans due from officers in determining the fair market value of the dental practice. 343 Ill.App.3d at 637, 278 Ill.Dec. 485, 798 N.E.2d 1242. The appellate court therefore reversed the circuit court's property distribution and remanded to the circuit court for a redistribution including the items of marital property that were erroneously omitted from the original judgment for dissolution. 343 Ill.App.3d at 637, 278 Ill.Dec. 485, 798 N.E.2d 1242. Finally, the appellate court held that the circuit court did not abuse its discretion in determining that Jodi was able to pay her own attorney fees. 343 Ill.App.3d at 638, 278 Ill.Dec. 485, 798 N.E.2d 1242.

Justice Bowman, dissenting, disagreed with the majority's conclusion that the circuit court erred in not including personal goodwill in the valuation of Earl's dental practice. 343 Ill.App.3d at 638, 278 Ill.Dec. 485, 798 N.E.2d 1242 (Bowman, J., dissenting). Justice Bowman stated that the majority's holding was contrary to the language expressed by this court in *Zells*. 343 Ill.App.3d at 638, 278 Ill.Dec. 485, 798 N.E.2d 1242 (Bowman, J., dissenting). Justice Bowman noted that the circuit court considered both Jodi's waiver of maintenance and the future income generating ability of each party in awarding Jodi a disproportionate share of the marital assets. 343 Ill.App.3d at 639, 278 Ill.Dec. 485, 798 N.E.2d 1242 (Bowman, J., dissenting). In addition, the circuit court based its child support award on Earl's income from his dental practice. 343 Ill.App.3d at 639, 278 Ill.Dec. 485, 798 N.E.2d 1242 (Bowman, J., dissenting). Justice Bowman concluded that, because the personal goodwill of Earl's dental practice was reflected in the child support award, any additional consideration of goodwill in the valuation of his dental practice would be duplicative and improper. 343 Ill.App.3d at 639, 278 Ill.Dec. 485, 798 N.E.2d 1242 (Bowman, J., dissenting), quoting *Zells,* 143 Ill.2d at 256, 157 Ill.Dec. 480, 572 N.E.2d 944.

Earl then petitioned this court for leave to appeal from the appellate court's holding that goodwill and accounts receivable should have been included in the valuation of his dental practice. This court allowed Earl's petition for leave to appeal. 177 Ill.2d R. 315. Jodi cross-appealed, again challenging the circuit court's failure to order Earl to pay her costs and attorney fees. Jodi also argues on cross-appeal that if this court finds that goodwill and accounts receivable were properly excluded from the valuation of Earl's dental practice, this court should remand to the circuit court for a reconsideration of Jodi's waiver of maintenance.

ANALYSIS

As noted, Earl first argues that the appellate court erred in including the personal goodwill of his dental practice as an element of valuation. Generally, the

[824 N.E.2d 183]

valuation of assets in an action for dissolution of marriage is a question of fact, and the circuit court's determination will not be disturbed absent an abuse of discretion. *In re Marriage of Stone,* 155 Ill.App.3d 62, 70, 107 Ill.Dec. 747, 507 N.E.2d 900 (1987).

fastcase

However, the issue in this case-whether personal goodwill must be considered a divisible marital asset when spousal maintenance is not awarded-presents an issue of law and not a question of fact. Accordingly, this court reviews the issue *de novo*. See *In re Marriage of Crook,* 211 Ill.2d 437, 442, 286 Ill.Dec. 141, 813 N.E.2d 198 (2004).

In support of his claim that the appellate court erred in considering personal goodwill in valuing his dental practice, Earl contends that the appellate court majority misinterpreted this court's decision in *In re Marriage of Zells,* 143 Ill.2d 251, 157 Ill.Dec. 480, 572 N.E.2d 944 (1991). At issue in *Zells* was the division and distribution of marital property between a lawyer and his spouse. *Zells,* 143 Ill.2d at 252, 157 Ill.Dec. 480, 572 N.E.2d 944. The circuit court and the appellate court had found that the goodwill in the husband's law practice was a marital asset subject to division and distribution. *Zells,* 143 Ill.2d at 252, 157 Ill.Dec. 480, 572 N.E.2d 944. In addressing the issue, this court noted that the appellate court districts were divided on the issue of whether personal goodwill should be considered in valuing a professional practice. *Zells,* 143 Ill.2d at 254-55, 157 Ill.Dec. 480, 572 N.E.2d 944. For example, the Fifth District, in *In re Marriage of White,* 98 Ill.App.3d 380, 384, 53 Ill.Dec. 786, 424 N.E.2d 421 (1981), had held that goodwill was a factor to be considered in valuing a professional corporation. The *White* court had noted that "despite the intangible quality of good will in a professional practice, it is of value to the practicing spouse both during and after the marriage and its value is manifested in the amount of business and, consequently, in the income which the spouse generates." *White,* 98 Ill.App.3d at 384, 53 Ill.Dec. 786, 424 N.E.2d 421.

In contrast, the First District had taken the position that the goodwill of a professional business was not marital property subject to division. *In re Marriage of Wilder,* 122 Ill.App.3d 338, 77 Ill.Dec. 824, 461 N.E.2d 447 (1983). The *Wilder* court declined to follow the reasoning of the Fifth District in *White,* finding that the *White* court's definition of goodwill was reflected in three of the factors that the trial court must consider in apportioning marital property under section 503(d) of the Dissolution Act (Ill.Rev.Stat.1981, ch. 40, par. 503(d), now 750 ILCS 5/503(d) (West 2000)), including the ability to generate income. *Wilder,* 122 Ill.App.3d at 347, 77 Ill.Dec. 824, 461 N.E.2d 447.

Subsequently, the Third District elected to follow *Wilder* rather than *White. In re Marriage of Courtright,* 155 Ill.App.3d 55, 107 Ill.Dec. 738, 507 N.E.2d 891 (1987). The appellate court in *Courtright* stated that:

> "Although many businesses possess this intangible known as good will, the concept is unique in professional business. The concept of professional good will is the sole asset of the professional. If good will is that aspect of a business which maintains the clientele, then the good will in a professional business is the skill, the expertise, and the reputation of the professional. It is these qualities which would keep patients returning to a doctor and which would make those patients refer others to him. The bottom line is that this is reflected in the doctor's income-generating ability." *Courtright,* 155 Ill.App.3d at 58, 107 Ill.Dec. 738, 507 N.E.2d 891.

[824 N.E.2d 184]

The court in *Courtright* concluded that, although goodwill had not been considered in the trial court's valuation of the husband's

fastcase

business itself, goodwill was a factor in examining the husband's income potential. *Courtright,* 155 Ill.App.3d at 59, 107 Ill.Dec. 738, 507 N.E.2d 891. The court held that "[t]o figure good will in both facets of the practice would be to double count and reach an erroneous valuation." *Courtright,* 155 Ill.App.3d at 59, 107 Ill.Dec. 738, 507 N.E.2d 891.

Upon review of the appellate court decisions, this court in *Zells* agreed with the reasoning of the court in *Courtright*. *Zells,* 143 Ill.2d at 256, 157 Ill.Dec. 480, 572 N.E.2d 944. We held that:

> "Adequate attention to the relevant factors in the Dissolution Act results in an appropriate consideration of professional goodwill as an aspect of income potential. The goodwill value is then reflected in the maintenance and support awards. Any additional consideration of goodwill value is duplicative and improper." *Zells,* 143 Ill.2d at 256, 157 Ill.Dec. 480, 572 N.E.2d 944.

We stated that "[g]oodwill represents merely the ability to acquire future income. Consideration of goodwill as a divisible marital asset results in gross inequity." *Zells,* 143 Ill.2d at 254, 157 Ill.Dec. 480, 572 N.E.2d 944.

In this case, in addressing our decision in *Zells,* the appellate court majority focused on the statement that "goodwill value is then reflected in the maintenance and support awards." The appellate court majority interpreted *Zells* as holding that "personal goodwill, *if used as a factor in calculating income potential, on which the maintenance and support awards are based,* cannot also be used as a divisible marital asset." (Emphasis added.) 343 Ill.App.3d at 635, 278 Ill.Dec. 485, 798 N.E.2d 1242. The majority therefore concluded that "if goodwill is not considered as part of a spouse's income-generating ability relative to a maintenance award, it may be considered in the valuation of a professional practice as a divisible marital asset." 343 Ill.App.3d at 636, 278 Ill.Dec. 485, 798 N.E.2d 1242. The majority also rejected the dissent's assertion that personal goodwill was reflected in the child support award. 343 Ill.App.3d at 636, 278 Ill.Dec. 485, 798 N.E.2d 1242. The majority interpreted *Zells* as providing that personal goodwill must be reflected in both the maintenance *and* support awards. 343 Ill.App.3d at 636, 278 Ill.Dec. 485, 798 N.E.2d 1242. Thus, if personal goodwill was reflected only in the award of child support, the exclusion of goodwill from the valuation of the dental practice would result in an unfair and unjust distribution of marital property. 343 Ill.App.3d at 636, 278 Ill.Dec. 485, 798 N.E.2d 1242. Consequently, the court concluded that, because Jodi had waived maintenance, personal goodwill should have been included when valuing Earl's dental practice.

Earl disputes the appellate court's application of *Zells*. Earl maintains that *Zells* held that only one of the allowances predicated on future income, maintenance or support, was necessary for a double count of goodwill to exist if goodwill is also used to value an asset. Earl additionally observes that the majority did not address this court's decision in *In re Marriage of Talty,* 166 Ill.2d 232, 209 Ill.Dec. 790, 652 N.E.2d 330 (1995). *Talty* held that an impermissible double count takes place if professional goodwill is used first to give the other spouse a disproportionate share of the assets and then is used in valuing the business. *Talty,* 166 Ill.2d at 238-39, 209 Ill.Dec. 790, 652 N.E.2d 330. Earl argues that because Jodi sought and received a disproportionate share of the marital assets, an impermissible double counting

[824 N.E.2d 185]

fastcase

would take place if Earl's professional goodwill is considered in valuing his dental practice.

Upon review, we agree with Earl that the appellate court majority misinterpreted our decision in *Zells*. Section 503(d) of the Dissolution Act sets forth relevant factors to be considered in dividing marital property in just proportions. These factors include:

> "(5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;
>
> * * *
>
> (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
>
> * * *
>
> (10) whether the apportionment is in lieu of or in addition to maintenance;
>
> (11) the reasonable opportunity of each spouse for future acquisition of capital assets and income[.]" 750 ILCS 5/503(d)(5), (d)(8), (d)(10), (d)(11) (West 2000).

In *Zells* we noted that adequate attention to the preceding factors would result in an appropriate consideration of professional goodwill as an aspect of income potential that would then be reflected in the maintenance and support awards. *Zells,* 143 Ill.2d at 256, 157 Ill.Dec. 480, 572 N.E.2d 944. We therefore held that any additional consideration of goodwill value is duplicative and improper. *Zells,* 143 Ill.2d at 256, 157 Ill.Dec. 480, 572 N.E.2d 944. However, as this court made clear in *Talty,* the basis for our holding in *Zells* was not simply the fact that maintenance and support were awarded. Rather, the basis for our holding in *Zells* was the fact that personal goodwill "is already reflected in a number of the circumstances that must be considered by a judge in making an equitable division of property under the [Dissolution] Act." *Talty,* 166 Ill.2d at 237, 209 Ill.Dec. 790, 652 N.E.2d 330. Specifically we stated:

> "`A workable definition of goodwill is that "goodwill is the value of a business or practice that exceeds the combined value of the physical assets." (2 Valuation and Distribution of Marital Property, sec. 23.04[1] (M. Bender ed. 1984).)' (*In re Marriage of White* (1986), 151 Ill.App.3d 778, 780, 104 Ill.Dec. 424, 502 N.E.2d 1084.) `Goodwill represents merely the ability to acquire future income.' (*Zells,* 143 Ill.2d at 254, 157 Ill. Dec. 480, 572 N.E.2d 944.) To the extent that the goodwill of the car dealership depends on [the husband's] personal efforts, the same elements that underlie that calculation were also considered by the court in its assessment of the criteria contained in section 503(d)." *Talty,* 166 Ill.2d at 238, 209 Ill.Dec. 790, 652 N.E.2d 330.

Notably, in *Talty,* although no award of maintenance or child support was made, this court nonetheless held that personal goodwill should not be considered an asset of the business because the elements that constitute personal goodwill are considered under section 503(d) of the Dissolution Act in

fastcase

dividing marital property. *Talty,* 166 Ill.2d at 240, 209 Ill.Dec. 790, 652 N.E.2d 330.

In this case, as in *Talty,* the personal goodwill in Earl's dental practice was considered by the circuit court in assessing the criteria in section 503(d) and in deciding to award Jodi a disproportionate share of the marital assets. Any further consideration of that goodwill in valuing Earl's dental practice would amount to an impermissible

[824 N.E.2d 186]

double counting. Accordingly, we find that the appellate court erred in holding that personal goodwill should have been included in the valuation of Earl's dental practice.

Notwithstanding this court's decisions in *Zells* and *Talty,* Jodi argued in her brief and at oral argument that this court should follow the approach taken by the appellate court in *In re Marriage of Grunsten,* 304 Ill.App.3d 12, 237 Ill.Dec. 342, 709 N.E.2d 597 (1999), in valuing Earl's dental practice. *Grunsten* held that, in valuing a closely held corporation, it was proper to consider the price paid for the corporation four years earlier, as well as the increase in gross revenues since the corporation was purchased. *Grunsten,* 304 Ill.App.3d at 18, 237 Ill.Dec. 342, 709 N.E.2d 597. Jodi argues that this court should look to the price that Earl paid Dr. Taub for his dental practice, as well as at the increase in revenues since Earl purchased the practice in order to determine a fair market value for the practice.

We decline to adopt the approach set forth in *Grunsten* for purposes of the valuation in this case. The issue of goodwill in valuing the corporation was not addressed by the court in *Grunsten*. Moreover, the corporation in *Grunsten* was a closely held corporation, while Earl's dental practice is a professional corporation. The goodwill in a professional practice is generally personal in nature, while the goodwill in a corporation might include both personal and enterprise goodwill. *Talty,* 166 Ill.2d at 239, 209 Ill.Dec. 790, 652 N.E.2d 330. As we recognized in *Talty,* the duplication of the factors set forth in section 503(d) of the Act is limited to personal goodwill and does not extend to enterprise goodwill. *Talty,* 166 Ill.2d at 239-40, 209 Ill.Dec. 790, 652 N.E.2d 330. Because the court in *Grunsten* did not address the issue of goodwill, let alone whether any enterprise or personal goodwill existed in the corporation, we find that *Grunsten* is inapposite.

Earl next argues that the appellate court erred in remanding this cause to the circuit court with directions to consider accounts receivable in distributing the marital estate.[1] Earl concedes that courts have classified accounts receivable as assets, but argues that no court has considered the issue of double counting with regard to accounts receivable. Earl contends that the accounts receivable are analogous to goodwill. Earl argues that accounts receivable are income from which child support payments are made, so that if accounts receivable are considered in valuing the dental practice, the same money is being paid upon twice. Jodi responds that goodwill and accounts receivable are distinguishable. Goodwill is an intangible asset, while accounts receivable are tangible, or fixed, assets and may be considered in valuing Earl's dental practice.

Because the issue of whether accounts receivable are properly included in valuing a professional corporation presents an issue of law, our review is *de novo*. See *In re Marriage of Crook,* 211 Ill.2d 437, 442, 286 Ill.Dec. 141, 813 N.E.2d 198 (2004). Although this court has not considered the issue, our appellate court has addressed whether accounts receivable should be considered in valuing a professional practice. In *In re Marriage of Tietz,* 238 Ill.App.3d 965, 973, 178 Ill.Dec. 876, 605 N.E.2d 670 (1992), the respondent husband argued that the trial

fastcase

court erred in valuing his law practice by taking into consideration accounts

[824 N.E.2d 187]

counts receivable. Relying on this court's decision in *Zells,* the respondent argued that accounts receivable, like goodwill and contingent fees, were part of his future earnings and were accounted for in his projected income, so that it would be duplicative to also consider the accounts receivable as a separate asset in valuing respondent's law practice. *Tietz,* 238 Ill.App.3d at 975, 178 Ill.Dec. 876, 605 N.E.2d 670. The respondent maintained that the accounts receivable should not be viewed as marital property subject to distribution, but instead should be used in determining income for purposes of support and maintenance. *Tietz,* 238 Ill.App.3d at 975, 178 Ill.Dec. 876, 605 N.E.2d 670.

The appellate court held that *Zells* did not apply to accounts receivable. *Tietz,* 238 Ill.App.3d at 976, 178 Ill.Dec. 876, 605 N.E.2d 670. The court in *Tietz* noted that, in addition to goodwill, *Zells* had also considered whether a lawyer's contingent fee contracts are subject to valuation, division and distribution as part of the marital estate. *Zells* held that the proper context for the consideration of fees, contingent or otherwise, was in the determination of income for support and maintenance, so that future earned fees could be considered if the subject of maintenance was revisted. *Zells,* 143 Ill.2d at 253, 157 Ill.Dec. 480, 572 N.E.2d 944. The court in *Tietz* then concluded that:

> "Clearly, future earned fees, like contingent fees, are not marital assets because their value is too speculative and because they are fees earned in the future. Accounts receivable, however, are distinguishable because they are assets already earned with a known value but have not yet been collected." *Tietz,* 238 Ill.App.3d at 977, 178 Ill.Dec. 876, 605 N.E.2d 670.

The appellate court held that it was not error for the trial court to value the law partnership by viewing the tangible assets, including accounts receivable. *Tietz,* 238 Ill.App.3d at 977, 178 Ill.Dec. 876, 605 N.E.2d 670. The court stated that "[a]ccounts receivable are only `future income' in the sense they will be collected in the future. The distinction is these fees have already been earned and have a known value." *Tietz,* 238 Ill.App.3d at 977, 178 Ill.Dec. 876, 605 N.E.2d 670.

Subsequent appellate court decisions have also rejected the claim that considering accounts receivable in valuing a business results in a double recovery. See *In re Marriage of Steinberg,* 299 Ill.App.3d 603, 233 Ill.Dec. 611, 701 N.E.2d 254 (1998) (court rejects husband's theory that because accounts receivable when collected become part of the husband's income upon which support is based, wife would receive double benefit if marital estate also was reimbursed for increase in accounts receivable); *In re Marriage of Lee,* 246 Ill.App.3d 628, 186 Ill.Dec. 257, 615 N.E.2d 1314 (1993) (court rejects husband's claim that trial court considered his "future income" twice, once in valuing the accounts receivable and again in determining the proportion of marital assets awarded each party, holding that accounts receivable are simply past, but not yet collected, income).

We agree with the appellate court in the preceding cases. Although accounts receivable have not been collected, they are assets that have been earned and have a known value and, thus, are distinguishable from future earnings or income-generating ability. Because accounts receivable have a known value, a court can properly consider accounts receivable as assets of the business. As the *Tietz* court correctly observed, accounts

fastcase

receivable are future income only in the sense that they will be collected in the future. Accounts receivable are not future income in the sense that they are assets considered by a

[824 N.E.2d 188]

circuit court in determining a party's income-generating ability for purposes of maintenance or child support awards. The fact that the accounts receivable may not be collected until a future date does not transform those assets into speculative or future income. Consequently, we agree with the appellate court that the circuit court should have considered the accounts receivable in valuing Earl's dental practice. We therefore affirm that portion of the appellate court's order remanding this cause to the circuit court for a redistribution of marital property which includes accounts receivable, in addition to cash on hand, cash surrender value of life insurance, and loans due from officers.

Finally, Earl argues that if this court affirms the appellate court's holding that goodwill and/or accounts receivable should be included in valuing Earl's dental practice, this court must also order the circuit court to reassess the 67/33 allocation of marital assets. Earl contends that the addition of personal goodwill and accounts receivable would increase the marital estate by more than $300,000, resulting in an unjust allocation of assets if the 67/33 division is allowed to stand.

Section 503(d) of the Dissolution Act provides that the circuit court shall divide marital property in "just proportions." 750 ILCS 5/503(d) (West 2000). In order to divide the marital property in just proportions, the circuit court first must establish the value of the assets. *In re Marriage of Cutler,* 334 Ill.App.3d 731, 736, 268 Ill.Dec. 496, 778 N.E.2d 762 (2002). Any conflicts in testimony concerning the valuation of assets must be resolved by the trier of fact. *In re Marriage of Stone,* 155 Ill.App.3d 62, 70-71, 107 Ill.Dec. 747, 507 N.E.2d 900 (1987). Here, Earl's expert showed adjusted accounts receivable of $112,000, while Earl stated that the accounts receivable would amount to $89,000. Jodi's expert discounted the receivables to $78,550. Consequently, upon remand, the circuit court first must determine the proper value of the accounts receivable, then it must include the accounts receivable, cash on hand, cash surrender value of life insurance and the loans due from officers in the distribution of marital assets. Because the circuit court has not had an opportunity to reassess the allocation of marital assets in light of the redistribution, we will not at this point usurp the circuit court's discretion to determine whether the 67/33 allocation of assets remains a just allocation upon redistribution. Rather, we find that it is for the circuit court to determine whether the 67/33 allocation must be reassessed once the accounts receivable, cash on hand, cash surrender value of life insurance and loans due from officers are added to the marital estate.

We next consider the issues raised in Jodi's cross-appeal. Jodi argues that, if this court agrees that goodwill and/or accounts receivable were properly excluded from the valuation of Earl's dental practice, this court should find that the circuit court abused its discretion in failing to *sua sponte* declare Jodi's waiver of maintenance unconscionable. In the event that this court declines to include goodwill and/or accounts receivable in the valuation of the dental practice, Jodi asks this court to either enter an award of maintenance or remand to the circuit court for an award of maintenance.

Earl responds that Jodi should not be allowed to change her litigation position on appeal. Earl notes that Jodi elected to waive maintenance at trial in order to seek a disproportionate share of the marital assets. Based upon Jodi's waiver of maintenance, the circuit court did in fact award Jodi a

fastcase smarter legal research

disproportionate share of the marital assets. Jodi should not be allowed to

[824 N.E.2d 189]

retract her waiver of maintenance simply because the circuit court did not accept her valuation of the dental practice.

We agree with Earl. This court has held that the theory under which a case is tried in the trial court cannot be changed on review, and an issue not presented to or considered by the trial court cannot be raised for the first time on review. *Daniels v. Anderson,* 162 Ill.2d 47, 58, 204 Ill.Dec. 666, 642 N.E.2d 128 (1994). To allow a party to change his or her trial theory on review would weaken the adversarial process and the system of appellate jurisdiction, and could also prejudice the opposing party, who did not have an opportunity to respond to that theory in the trial court. *Daniels,* 162 Ill.2d at 59, 204 Ill.Dec. 666, 642 N.E.2d 128. Here, Jodi elected to waive maintenance in order to request a disproportionate share of the marital assets. Nonetheless, Jodi now claims that the division of assets was unconscionable because the valuation of the dental practice did not include personal goodwill. Jodi, however, cannot claim that she was unaware that personal goodwill would be excluded from the valuation because our decisions in *Zells* and *Talty* were well established at the time that Jodi elected to waive maintenance. In addition, although goodwill was not included in the valuation of the dental practice, the circuit court considered goodwill, as evinced by Earl's greater ability to acquire assets in the future, in awarding Jodi 67% of the marital assets and in setting the amount of child support. We will not allow Jodi to change her trial strategy on appeal and now seek maintenance simply because the circuit court did not accept her expert's valuation of Earl's dental practice.

In any event, the propriety of a maintenance award is within the discretion of the trial court and the court's decision will not be disturbed absent an abuse of discretion. *In re Marriage of Puls,* 268 Ill.App.3d 882, 887, 206 Ill.Dec. 520, 645 N.E.2d 525 (1994). A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court. *Puls,* 268 Ill.App.3d at 888, 206 Ill.Dec. 520, 645 N.E.2d 525. Moreover, the burden is on the party seeking reversal concerning maintenance to show an abuse of discretion. *Puls,* 268 Ill.App.3d at 888, 206 Ill.Dec. 520, 645 N.E.2d 525. Given that Jodi waived maintenance in order to seek a disproportionate share of the assets, and did in fact receive a disproportionate share of the assets, we cannot say that the circuit court's failure to *sua sponte* reconsider Jodi's waiver of maintenance amounted to an abuse of discretion.

Finally, Jodi argues on cross-appeal that the circuit and appellate courts erred in denying her request for contribution of attorney fees and costs. Jodi claims that the circuit court abused its discretion because the evidence revealed a gross disparity in income and earning capacity, as well as Jodi's financial inability to pay her fees.

Earl contends that Jodi has failed to meet her burden of showing that the circuit court's finding was an abuse of discretion. Jodi failed to present any facts or argument with regard to the fee factors, including complexity, nature of the controversy, or importance of the subject matter. Jodi also failed to provide this court with a record reflecting the amount of Earl's fees, which is necessary to an analysis concerning an award of attorney fees. Earl argues that absent a finding that the dental practice was undervalued, the circuit court did not abuse its discretion in denying Jodi's request that Earl pay more than $67,000 for her attorney and expert fees, in addition to his own fees, out of the

[824 N.E.2d 190]

fastcase

$161,000 that he received in the distribution of marital assets.

Section 508 of the Dissolution Act allows for an award of attorney fees where one party lacks the financial resources and the other party has the ability to pay. 750 ILCS 5/508 (West 2000). The party seeking an award of attorney fees must establish her inability to pay and the other spouse's ability to do so. *In re Marriage of Puls,* 268 Ill.App.3d 882, 889, 206 Ill.Dec. 520, 645 N.E.2d 525 (1994). Financial inability exists where requiring payment of fees would strip that party of her means of support or undermine her financial stability. *Puls,* 268 Ill.App.3d at 889, 206 Ill.Dec. 520, 645 N.E.2d 525. In addition, a trial court's decision to award or deny fees will be reversed only if the trial court abused its discretion. *In re Marriage of Snow,* 277 Ill.App.3d 642, 653, 214 Ill.Dec. 398, 660 N.E.2d 1347 (1996).

The appellate court affirmed the circuit court's order holding each party responsible for his and her own attorney fees and costs. The appellate court noted that the circuit court found both parties were equally unreasonable, litigious and quarrelsome throughout the proceedings, resulting in an unnecessarily expensive divorce. In addition, the circuit court had considered the factors set forth in section 503 of the Dissolution Act and found it was equitable to hold both parties responsible for their own attorney fees. The appellate court further noted that Jodi had failed to show an inability to pay her own attorney fees. Finally, the appellate court reiterated that Jodi had been awarded a disproportionate share of the marital assets, amounting to approximately $326,000.

We agree with the appellate court that Jodi has failed to establish that the circuit court abused its discretion in this case. Jodi has not established her inability to pay or Earl's ability to do so. Jodi also has not established that requiring payment of fees would strip her of her means of support or would undermine her financial stability. Although Jodi claims she is entitled to fees because Earl's dental practice was worth $650,000, we note that Earl's greater earning capacity was taken into consideration in awarding Jodi a disproportionate share of the marital assets and in setting the amount of child support. Consequently, we affirm the circuit court's order directing each party to pay his or her own fees and costs.

For these reasons, we reverse the appellate court's judgment finding that the circuit court should have included personal goodwill in the valuation of Earl's dental practice. We affirm the appellate court's finding that the circuit court should have included accounts receivable, cash on hand, cash surrender value of life insurance policies and loans to officers in its valuation of the dental practice, and remand the cause to the circuit court for a redistribution including those assets. Finally, we affirm the judgment of the circuit and appellate courts directing that each party is responsible for his or her own attorney's fees and costs.

Appellate court judgment affirmed in part and reversed in part; circuit court judgment affirmed in part and reversed in part; cause remanded with directions.

Notes:

1. Earl does not challenge the appellate court's finding that cash on hand, the cash surrender value of life insurance, and loans due from officers should be added to the value of the corporation.

2011 IL App (2d) 080974
977 N.E.2d 761
364 Ill.Dec. 852

In re MARRIAGE OF Jennifer STEEL, Petitioner–Appellant and Cross–Appellee,
and
Robert Steel, Respondent–Appellee and Cross–Appellant.

Nos. 2–08–0974, 2–08–1164.

Appellate Court of Illinois, Second District.

Nov. 21, 2011.
Rehearing Denied Dec. 30, 2011.

[977 N.E.2d 764]

Robert G. Black, Law Offices of Robert G. Black, Naperville, for Jennifer Steel.

Barry A. Schatz, Berger Schatz, Chicago, for Robert Steel.

Justice BIRKETT delivered the judgment of the court, with opinion.

OPINION

[364 Ill.Dec. 855]¶ 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 [364 Ill.Dec. 856]

[977 N.E.2d 765]

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.

fastcase

¶ 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 1,553 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[364 Ill.Dec. 857]

[977 N.E.2d 766]

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

fastcase

¶ 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 [364 Ill.Dec. 858]

[977 N.E.2d 767]

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

fastcase

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[364 Ill.Dec. 859]

[977 N.E.2d 768]

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

fastcase

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

[977 N.E.2d 769]

[364 Ill.Dec. 860](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

fastcase

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 [364 Ill.Dec. 861]

[977 N.E.2d 770]

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

fastcase

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 [364 Ill.Dec. 862]

[977 N.E.2d 771]

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

fastcase

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 [364 Ill.Dec. 863]

[977 N.E.2d 772]

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

fastcase

which he acquired 74,200 shares of *non* voting stock alone. Also by [364 Ill.Dec. 864]

[977 N.E.2d 773]

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 7. 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:

fastcase

"[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 [364 Ill.Dec. 865]

[977 N.E.2d 774]

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 [303 Ill.Dec. 75, 850 N.E.2d 880];*In re Marriage of Jelinek,* (1993) 244 Ill.App.3d 496 [184 Ill.Dec. 692, 613 N.E.2d 1284]. 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 as non-marital pursuant to [364 Ill.Dec. 866]

[977 N.E.2d 775]

fastcase

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, 294 Ill.Dec. 897, 831 N.E.2d 1222 (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, 297 Ill.Dec. 795, 838 N.E.2d 282 (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, 297 Ill.Dec. 795, 838 N.E.2d 282.

¶ 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 [364 Ill.Dec. 867]

[977 N.E.2d 776]

fastcase

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, 335 Ill.Dec. 761, 919 N.E.2d 480 (2009); *In re Marriage of Joynt,* 375 Ill.App.3d 817, 314 Ill.Dec. 551, 874 N.E.2d 916 (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, 230 Ill.Dec. 250, 693 N.E.2d 379 (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 [364 Ill.Dec. 868]

[977 N.E.2d 777]

fastcase

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, 314 Ill.Dec. 551, 874 N.E.2d 916. Under certain circumstances, however, retained earnings may be considered marital property. *Id.* at 819, 314 Ill.Dec. 551, 874 N.E.2d 916. 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, 314 Ill.Dec. 551, 874 N.E.2d 916;*Lundahl,* 396 Ill.App.3d at 503–04, 335 Ill.Dec. 761, 919 N.E.2d 480. "[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, 314 Ill.Dec. 551, 874 N.E.2d 916. 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, 314 Ill.Dec. 551, 874 N.E.2d 916;*Lundahl,* 396 Ill.App.3d at 503–04, 335 Ill.Dec. 761, 919 N.E.2d 480.*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, 314 Ill.Dec. 551, 874 N.E.2d 916. 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 [364 Ill.Dec. 869]

[977 N.E.2d 778]

services he provided." *Id.* at 821, 314 Ill.Dec. 551, 874 N.E.2d 916. The *Joynt* court did not explain the significance of this fourth factor,

fastcase

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 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 [364 Ill.Dec. 870]

[977 N.E.2d 779]

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

fastcase

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, 314 Ill.Dec. 551, 874 N.E.2d 916.

¶ 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 through 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 [364 Ill.Dec. 871]

[977 N.E.2d 780]

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

fastcase

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, 324 Ill.Dec. 310, 895 N.E.2d 1025 (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, 297 Ill.Dec. 795, 838 N.E.2d 282.

¶ 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 [364 Ill.Dec. 872]

[977 N.E.2d 781]

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 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

fastcase

were a gift to the marital estate. *Wojcik,* 362 Ill.App.3d at 155, 297 Ill.Dec. 795, 838 N.E.2d 282; see also *In re Marriage of Berger,* 357 Ill.App.3d 651, 660, 293 Ill.Dec. 954, 829 N.E.2d 879 (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, 297 Ill.Dec. 795, 838 N.E.2d 282 ("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, 297 Ill.Dec. 795, 838 N.E.2d 282.

¶ 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, 297 Ill.Dec. 795, 838 N.E.2d 282. 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 [364 Ill.Dec. 873]

[977 N.E.2d 782]

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

fastcase

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, 159 Ill.Dec. 375, 576 N.E.2d 44 (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, 159 Ill.Dec. 375, 576 N.E.2d 44. 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, 159 Ill.Dec. 375, 576 N.E.2d 44. Afterwards, he deposited over $340,000 in marital funds into the account. *Id.* at 769, 159 Ill.Dec. 375, 576 N.E.2d 44. 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 [364 Ill.Dec. 874]

[977 N.E.2d 783]

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, 159 Ill.Dec. 375, 576 N.E.2d 44. 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, 159 Ill.Dec. 375, 576 N.E.2d 44.

¶ 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 [364 Ill.Dec. 875]

[977 N.E.2d 784]

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

fastcase

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, 293 Ill.Dec. 954, 829 N.E.2d 879. 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 [364 Ill.Dec. 876]

[977 N.E.2d 785]

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, 171 Ill.Dec. 501, 594 N.E.2d 353 (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.

¶ 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:

fastcase

"[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. * * *

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[364 Ill.Dec. 877]

[977 N.E.2d 786]

* * *.' 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

fastcase

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, 330 Ill.Dec. 508, 909 N.E.2d 221 (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 [364 Ill.Dec. 878]

[977 N.E.2d 787]

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, 280 Ill.Dec. 726, 802 N.E.2d 1247 (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, 289 Ill.Dec. 610, 820 N.E.2d 386 (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, 302 Ill.Dec. 173, 848 N.E.2d 173 (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, 307 Ill.Dec. 885, 860 N.E.2d 539 (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.

fastcase

¶ 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, 300 Ill.Dec. 220, 843 N.E.2d 478 (2006); see [364 Ill.Dec. 879]

[977 N.E.2d 788]

also *In re Marriage of Abrell,* 236 Ill.2d 249, 275, 337 Ill.Dec. 940, 923 N.E.2d 791 (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

fastcase

better evidence. See *In re Marriage of Smith,* 114 Ill.App.3d 47, 54, 69 Ill.Dec. 827, 448 N.E.2d 545 (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, 167 Ill.Dec. 260, 587 N.E.2d 529 (1992). In *Landwehr,* the trial court, at the 1989 dissolution hearing, valued the petitioner's 1986 Oldsmobile Cutlass at $15,980 and his [364 Ill.Dec. 880]

[977 N.E.2d 789]

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.

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

fastcase

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 [364 Ill.Dec. 881]

[977 N.E.2d 790]

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

fastcase

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 [364 Ill.Dec. 882]

[977 N.E.2d 791]

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 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, 179 Ill.Dec. 568, 606 N.E.2d 400 (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.

Justices ZENOFF and SCHOSTOK concurred in the judgment and opinion.

Notes:

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

[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.

[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.

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.

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.

Page 290

466 N.E.2d 290
125 Ill.App.3d 473, 80 Ill.Dec. 838
In re the Marriage of Thelma Kathryn FRAZIER, Petitioner-Appellee,
and
William Tucker Frazier, Respondent-Appellant.
No. 5-83-0293.
Appellate Court of Illinois, Fifth District.
June 8, 1984.

Page 291

[80 Ill.Dec. 839] Sprague, Sprague & Ysursa by John R. Sprague, Belleville, for respondent-appellant.

Crowder & Scoggins, Ltd., Columbia, for petitioner-appellee.

WELCH, Presiding Justice:

In a judgment entered in the circuit court of St. Clair County, the marriage of petitioner Thelma Kathryn Frazier and respondent William Tucker Frazier was dissolved and the parties' property was divided between them. No maintenance was awarded and no child support is involved. From this judgment, the respondent appeals, challenging the court's disposition of property.

The respondent is a State Farm insurance agent. The court classified his agency as marital property and awarded it to the respondent. Relying upon the testimony of a professor of accounting who ascertained the discounted present value of the respondent's future earnings[125 Ill.App.3d 474] until retirement, the court valued the agency at $144,000. It ordered the respondent to execute a $40,000 note, payable over five years at 10 1/2% interest, as her share of that asset.

The trial court did not err in considering the agency as marital property, inasmuch as it was acquired during marriage. (In re Marriage of Boone (1980), 86 Ill.App.3d 250, 41 Ill.Dec. 750, 408 N.E.2d 96.) However, the respondent's primary argument is that the court erred in valuing that interest. He contends that a State Farm agent has a more tenuous proprietary interest in his agency than does an insurance broker (In re Marriage of Leon (1980), 80 Ill.App.3d 383, 35 Ill.Dec. 717, 399 N.E.2d 1006), or the owner of an incorporated insurance agency (In re Marriage of Reib (1983), 114 Ill.App.3d 993, 70 Ill.Dec. 572, 449 N.E.2d 919). Methods appropriate for valuing a brokerage or insurance corporation, he reasons, are thus inappropriate for valuing a State Farm agency and result in excessive valuation. According to the respondent, the capitalization of earnings method used by the expert to determine the worth of the agency produced an unrealistically high figure for his interest in the agency. He argues that the court

Page 292

[80 Ill.Dec. 840] wrongly permitted the expert to apply that method in this case, even though such calculations may be warranted in evaluating a brokerage or insurance corporation.

The respondent began his association with State Farm as an agent in 1961. Before his marriage to the petitioner in 1970, the respondent became an agency manager, with some loose supervisory authority over approximately ten agents. In 1976, he assumed an existing State Farm agency in Granite City. He did not pay for such items as accounts receivable or lists of policyholders, because those items are the property of State Farm. Nonetheless, the accounts present in the office when it was taken over by the respondent were assigned to him. By that assignment, the respondent became obligated to service those accounts, and, in return, receives a commission from them.

As a State Farm agent, the respondent receives no salary. He is paid a percentage of premiums received by State Farm from his accounts. That percentage commission varies according to the type of policy. He must provide his own office equipment and pay for his own expenses, including employee salaries and rent. He is given full control of his daily activities and his contract with State Farm describes him as an independent contractor. Presently the respondent's office is staffed by him and two full-time secretaries.

The respondent's agency agreement does not grant him an exclusive territory, and in fact, there are five other State Farm agents in Granite City. But, a State Farm agent must handle State Farm insurance exclusively. State Farm may, after written notice to the agent, [125 Ill.App.3d 475] transfer any automobile policy to the account of another State Farm agent when the policyholder makes a bona fide request in writing. Either State Farm or the agent may terminate the agency agreement upon written notice to the other, in which case State Farm's property must be returned. The agreement provides that "neither the Agreement nor any interest thereunder can be sold, assigned, or pledged * * *."

The respondent does not have a retirement plan with State Farm. If the agreement is terminated, he becomes entitled to termination benefits. The formula for calculating those benefits need not be explained, but they are based upon commissions on "personally produced" policies and continue for five years after termination. In the event that termination would occur after the respondent turns 65, and after 20 years of service as a State Farm agent, he would be entitled to extended termination benefits, to be paid after primary termination benefits had ceased, until the end of his life. At trial, the respondent estimated that his termination benefits were worth less than $30,000. He was 53 at that time and was not yet eligible for extended termination benefits.

The sole witness to testify as to the value of the agency was Dr. James P. Jennings, professor of accountancy at St. Louis University. Dr. Jennings used what is known as the "capitalization of earnings technique" in arriving at the worth of the agency. He noted that this is a broadly accepted method of determining value. Its premise is that the value of any income producing resource is not the historic cost of assets, nor is it the historic cost of assets minus liabilities. It is instead the discounted present value of the future stream of earnings, estimated by the use of recent past earnings. See Jennings, "Issues in Valuing Closely Held Businesses," 37 J.Mo.B. 243 (1981).

This technique is best illustrated by example. At trial, Dr. Jennings started with the figure of $162,491, which represents respondent's net before-tax income from the insurance agency for the years 1976 through 1980. This amount was gleaned from respondent's tax returns. Dividing by five gives an average annual net before-tax income of $32,498. Dr. Jennings estimated that the tax on that income would be 30%, and thus the respondent's average annual net after-tax income for the specified five-year period is $22,748.

Dr. Jennings assumed that the respondent, 53 years old at the time of trial,

Page 293

[80 Ill.Dec. 841] would work for 12 more years. Multiplying respondent's average annual net after-tax income by the twelve years which he was projected to work and reducing that amount to its present cash value, assuming an interest rate of 12%, Dr. Jennings arrived at the figure [125 Ill.App.3d 476] of $144,491. It is apparently this value which the trial court assigned to the business. Dr. Jennings calculated an alternate value of

$133,998, using a different amount as the respondent's net before-tax income from the agency between 1976 and 1980. The other assumptions and techniques used in the first calculation remained the same in the second analysis.

Although this accounting method may provide an accurate measure of the value of a business for some purposes, there is a fallacy in using it to value marital property to be divided upon dissolution. Marital property, as it is defined in Section 503 of the Marriage and Dissolution of Marriage Act (Ill.Rev.Stat.1983, ch. 40, par. 503), must be valued as of the date of dissolution of the marriage. (In re Marriage of Rossi (1983), 113 Ill.App.3d 55, 60, 68 Ill.Dec. 801, 805, 446 N.E.2d 1198, 1202.) This is so that spouses may be granted an interest in property which is acquired during the marriage or increases in value by the infusion of marital funds or efforts, without receiving an interest in assets of the other spouse which are acquired or appreciate after dissolution. (See In re Marriage of Goldstein (1981), 97 Ill.App.3d 1023, 53 Ill.Dec. 397, 423 N.E.2d 1201.) Marital property rights cannot inure in property acquired after a judgment of dissolution of marriage (Ill.Ann.Stat., ch. 40, par. 503(a)(3), Hist. and Prac. Notes, at 462 (Smith-Hurd 1980)), and the same is true of the appreciation of marital property occurring after that judgment.

Dr. Jennings purported to place a value on the agency as of the time of trial, and the method he used to do that was his reduction of the respondent's future earnings to present cash value. But, because of the nature of the respondent's business, those calculations include as marital property labor which will be performed after dissolution. The respondent's agency is not like shares of stock, which will produce income without further efforts by the owner. Nor is it akin to a sole proprietorship or partnership, which can be converted into assets which will produce income without such efforts. The respondent may not rest on his laurels and receive the future stream of commissions projected by Dr. Jennings. He must send out renewals, forward premiums to State Farm, answer questions about policies, process claims, advertise to let policyholders know of the continuing nature of the business, attend seminars and study brochures to keep abreast of new developments in insurance, among other efforts, all to retain the patronage of the accounts currently held by him.

In valuing the agency at the discounted present value of the respondent's expected future earnings, Dr. Jennings ignored the fact that those earnings will be due in large part to the respondent's activity[125 Ill.App.3d 477] following dissolution. In failing to reduce the value of the agency to account for that activity, the court effectively classified as marital property the results of the respondent's future efforts to maintain his current accounts. Furthermore, the twin assumptions, implicit in Dr. Jennings's calculations, that the respondent's office expenses and commissions from policies written or assigned during marriage will remain constant, seem to be unwarranted. These shortcomings produced, in our opinion, a grossly excessive valuation of the agency as a marital asset. This cause must therefore be remanded for revaluation and redistribution of the value of the agency in accordance with the views expressed herein.

In most of the respondent's remaining arguments, he does not challenge the court's classification or valuation of the parties' property. He instead argues that the court's distribution of that property was inequitable. Inasmuch as the equity of that distribution depends upon the value of the agency, the respondent should

Page 294

[80 Ill.Dec. 842] present his position to the trial court, as well as his argument that the

fastcase

court failed to apportion certain marital debts.

The respondent insists that the court erroneously classified his equitable interest in a land trust as marital property and valued it at $11,500. The respondent purchased a one-half interest in the trust for $5,000 during the marriage. That money was obtained from a note at the Bank of Belleville which, in turn, was purchased with funds from a savings account in the name of the respondent and his mother before the parties' marriage. The interest in the land trust is in the name of the respondent only. The trust holds legal title to an apartment building which was purchased for $140,000 in 1976 and on which there was $117,000 in outstanding indebtedness as of the time of trial. The owner of the other half interest in the trust paid $10,000 or $15,000 for it. The respondent explained that the difference between his investment and that of the other owner is that he manages the property. As a manager, the respondent must collect rent, institute legal action against delinquent tenants, see that repairs are made and pay for insurance on the building.

Contrary to the position taken in the petitioner's brief, the respondent's testimony was not vague as to the origin of his investment in the trust. That money is certainly non-marital property. The question is then whether that property became non-marital by virtue of its investment in the trust. The respondent testified that no money acquired since his marriage to the petitioner was invested in the trust. Thus, it cannot be said that the respondent has commingled marital funds with his original investment.

[125 Ill.App.3d 478] The petitioner asserts that the respondent's services during the marriage as manager of the apartment building should act to convert his interest in the trust into marital property. Property acquired in exchange for property acquired before the marriage is non-marital (Ill.Rev.Stat.1983, ch. 40, par. 503(a)(3)), but may become marital if it increases in value because of the efforts of the parties (In re Marriage of Lee (1981), 87 Ill.2d 64, 58 Ill.Dec. 779, 430 N.E.2d 1030), rather than solely because of inflationary factors (In re Marriage of Komnick (1981), 84 Ill.2d 89, 49 Ill.Dec. 291, 417 N.E.2d 1305). Here, the respondent made no capital improvements to the apartment building, and his services as manager were not shown to have added to the value of the building. Those services, including the payment of insurance premiums, were primarily conservative in nature, and thus do not transform the interest in the land trust into marital property. (See In re Marriage of Holman (1984), 122 Ill.App.3d 1001, 78 Ill.Dec. 314, 462 N.E.2d 30.) To hold otherwise would convert non-marital property into marital property by the simple act of preserving it. The respondent's interest in the trust must therefore be considered a non-marital asset. The court's valuation of that interest at $11,500 is supported by the record and is not undermined by the respondent's opinion that the apartment building "was a losing proposition."

Finally, the respondent argues that the court erred in failing to award him certain personal property acquired before marriage and allegedly still in the possession of the petitioner. The list of that property is far too long to discuss in detail, but it consists basically of furniture, household effects and some antiques. Some of these items--a gun collection, marble top table, secretary desk, music box, stereo and personal effects, including tools--were specifically awarded to the respondent. If the petitioner retains such items, the respondent's remedy is to seek enforcement of the judgment in the trial court. Other requested items--silverware and a portable generator--were, by the admission of the respondent, acquired after marriage. Still other items--a fuel tank and a metal file cabinet--were in the possession of the respondent and were not awarded to the petitioner. Most of the remaining property now sought by the respondent is furniture

fastcase

which was in an apartment lived in by him before marriage. However, the petitioner

Page 295

[80 Ill.Dec. 843] testified that that furniture was sold with the apartment, and thus it is no longer available to distribute.

There are certain items which, according to the testimony of the parties, were acquired by the respondent before marriage, are still in the possession of the petitioner, and were not awarded to the respondent. They are a Zenith TV console, several antique swords, an [125 Ill.App.3d 479] antique lamp and a Mah-Jongg set. These items should be awarded to the respondent as his non-marital property.

For the foregoing reasons, the judgment of the circuit court of St. Clair County is reversed and this cause is remanded for revaluation of the respondent's interest in his State Farm agency and redistribution of the parties' marital property considering that new valuation and our reclassification of certain assets as non-marital.

REVERSED AND REMANDED.

JONES and KASSERMAN, JJ., concur.

fastcase

Page 597

709 N.E.2d 597
304 Ill.App.3d 12, 237 Ill.Dec. 342
In re the MARRIAGE OF Barbara GRUNSTEN, Petitioner-Appellant,
and
Richard Grunsten, Respondent-Appellee.
No. 1-95-3583.
Appellate Court of Illinois,
First District, Sixth Division.
Feb. 11, 1999.
As Modified on Denial of Rehearing April 30, 1999.

Page 599

Joel Ostrow, Chicago, of counsel, for appellant Barbara Grunsten.

Sloan & Associates, Chicago (Mel Sloan, Bradley J. Plaschke, of counsel), for appellee Richard Grunsten.

MODIFIED ON DENIAL OF REHEARING

Justice ZWICK delivered the opinion of the court:

The petitioner, Barbara Grunsten, appeals from the judgment of dissolution of her marriage to the respondent, Richard Grunsten, challenging the trial court's distribution of marital assets, its award of maintenance and its findings regarding the payment of attorney's fees.

A substantial amount of evidence and testimony was presented in the trial court over eleven days between August 11, 1994 and October 24, 1994. However, only those facts necessary to an understanding of this court's decision will be set forth. The relevant facts will be discussed in the analysis of the issues to which they are pertinent.

I. Valuation of GSP Marketing Services, Inc.

Richard is the sole shareholder of an Illinois corporation, GSP Marketing Services, Inc. (GSP). GSP designs and produces mail order catalogs and performs other marketing services. The business was founded in 1979, and it is conceded to be marital property. The parties stipulated that GSP should be valued as of December 31, 1993. Each party retained accountants as expert witnesses for this purpose.

The trial court noted that similar approaches were taken by each accountant in valuing GSP. Both witnesses based their valuation on capitalizing the average earnings over a four or five year period weighted in favor of more recent years and discounted due to the a lack of marketability of closely held corporations. However, each used a different valuation method in reaching his final conclusion. Barbara's accountant valued GSP's shares using various economic assumptions and concluded the shares had a fair market value of $1,043,771. Richard's accountant valued Richard's shares as being worth $418,954.

As explained in the trial court's Memorandum Opinion and Order, Barbara's accountant used an "excess earnings" or "formula" method. This method assumes that the principal officers of closely held corporations take advantage of their ability to set their own compensation to minimize taxes by drawing out unneeded corporate profits in the form of salary and bonuses--rather than as dividends--in order to avoid the double taxation which occurs when corporations make profit. [1] Such compensation necessarily exceeds a lower level of compensation which could be paid to a non-owner hired to perform the same job. To compensate for this tax-avoidance practice, the excess payments are adjusted back into the corporation's history in estimating what its future profits are likely to be.

Barbara's accountant determined Richard's "normal" compensation by

fastcase

referencing a salary survey of chief executive officers of small businesses conducted by the Research Institute of America. For example, he found that Richard's 1993 salary was $282,463, of which $182,500 was "normal" and $99,963 was "excess." A weighted average of this adjusted annual compensation was then capitalized to determine the corporation's "goodwill."

Page 600

The value of GSP according to Barbara's expert's method is expressed by the following formula: Value = Current (1993) net tangible assets + goodwill--discount for lack of marketability. The final estimate of $1,043,771 was derived by averaging various rates of return on net tangible assets and capitalization rates.

In addition to the above analysis, Barbara's expert noted that GSP had originally been started with another shareholder named Bob Simonek. Simonek owned 50% of GSP outstanding shares when he died in 1987 or 1988. On April 8, 1989, Richard entered into a written agreement with Simonek's widow in which he bought Simonek's shares for a cash payment of $245,246. In addition, Simonek's widow served as a consultant to GSP for a period of three years following Simonek's death at an annual salary of $45,833.34 per year. However, she was not at work very often in those three years and Richard could only recall her working on one of forty GSP accounts. The buyout also included furnishing $25,000 over ten years to establish an insured college scholarship for Mr. Simonek's daughter. [2]

In the fiscal year of Simonek's death, gross sales of GSP had been $6,204,909. By 1992, they had risen to $9,006,809. Given the increasing strength of GSP's financial position since the time of the Simonek sale, Barbara's expert stated that whatever value was placed on GSP, the terms of the Simonek stock purchase set a baseline for what 50% of the company was currently worth.

The report of Richard's accountant, who had a pre-existing relationship with both Richard and GSP, was based upon the "capitalization of earnings" method. This method assumes that various types of business investments entail different levels of risk. The risk is expressed in terms of a risk factor multiple ranging from 1 to 4 with no risk being given a value of 1 and the highest risk receiving a value of 4. The bench mark for measuring risk is the interest rate on 30-year government bonds, being 6.35 percent at the time of valuation. The capitalization rate is determined by multiplying the risk factor by the benchmark rate. Thus, the capitalization rate for a high risk business on December 31, 1993 is 4 X 6.35 = 25.4. The value of a high risk business on December 31, 1993 can then be expressed as follows: Value = 100 divided by 25.4 = 3.93 X weighted average of net annual corporate earnings--discount for lack of marketability.

Richard's accountant opined that GSP was a high risk business, principally because its value was closely tied to Richard's personal expertise and his relationships with clients. He also noted that GSP had a small customer base and that 60% of its sales were accounted for by only five clients. He computed GSP's weighted average annual net income to be $152,021, and he employed a 30% discount for lack of marketability. His computation of GSP's value was then expressed as follows: Value = 3.93 X $152,021 = $598,506 [3] X .70 = $418,954.

The trial court found that both accountants had been "flawed" in their analysis. The court stated that the assumptions of Barbara's accountant regarding "normal" and "excess" officer compensation to have been "wholly arbitrary." The court was also critical of Barbara's accountant's methodology in that he only "looked up numbers in a study whose

fastcase

parameters were not described, and the numbers were not specific either for the industry or geographic location." Indeed, the court specifically found that Richard's salary had not been inflated to avoid federal taxes. It noted that Richard was actively involved with all 40 of GSP's active clients and that he personally managed the five largest client accounts. The court also observed that GSP's chief salesman, Michael Zaremba, was paid over $400,000 in 1993,

Page 601

while Richard received only $282,463 that year. The court found Richard's expert to have used a proper methodology in calculating GSP's value, but determined that Richard's expert had overstated the riskiness of GSP's business. Rather than being a high risk business, the trial court stated that GSP should be considered as "moderately risky." In applying the correct risk factor to Richard's expert's formula, the trial court determined that GSP had a fair market value on December 31, 1993 of $558,677.

Section 503(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503(c) (West 1996)) requires that the court shall divide marital property in "just proportions." To apportion marital assets under section 503(c), the value of such assets must first be established. In re Marriage of Melnick, 127 Ill.App.3d 102, 82 Ill.Dec. 228, 468 N.E.2d 490 (1984). Testimony concerning the valuation of assets in an action for dissolution of marriage are matters to be resolved by the trier of fact, and as long as the court's valuation is within the range testified to by the expert witnesses, it ordinarily will not be disturbed on appeal unless it is against the manifest weight of the evidence. In re Marriage of Wilder, 122 Ill.App.3d 338, 349, 77 Ill.Dec. 824, 461 N.E.2d 447 (1983). As the trial court noted, determining market value for a closely held business is not unlike the evaluation process which must be applied in valuing professional corporations. The process is inherently subjective:

"Placing a fair market value on the professional corporation is an art, not a science, and the court must rely on expert witnesses to assist it in this difficult task. There is no exact formula that can be applied, so the trial court must rely on experts who may differ significantly in both methodology and valuation. The trial court must consider the relevant evidence before it; determine the credibility of the experts, the reasonableness of their testimony, the weight given to each of them, and their expertise in the particular area of valuation; and then determine fair market value."

In re Marriage of Gunn, 233 Ill.App.3d 165, 183, 174 Ill.Dec. 381, 598 N.E.2d 1013 (1992).

On appeal Barbara argues, inter alia, that the trial court's valuation of GSP is against the manifest weight of the evidence because it is below the valuation Richard paid to Simonek's widow four years earlier, and because the evidence establishes that GSP's financial health had greatly improved since the earlier transaction. Barbara argues, as her expert did below, that the Simonek transaction should necessarily set the "floor value" for GSP. We agree.

Although valuation of a closely held corporation is subjective in nature, the process is obviously much less so when done with the benefit of viewing a similar transaction, particularly when the comparison transaction involves the same property. This is because fair value is best measured by what a willing buyer would pay a willing seller in a voluntary transaction. See In re Parker, 216 Ill.App.3d 672, 159 Ill.Dec. 131, 575 N.E.2d 938 (1991). Here, on reviewing the record, we conclude that the trial court failed to give the Simonek sale sufficient consideration in assessing the value of GSP. Had the court done so, it would have

fastcase

been evident that Richard's expert's valuation was grossly inaccurate.

In our view, GSP cannot be reasonably valued at less than twice the value Richard gave Mrs. Simonek. Yet the trial court's valuation of $558,677 is clearly far below this threshold amount. The present value of the Simonek transaction can be logically calculated by adding the cash payment made to Mrs. Simonek ($245,246), the cash value of the $25,000 tuition payments, and any unearned salary Mrs. Simonek received in the transaction, and then adjusting this sum to account for the growth of GSP since the sale. In light of Mrs. Simonek's apparent lack of any articulable consulting skills and Richard's own concession that she was not at GSP very often during the three years she was paid as a consultant, it is clear that the salary payments made to Mrs. Simonek must be treated in large measure as consideration for the sale.

If extremely conservative estimates are applied to the unearned salary and scholarship

Page 602

payments and they are valued at 50% of their nominal cost to Richard, the total amount of consideration received by Mrs. Simonek for her shares is $245,246 (cash) + $68,750 (1/2 of the "salary payments") + $12,500 (1/2 of the scholarship payments) = $326,496. This means the corporation had an estimated worth, in 1989, of twice this amount, or $652,992. Although profitability figures were in dispute at trial, it was conceded that GSP's gross revenues grew between 1989 and 1993 by more than 50%. If the corporation's fair market value is then calculated assuming its gross revenues roughly corresponded with its profitability to account for its financial growth, once again conservatively discounting the suggested nominal value by half, it is evident that GSP cannot be reasonably valued at less than $652,992 X 1.25 or $816,240.

We have carefully reviewed the record with regard to the court's valuation of GSP. Following our review, we conclude that a most conservative valuation of GSP suggested by the record, taking into account the experts' valuations, the Simonek transaction and the company's sustained growth since 1989, cannot be reasonably set below $816,240. This figure is not only supported by the financial evidence but also within the range of values suggested by the experts. Accordingly, we set GSP's value at this amount. We make this specific finding rather than remand the case for further proceedings in light of the voluminous record before us which shows that the parties have litigated their dispute to the point where further proceedings could never be construed as serving the ends of justice. See generally, Supreme Court Rule 366(a) (155 Ill.2d R. 366(a)).

II. Barbara's Permanent Maintenance

Barbara is a 52 year old woman with a college degree in fine arts. At the time of the dissolution, she had been married to Richard for more than 21 years. From the time of her graduation in 1964 until July of 1990 she was employed in the photography and modeling fields. She has worked as a photography stylist and as a booking subagent for models. Her salary when she left her last employment in 1990 was $22,000. Richard, in extreme contrast, earned an annual salary at the time of the dissolution of over $275,000 per year. As the trial court recognized in its Order and Memorandum, his income had provided them both with a "luxurious" lifestyle.

Barbara offered an affidavit showing her monthly expenses to be $11,664. The trial court rejected the affidavit calling it "the Paul Bunyon of all income and expense affidavits." The affidavit does not appear to have been included in the record on appeal. However, the trial court noted that it simultaneously listed a $2,000 mortgage payment on an unbought home and $1,000 for unmade repairs to Barbara's present home. It also

fastcase smarter legal research

requested $450 for a professional dog walker to escort her pet to dog shows. The court found that the affidavit "represented the lifestyle of the divorce, not the marriage." Accordingly, the court disregarded the affidavit and looked instead to an affidavit Barbara had filed five months after the dissolutions proceedings had been instituted, finding it to be a better indication of Barbara's "reasonable needs." The affidavit sought temporary support of $4,800 per month.

Section 504(a) of the Act (750 ILCS 5/504(a) (West 1996)) provides a court may grant permanent or temporary maintenance upon consideration of "all relevant factors," including:

"(1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;

(2) the needs of each party;

(3) the present and future earning capacity of each party;

(4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having foregone or delayed education, training, employment, or career opportunities due to the marriage;

(5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment

Page 603

or is the custodian of a child making it appropriate that the custodian not seek employment;

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

(7) the duration of the marriage;

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

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

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

(11) any valid agreement of the parties; and

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

An award of maintenance is within the discretion of the trial court and will not be reversed on appeal unless it constitutes an abuse of discretion or is against the manifest weight of the evidence. In re Marriage of Hensley, 210 Ill.App.3d 1043, 1048, 155 Ill.Dec. 486, 569 N.E.2d 1097 (1991); In re Marriage of Hart, 194 Ill.App.3d 839, 851, 141 Ill.Dec. 550, 551 N.E.2d 737 (1990). An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. In re Marriage of Cheger, 213 Ill.App.3d 371, 378, 157 Ill.Dec. 116, 571 N.E.2d 1135 (1991).

Here, the trial court, in dividing the parties assets, awarded Barbara very little income producing property, yet awarded her only $1,538 in monthly permanent maintenance to sustain a lifestyle which the court's own assessment would cost her approximately $4,800 per month. Although an award of marital property is correctly considered by the trial court in setting maintenance under section 504(a), the law is clear that a spouse is not required to sell assets for self-support where the other spouse has the financial ability to pay sufficient maintenance while meeting his own needs. See In re Marriage of Tietz, 238 Ill.App.3d

fastcase

965, 972, 178 Ill.Dec. 876, 605 N.E.2d 670 (1992); In re Marriage of Pearson, 236 Ill.App.3d 337, 350, 177 Ill.Dec. 650, 603 N.E.2d 720 (1992). The paucity of the court's maintenance award in this case is evident when it is recognized that Barbara's monthly maintenance was set at less than half the amount Richard claimed at one point he needed for clothing and entertainment. Moreover, the court, by basing its determination of Barbara's reasonable needs on her initial affidavit, necessarily failed to take into consideration several of Barbara's long-term expenses such as real estate taxes, health insurance and home repairs. Insomuch as these were all part of the standard of living of the marriage, the record establishes that the court underestimated Barbara's reasonable needs.

The record also demonstrates that the court unreasonably discounted Barbara's likely long-term health care expenses and over estimated her ability to earn salary income. The court stated that it believed Barbara's physician to be "the most pathetic witness" it had ever seen, yet Richard never disputed that Barbara had been treated for depression during the course of their marriage and that, at one point prior to the start of the dissolution proceedings, Barbara was incurring as much as $800 per month in psychiatric costs. Apparently based upon its negative view of Barbara's expert witness, the court concluded that Barbara was "in good health" and that her reasonable medical expenses should be no more than $300 per month. However, the evidence presented by Barbara as to the reasonable cost of her psychiatric care was not disputed by expert testimony from Richard. Although a trial judge may be free to disregard psychiatric testimony, he may not do so based upon his own prejudices where the testimony offered of psychiatric illness has substantial foundation. In re Violetta B., 210 Ill.App.3d 521, 535, 154 Ill.Dec. 896, 568 N.E.2d 1345 (1991).

The factual foundation presented in this case is that Barbara had been treated by her physician for 12 years during the course of the marriage and that she was being treated for depression at the time of the proceedings. She testified that she suffers frequent crying spells, sleep loss, memory loss, continual feelings of anxiety and an inability to cope with stress. In addition to her depression, her treating physician testified that if she returned

Page 604

to her previous line of work, it could be "very damaging" to her self esteem. Despite this testimony, and despite the court's finding that Barbara was entitled to continue to live the "luxurious" lifestyle of the marriage, the trial court stated that it did not "see why she couldn't go back to [the modeling industry] at $22,000 per year."

Under these facts, the trial court's finding that Barbara was "healthy" and had a future as an employee in the modeling industry was against the manifest weight of the evidence. In addition, the court's finding that Barbara was likely to incur monthly medical expenses of only $300 per month was against the manifest weight of the evidence.

In light of the factors set out in section 504(a) and the court's finding that Barbara's reasonable needs shortly after the dissolution were $4,800 per month, we set her permanent maintenance at this level. We do so recognizing that certain long-term costs may have been omitted from her initial affidavit on which the court based the $4,800 amount, but conclude that $4,800 is the only value supported by the record before us and that any additional costs which have been omitted are not likely to be so onerous to Barbara as to require further adjustment. Moreover, we note that the trial court made the amount of Barbara's permanent maintenance subject to periodic future review.

fastcase

III. Attorney's Fees

The record shows that Barbara filed a petition for fees and costs on April 23, 1995, seeking imposition of those expenses against Richard. Richard responded by filing a Motion for Summary Judgment, stating that Barbara had sufficient assets to pay her own fees, and that her statement at trial that her fees had been $40,000 was res judicata precluding her claim of legal fees totalling $134,000.

Barbara responded by filing her own Motion for Summary Judgment stating that her monthly payments under the judgment were her only income as compared to Richard's $275,000 salary, that he had a far superior asset position and that res judicata on the extent of her legal fees was inapplicable because the fees discussed at trial had been those which had been paid as of that time, not those which had been earned.

Respective counsel appeared before the court on August 28, 1997. The court stated that it did not believe the fee issue was amenable to summary judgment since Barbara's property distribution did not contemplate her paying her own fees. At that time the fee petition was for a total of $137,534.75, of which $63,652.87 had been paid. The court also stated, however, that it simply did not believe Barbara had an inability to pay, partly evidenced by what she had already paid, and supported by its view that she could be working and using her salary income to pay legal fees. The court also stated that Barbara could get a home equity loan on her residence. The court then denied Barbara's request for a hearing on the parties' financial circumstances and entered an order denying assessment of any of Barbara's fees against Richard.

On appeal Barbara argues that it was error to enter an order disposing of the fee issue without holding a hearing. We agree. In In re Marriage of Cierny, 187 Ill.App.3d 334, 134 Ill.Dec. 918, 543 N.E.2d 201 (1989), the court held that the right to a hearing on the financial ability to pay attorney's fees exists if requested, and is only waived if no such request is made. Here, Barbara repeatedly requested a hearing once the trial court stated its view that the fee issue was not amenable to summary judgment. This is despite the fact that Barbara's maintenance had been set by the court at 32% of what the court determined were her reasonable needs.

In sum, after finding the trial court's valuation of GSP and monthly maintenance to Barbara to be so low as to be against the manifest weight of the evidence, we find the record supports a fair market valuation of GSP at $816,240. In addition, we find the record requires a permanent monthly maintenance award to Barbara of at least $4,800. On remand, we direct the court to enter an order adjusting its Memorandum and Order as to make it consistent with these findings,

Page 605

as well as to hold a hearing on the attorney's fees issue.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

BUCKLEY, J., and QUINN, J., concur.

----

1 Double taxation occurs because the corporation must pay corporate income tax on its profits, and because shareholders must subsequently pay personal income tax on any dividends declared by the corporation. If corporate earnings that would otherwise represent profit to the corporation are diverted instead to an executive

fastcase

officer/shareholder in the form of salary, no corporate taxes are assessed with regard to the diverted payments, and so only personal income tax is collected. See generally, CLOSELY HELD CORPORATIONS § 2.5 (Illinois Institute for Continuing Legal Education, 1996).

2 Barbara argues on appeal that, in addition, Mrs. Simonek had an $80,000 debt to the corporation forgiven as part of the compensation she received for her shares. However, a close reading of the record shows that Richard disputed this, testifying that the cash payment of $245,246 was calculated after taking the debt into account.

3 In fact, 3.93 X $152,021 = $597,443. When this correct figure is multiplied by .70, a final valuation for GSP is calculated to be $418,210, not $418,954. The error appears in the trial court's Memorandum and Opinion but, as explained immediately below, did not affect the court's final valuation of GSP.

Page 1246

652 N.E.2d 1246
273 Ill.App.3d 404, 210 Ill.Dec. 270
In re the MARRIAGE OF Suzanne HEAD, Petitioner-Appellee,
and
Henry Head, Respondent-Appellant.
No. 1-92-3949.
Appellate Court of Illinois,
First District, Second Division.
June 30, 1995.

Page 1247

[210 Ill.Dec. 271] John G. Cadwell, Chicago, for appellant.

[273 Ill.App.3d 405] Kanter & Mattenson, Ltd., Chicago, for appellee (Stuart Gordon, David M. Mattenson, of counsel).

Justice McCORMICK delivered the opinion of the court:

Respondent Henry Head appeals from a judgment entered after our remand of this cause. (Head v. Head (1988), 168 Ill.App.3d 697, 119 Ill.Dec. 549, 523 N.E.2d 17 (Head I).) The sole issue on retrial was the value of Henry's medical practice for the purpose of the distribution of marital assets. The trial court found that the medical practice was worth $76,920, which consisted of $58,000 in tangible assets and $18,920 in intangible assets. The trial court also awarded petitioner Suzanne Head $47,679 in attorney fees. Henry challenges both of these findings. We modify the trial court's finding relative to the value of Henry's medical practice and affirm the award of attorney fees.

Prior to Head I, the trial court had found, pursuant to a stipulation by the parties, that [210 Ill.Dec. 272] Henry's interest in the tangible assets of the professional corporation was valued at $58,000. Henry argued that his interest in the

Page 1248

tangible assets of the professional corporation constituted the sole value of his medical practice. Suzanne presented expert testimony that the practice was worth $515,000 based upon a "capitalization of earnings" valuation method. The trial court rejected Suzanne's valuation, but ruled that considering Henry's level of skill in the sub-specialty of gastroenterology, as well as the above average earnings of his practice (which he shared with two other doctors), the value of the medical practice was $175,000.

In Head I, we held that the $117,000 in excess of the $58,000 in tangible assets applied by the trial court was based solely upon Henry's ability to acquire income, also called "professional goodwill." * Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) (Ill.Rev.Stat.1985, ch. 40, pars. 503(d)(7), (10)) requires the court to consider the sources of income and earning power of the spouses in apportioning the total marital assets between the parties. Section 504(b)(1) of the Dissolution Act (Ill.Rev.Stat.1985, ch. 40, par. 504(b)(1)) provides for awards of maintenance, based, inter alia, on the future earning capacity of the parties. We held that it was improper to value the professional goodwill of the corporation both in the valuation of the medical practice as an asset and again as potential income for the purpose of apportioning the total marital assets and awarding maintenance. We therefore remanded the cause "for further proceedings as to the division of the marital assets consistent with the views expressed" in the opinion. Head I, 168 Ill.App.3d at 704, 119 Ill.Dec. 549, 523 N.E.2d 17.

On remand, Suzanne prepared to present expert testimony that a medical practice can have value above that of its tangible assets that [273 Ill.App.3d 406] is not based upon the professional goodwill of the practitioner. Because this intangible assets value, which

fastcase

Suzanne's expert later identified as "enterprise goodwill," is not premised upon the income potential of the professional, Suzanne argued that it is divisible marital property under section 503(d) of the Dissolution Act. Henry filed a motion in limine seeking to exclude evidence of the intangible assets value, relying on our statement in Head I that "the value of tangible assets is a proper basis for valuation of a medical practice." (Head I, 168 Ill.App.3d at 700, 119 Ill.Dec. 549, 523 N.E.2d 17.) Henry urged the trial court to value his medical practice at $58,000, the value of the tangible assets.

The trial court denied Henry's motion, ruling that Head I only restricted it from considering evidence of goodwill if that evidence included future earning potential. The trial court, without referring to the goodwill either as professional or enterprise goodwill, agreed with Suzanne that to the extent that evidence of goodwill did not include future earning potential, the court was required to consider it as part of the valuation of the practice. According to the trial court, an example of the goodwill it could consider would be "the value of the professional corporation if the Respondent were to sell his interest in the corporation and then leave the corporation without giving a covenant not to compete." The trial court reasoned that this value might "arise from or be based, in part, upon the location of the [medical] office, the transferrable affiliation of the practice, the administrative facilities of the practice, and/or a patient list." The trial court further supported its ruling based on its observation that this court had stated only that tangible assets was "a," as opposed to "the," proper basis for valuing a professional corporation, and ruled that it would permit Suzanne to present expert testimony valuing Henry's practice using a capitalization of earnings method so long as it did "not in any way reflect the future earnings" of Henry. The trial court further ruled that this court's opinion in Head I was not res judicata of any reconsideration of the value of the practice above tangible assets because neither the trial court nor this court had considered the issue of goodwill, excluding Henry's earning capacity.

[210 Ill.Dec. 273] Subsequent to the trial court's order, but prior to retrial, our supreme court issued In re Marriage of Zells (1991), 143 Ill.2d 251,

Page 1249

157 Ill.Dec. 480, 572 N.E.2d 944, in which it held, as we did in Head I, that professional goodwill could not be considered in the valuation of a professional business:

"Adequate attention to the relevant factors in the Dissolution Act results in an appropriate consideration of professional goodwill as an aspect of income potential. The goodwill value is then reflected in the maintenance and support awards. Any additional consideration[273 Ill.App.3d 407] of goodwill value is duplicative and improper." (Zells, 143 Ill.2d at 254-56, 157 Ill.Dec. 480, 572 N.E.2d 944.)

Pursuant to Zells, Henry filed a renewed motion in limine seeking to exclude consideration of any goodwill in the valuation of his practice, again urging the trial court to fix the value of his practice based upon his $58,000 stipulated interest in the tangible assets of the professional corporation. The trial court continued this motion, and the parties went to trial on the issue of the value of the medical practice, which included Suzanne's evidentiary presentation of goodwill.

James J. Unland, an expert in medical practice transactions, testified on behalf of Suzanne. His conclusions were based on an excess net cash flow methodology, which is equal to the return to a dispassionate investor after subtracting overhead and physicians' salaries from revenues. Unland testified that

fastcase

the transferrable value in a medical practice is the goodwill of the practice. According to Unland, all goodwill is enterprise goodwill. He acknowledged that his definition of enterprise goodwill could include, depending on the circumstances, the earning capacity of the professional. The trial court informed Unland that, under Zells, such earning capacity was not to be considered in valuing the enterprise goodwill of Henry's practice. Unland thereupon calculated the enterprise goodwill of Henry's practice by attempting to exclude Henry's earning capacity, and including, among other things, its tangible assets; its size; its affiliation with Northwestern University; and the transferability of its patient base. Unland concluded that the enterprise goodwill in Henry's share of the practice was $510,000.

The trial court ruled that Suzanne had established that a medical practice has a cash value beyond the tangible assets and the earning potential of the professional; however, it also found that Unland's testimony had failed to establish that value without taking into consideration Henry's earning potential. Thus, the trial court rejected Unland's evaluation. Although conceding in its order that there was an "absence of evidence" on the intangible value of Henry's medical practice, the trial court nevertheless ruled that it was not precluded from finding such a value. The trial court stated that its task was "to place a value [on the practice] that is large enough to be at least moderately realistic, yet small enough so that in no way will it conflict with our supreme court's concern regarding double-counting." The trial court concluded that "[s]uch a value, to meet the above standards, should be between one-third and two-thirds of Henry's income at the time. Therefore, the value is set at fifty (50%) percent of Henry's 1983 income * * *, being $153,840.00 divided by 2 equals [273 Ill.App.3d 408] $76,920.00." In light of its valuation, the court decided not to change the remaining property division or maintenance provisions, but merely reduced Henry's share of the marital estate.

Henry claims that our mandate in Head I restricted the trial court from considering enterprise goodwill. He asserts that our statement that tangible assets was "a proper basis" upon which to value a medical practice (Head I, 168 Ill.App.3d at 702, 704, 119 Ill.Dec. 549, 523 N.E.2d 17) limited the trial court on remand to finding that the practice was worth $58,000 and calculating any necessary adjustments to the distribution of the marital assets. Suzanne insists that this court's mandate was one which directed the trial court to arrive at the correct value of the practice, using any appropriate methodology, tangible assets being one of those methodologies.

The findings of this court are final on all questions actually decided. (Zokoych v. Spalding (1980), 84 Ill.App.3d 661, 667, 40 Ill.Dec. 128, 405 N.E.2d 1220.) When this court remands a case with specific instructions, they must be followed exactly. (Aguilar v. Safeway Insurance Co. (1991), 221 [210 Ill.Dec. 274] Ill.App.3d 1095, 164 Ill.Dec. 418, 582 N.E.2d 1362.) However, when the remand instructions

Page 1250

are general, the trial court must examine this court's opinion and exercise its discretion to determine what further proceedings are required. In re Marriage of Sunko (1992), 237 Ill.App.3d 996, 179 Ill.Dec. 197, 606 N.E.2d 29.

In Head I, our remand instructions directed the trial court to conduct further proceedings consistent with the opinion. We held that the trial court had improperly valued Henry's medical practice due to double-counting of future income. We also noted that tangible assets was "a" proper method of valuation. We agree with the trial court's reasoning that "a" proper method does

fastcase

not constitute "the" proper method, and that our lack of specificity rendered the question of the valuation methodology open and the valuation itself a question of fact that could be relitigated. (Callier v. Callier (1986), 142 Ill.App.3d 407, 414, 96 Ill.Dec. 459, 491 N.E.2d 505.) If we intended to limit the trial court's consideration, we would have so stated. Furthermore, if we found that the tangible assets methodology was the only appropriate one, we would have simply modified the trial court's judgment to reflect that the value of Henry's practice was $58,000. The purpose of the remand was to enable the trial court to correctly value the practice, not to quibble over the methodology.

Henry next cites our supreme court's statement in Zells, that "[g]oodwill represents merely th[e] ability to acquire future income" (143 Ill.2d at 254, 157 Ill.Dec. 480, 572 N.E.2d 944), to argue that consideration of any goodwill in a professional concern is inappropriate and that tangible assets must be the valuation method. This is an overly broad reading of [273 Ill.App.3d 409] Zells. Zells, like Head I, simply provides that professional goodwill, if used as a factor of income potential in considering maintenance and support, cannot be used as a divisible marital asset. Zells does not restrict the valuation of a professional corporation beyond its tangible assets as long as a party can establish that value apart from earning potential. Henry mischaracterizes the Zells court's statement about "goodwill." That court was not presented with the concept of enterprise goodwill, which is goodwill that is distinct from professional goodwill, at least as that term has been defined in our cases. (See In re Marriage of Talty (1995), 166 Ill.2d 232, 209 Ill.Dec. 790, 652 N.E.2d 330.) Thus, Zells did not restrict the trial court in this case.

Nonetheless, we conclude that the trial court's valuation of the practice was unsupported in the record. As we have indicated, the trial court found Henry's practice to be worth $76,920. The parties stipulated that the tangible assets of the practice were worth $58,000. Thus, included in the trial court's valuation of Henry's practice is the additional sum of $18,920, representing the intangible value of the practice not related to income potential. Although the trial court did not specifically use the term enterprise goodwill, our review of Unland's testimony, as well as the trial court's order valuing Henry's practice, indicates that the $18,920 represents enterprise goodwill, and we analyze it as such.

Although our supreme court has recently stated that the goodwill of a professional practice "is generally personal in nature" (In re Marriage of Talty (1995), 166 Ill.2d at 239, 209 Ill.Dec. 790, 652 N.E.2d 330), the court has not yet reviewed a case in which a trial court has been presented, as was the trial court here, with evidence of the enterprise goodwill of such a practice. Thus, In re Marriage of Talty does not foreclose consideration of enterprise goodwill in professional practices. Indeed, no Illinois court has addressed, in light of Zells, the issue of whether a professional association possesses goodwill independent of the earning potential of the practitioner. We have reviewed the decisions of courts from other jurisdictions. We note the lack of a consensus as to the existence of enterprise goodwill in a professional practice, defined as any value of the practice as a going concern, independent of the tangible assets and the income potential of the practitioner. (In re Marriage of Talty (1995), 166 Ill.2d 232, 238-239, 209 Ill.Dec. 790, 652 N.E.2d 330.) Beyond even the theoretical existence of enterprise goodwill in a professional practice also lies the issue of whether its value is susceptible of proof. See, e.g., Spillert v. Spillert (Fla. 1st DCA 1990), 564 So.2d 1146, 1148 (court stated that

Page 1251

[210 Ill.Dec. 275] it would consider enterprise goodwill in valuing medical practices, but

fastcase

stressed that "proof of such valuation may be extremely difficult").

Two recent court opinions portray the range of disagreement on [273 Ill.App.3d 410] the subject. In Traczyk v. Traczyk (Okla.1995), 891 P.2d 1277, the Oklahoma Supreme Court held that enterprise goodwill, valued as "the expectation of continued patronage" in the event of the sale of a professional business, multiplied by the annual revenue of the firm, had been established in a podiatry practice. Conversely, in Bostwick v. Bostwick (1991) 1991 WL 42628, 1991 Del.Fam.Ct.Lexis 4, a trial court rejected altogether the existence of enterprise goodwill in an accounting practice because it concluded that any method used to obtain the enterprise value of the practice was based, in part, on the earning potential of the professional or based on speculation, such as in assuming that when a professional sells a business, he would execute a covenant not to compete. That is to say, the court in Bostwick believed that because no method of valuation can approximate enterprise goodwill, it does not exist.

The facts and circumstances revealed in the record before us do not permit us to conclude whether the concept of enterprise goodwill, as we have defined it, is valid or not. Like other reviewing courts which have faced this issue, we acknowledge that on appropriate proof, enterprise goodwill may be susceptible of valuation. (Traczyk v. Traczyk, 891 P.2d at 1279; Antolik v. Harvey (1988), 7 Haw.App. 313, 761 P.2d 305; Prahinski v. Prahinski (1988), 75 Md.App. 113, 540 A.2d 833; Wilson v. Wilson (1987), 294 Ark. 194, 741 S.W.2d 640.) However, the record on appeal makes it palpably clear that no such value has been proven in this case.

James Unland's testimony as to the aspects of a medical practice that can be transferrable, such as hospital affiliation and patient list, certainly bespeak a value independent of the earning potential of the practitioner. However, like the trial court, we fail to see, in Unland's net-excess-cash-flow calculation, an exclusion of that earning potential. Thus, the trial court correctly found an "absence of evidence" establishing enterprise goodwill value in Henry's practice. This should have ended the trial court's inquiry, and it should have fixed the value at the proven figure of $58,000 in tangible assets.

However, despite the absence of evidence, the trial court stated that it was not precluded from finding a value for enterprise goodwill, and assessed it in the amount of $18,920. In the absence of an evidentiary basis for that valuation, the trial court should not have determined the value of enterprise goodwill. When the record contains conflicting evidence regarding the value of a professional corporation, a trial court's selection of a value somewhere between the opposing values in evidence is not considered arbitrary or against the manifest weight of the evidence. (In re Marriage of Bush (1989), 191 Ill.App.3d 249, 258, 138 Ill.Dec. 423, 547 N.E.2d 590.) However, the trial court [273 Ill.App.3d 411] may only do so when the conflicting values are based on evidence supported by a proper foundation. (Bush, 191 Ill.App.3d at 258, 138 Ill.Dec. 423, 547 N.E.2d 590.) In this case, the trial court did not choose between two opposing values, both supported by proper evidence. The trial court rejected Unland's valuation because it included consideration of Henry's earning potential, which is barred under Zells. Somehow, the trial court concluded that Suzanne had established that medical practices have some unproved intangible value. The trial court further determined that the excess cash value of Henry's practice was "fifty (50%) percent of Henry's 1983 income * * *, being $153,840.00 divided by 2 equals $76,920.00." Subtracting the $58,000 in stipulated tangible assets from this figure leaves the $18,920 in dispute. We find the trial court's calculation to be speculative, arbitrary and without basis in the record. The

fastcase

only properly proven value of the medical practice that did not consider Henry's earning potential is the $58,000 in tangible assets. Therefore, pursuant to Supreme Court Rule 366(a)(5) (134 Ill.2d R. 366(a)(5)), we modify the trial court's judgment to reflect this conclusion and we reduce Henry's share of the marital estate accordingly.

Henry next challenges the trial court's award to Suzanne of attorney fees in the amount of $47,679. Henry claims this was

Page 1252

[210 Ill.Dec. 276] improper because, under Head I and Zells, retrial should not have been conducted in this case and was only had at the behest of Suzanne. We disagree. The trial court properly exercised its discretion in retrying the issue of practice valuation. Under Zells, as well as our decision in Head I, the issue of enterprise goodwill remained an open question. Suzanne's failure to establish enterprise goodwill does not negate the fact that it was a reasonable issue to litigate in the trial court.

Although a party is generally responsible for his own fees, a trial court retains discretion to award fees. (In re Marriage of Orlando (1991), 218 Ill.App.3d 312, 322, 160 Ill.Dec. 763, 577 N.E.2d 1334.) Section 508 of the Dissolution Act provides that the trial court, after considering the financial resources of the parties, may order a spouse to pay a reasonable amount of the costs incurred by the other spouse. (Ill.Rev.Stat.1985, ch. 40, par. 508.) This court will only reverse such a determination upon a clear abuse of discretion. Orlando, 218 Ill.App.3d at 322, 160 Ill.Dec. 763, 577 N.E.2d 1334.

Where one spouse has a superior ability to acquire income and superior capital assets, a fee award is not an abuse of discretion. (Orlando, 218 Ill.App.3d at 323, 160 Ill.Dec. 763, 577 N.E.2d 1334.) Furthermore, this court has held that one spouse can be ordered to pay all of the other spouse's fees if a depletion of principle would result from requiring the latter to pay [273 Ill.App.3d 412] the fees. (Orlando, 218 Ill.App.3d at 323, 160 Ill.Dec. 763, 577 N.E.2d 1334.) A financial inability to pay does not require that a party be destitute, but merely that the payment of fees would "strip the spouse of [a] means of support and undermine * * * financial stability." Orlando, 218 Ill.App.3d at 323, 160 Ill.Dec. 763, 577 N.E.2d 1334.

As we recognized in Head I, Henry's annual income, as well as his ability to earn income in the future, dwarfs Suzanne's. The trial court stressed that Suzanne had little discretionary income and that in order to pay her fees she would have to "invade capital," precisely the action Orlando stressed was not required. As in Orlando, in light of the parties' economic circumstances the trial court's award was not an abuse of discretion.

Judgment modified in part; affirmed in part.

CAMPBELL, P.J., and DiVITO, J., concur.

fastcase

Page 854

474 N.E.2d 854
130 Ill.App.3d 689, 85 Ill.Dec. 894
In re the Marriage of Charlotte Y. ROWE, Plaintiff-Appellee,
and
Cloyce E. Rowe, Defendant-Appellant.
No. 3-84-0365.
Appellate Court of Illinois,
Third District.
Feb. 5, 1985.

[130 Ill.App.3d 690]

Page 855

[85 Ill.Dec. 895] C. Stephan Marsh, Winstein, Kavensky, Wallace, & Doughty, Rock Island, for defendant-appellant.

James J. Mesich, Gende, Mesich & Beatty, Moline, for plaintiff-appellee.

STOUDER, Justice:

This appeal arises from the division of marital property upon the dissolution of the marriage of Charlotte Rowe, plaintiff and Cloyce Rowe, the defendant. Cloyce appeals the division of the marital assets by the Circuit Court of Rock Island County. Cloyce was awarded two businesses, Uniform World, Inc. and Uniform City, Inc. and Charlotte was awarded the marital home.

Cloyce raises three issues on appeal. First he argues that the two uniform businesses were improperly classified as marital property, second that the two businesses were overvalued, and third, even if they were properly classified as marital property the trial court erred because it failed to reimburse the defendant's non-marital estate for contributions made from his non-marital property.

The two uniform businesses in question were incorporated in 1972 and 1974. The couple were married in 1967. At the time of their marriage Cloyce was a shareholder and employee of Kaybee-Moline, Inc. in which he owned 150 shares which he had purchased in 1963. Subsequent to their marriage, Cloyce purchased 250 more shares of Kaybee-Moline stock and became the sole shareholder. In 1979, Kaybee-Moline, Inc. was liquidated, the trial court found, at a loss to creditors and presumably with a total loss to the owner.

Cloyce argues that both uniform businesses were established with funds from Kaybee-Moline, Inc. and that the additional stock acquired after their marriage was acquired from funds previously accumulated[130 Ill.App.3d 691] by Cloyce. Therefore, Cloyce reasons, the two businesses were his non-marital assets. We disagree. All property acquired during marriage is presumed marital property and "The presumption is overcome by showing that the property was acquired by a method listed in Sub-Section (a) of this Section." (Ill.Rev.Stat.1983, ch. 40, par. 503(b)). Subsection (a) of Section 503 of the Marriage and Dissolution of Marriage Act excepts certain property from "marital property". The part of sub-section (a) applicable to this case is "(2) property acquired in exchange for property acquired before the marriage * * * " (Ill.Rev.Stat.1983, ch. 40, par. 503(a)). Far from proving that the uniform businesses were acquired in exchange for Kaybee-Moline, Inc. the evidence suggests just the opposite. Cloyce admits in his brief that Kaybee-Moline was liquidated five years

Page 856

[85 Ill.Dec. 896] after the first uniform business was formed and three years after the formation of the second business. Furthermore, the trial court found that Cloyce presented no evidence that he had $30,000 to $40,000 in the bank at the time he was married. In fact, Cloyce's tax return for the year prior to his marriage showed only $96 in "other income". The trial court found that the

fastcase smarter legal research

success of the two uniform businesses was due to the joint efforts of Cloyce and Charlotte. We will not disturb the findings of the trial court when no other evidence except Cloyce's testimony exists to overcome the presumption created by the statute.

The next issue raised by Cloyce is that the businesses were overvalued because the accountant who testified as to their value took future earnings of the corporation into consideration in determining their value. Cloyce relies largely upon In Re Marriage of Frazier (1984), 125 Ill.App.3d 473, 80 Ill.Dec. 838, 466 N.E.2d 290 where the Fifth District held that the valuation of the husband's insurance agency based upon discounted present value of future earnings was not a proper method of valuation under the Marriage and Dissolution of Marriage Act because of the nature of the husband's business. In Frazier the husband's earnings from the business were based solely upon a percentage of the commissions generated by premium payments, he had no exclusive territory and State Farm had the right to transfer any automobile policy to another agent upon written notice. The business could be terminated upon notice by State Farm with only a termination payment by State Farm.

Unlike the agency valued in Frazier, the uniform businesses in this case were not service oriented businesses which relied solely upon the continuous "personally produced" services of Cloyce. They were well-established ongoing businesses to which Charlotte, too, had contributed her time and efforts. The businesses had inventory and equipment[130 Ill.App.3d 692] and would not disappear as an entity if Cloyce were forced to leave the businesses. The uniform businesses were marketable and had a present value if they were offered for sale at the time of the dissolution in spite of liabilities based upon the corporations' future earnings and good will. Therefore, the rationale of Frazier is not applicable to the facts of this case because of the differences in the agency and the two corporations in this case. The reasoning which supports the decision in Frazier does not support the reasoning in this case. We also note that the valuation of the two businesses at $170,000 as found by the trial court is based upon accepted accounting principles and is supported by the evidence.

As to the final allegation of error, we find that because defendant never proved that he contributed non-marital assets to the uniform businesses, the trial court did not err in refusing to reimburse Cloyce's non-marital estate.

We, therefore, affirm the decision of the Circuit Court of Rock Island County.

Affirmed.

HEIPLE, P.J., and SCOTT, J., concur.

fastcase

Page 642

499 N.E.2d 642
148 Ill.App.3d 849, 102 Ill.Dec. 85
In re the MARRIAGE OF Humberto SUAREZ, Petitioner-Appellant,
and
Alina A. Suarez, Respondent-Appellant.
No. 2-85-0847.
Appellate Court of Illinois, Second District.
Oct. 20, 1986.

Page 643

[148 Ill.App.3d 851] [102 Ill.Dec. 86] Beermann, Swerdlove, Woloshin, Barezky & Berkson, Howard A. London, Miles N. Beermann, Chicago, for petitioner-appellant.

Mammas & Goldberg, Evan James Mammas, Chicago, for respondent-appellant.

Justice UNVERZAGT delivered the opinion of the court:

The petitioner, Humberto Suarez (Humberto), appeals from the judgment of the circuit court of Lake County dissolving his marriage to the respondent, Alina Font Suarez (Alina), and awarding certain property, maintenance, child support, and child custody to the parties. He also appeals from the trial court's denial of his motion to reopen proofs and denial of his post-trial motion. He contends the trial court abused its discretion in its division of marital assets between the parties; that the awards of maintenance and child support are unwarranted and should be reversed; and that the trial court's overvaluation of the primary marital asset, the Diesel Radiator Company, amounted to reversible error which requires remand for revaluation of that asset, and, necessarily, reconsideration of the awards of property, maintenance and child support. Because we agree with the latter contention, we address only that issue.

The trial court heard evidence on February 13, 14, and 15, 1985. It found there were irreconcilable differences, that there

Page 644

[102 Ill.Dec. 87] was an irretrievable[148 Ill.App.3d 852] breakdown of the marriage, and that further attempts at reconciliation would be impracticable. It further found there was an agreement between the parties as to child custody. The court then proceeded to hear evidence concerning the division of property. After hearing the evidence, the court asked the parties to submit various written appraisals along with a memorandum indicating the value of the marital assets and their proposed distribution of them, and it would decide the case.

The trial court's judgment dissolving the marriage was entered on June 20, 1985. It included the following awards and property division:

Child custody. By agreement, the parties were awarded joint custody of the minor children. Lisa, age 14, will reside with Humberto; Alina, age 10, will reside with Alina.

Maintenance and child support. Humberto was ordered to pay Alina rehabilitative maintenance of $4,000 per month for five years. He was also ordered to pay child support for the daughter, Alina, of $1,500 per month.

Property disposition.

ASSET	WIFE	HUSBAND
Wife's bank account	$ 4,000	
Wife's IRA account	8,000	
Wife's pension	177,000	
Florida condominium		160,000
Florida home	51,000	
Oak Brook home	226,000	
Melrose Park Building		181,000

fastcase

One-half of stock Dreyfus fund 55,000
55,000
Cash value of wife's life insurance 7,000
Mercedes Benz automobile 30,000
Gold 28,500
Husband's pension 193,000
Husband's IRA accounts
6,000
Note receivable 10,000
Boat 32,000
Bank accounts 12,000
Cash value of life insurance
15,000
Stock in Diesel Radiator
2,000,000
-------- ----------
$927,500 $2,323,000

"In order to make a fairly even property distribution," the trial [148 Ill.App.3d 853] court ordered Humberto to pay Alina an additional $697,750 payable as follows: (a) cash in the sum of $397,750 upon entry of the judgment for dissolution of marriage; (b) a note for the balance of $300,000 to bear interest at the rate of 9% per annum with interest payments due monthly and a principal payment in the sum of $100,000 due on December 31 of each year commencing in 1985 until paid in full.

As noted, Humberto challenges the trial court's division of property, its awards of maintenance and child support and its valuation of the Diesel Radiator Company in the amount of $2,000,000. Because the valuation of Diesel is integral to the remainder of the court's judgment, we proceed to examine the errors Humberto asserts cumulated to produce what he contends is an excessive valuation. Specifically, he contends that the court erred in (1) basing its valuation on evidence that was almost a year old and in refusing to reopen the proofs to consider new evidence that the company had lost a substantial percentage of its sales; (2) basing the valuation almost entirely on the present value of income to be generated by Humberto's post-dissolution labor; (3) relying on excessive projections of the company's future earnings; and (4) disregarding numerous other factors which depressed the value of the company.

Humberto and Alina Suarez, both 40 years old, each testified at trial concerning the inception of Diesel Radiator. The company now sells and repairs diesel radiators and filters for locomotives. The parties secured a $17,000 small business loan and started the business as an equal partnership in 1970. Alina continued to work full-time at a printing company and worked part-time for Diesel doing paperwork, typing letters, and so forth. Humberto trained the men in the shop and used his mechanical engineering background to set up the operations of the business. The parties' children were born in 1971 and 1975. Diesel Radiator was incorporated in 1975. Since about 1977, Alina worked full-time at Diesel and was involved mostly with customer contacts; she also took care of the company's finances: check writing, accounts payable and receivable, deposits and transfers in the bank. Humberto was in charge of the repairmen and running the

Page 645

[102 Ill.Dec. 88] repair facilities, he designed equipment and processes, and was responsible for the development of new accounts. According to the record, Humberto and Alina comprised the management of the company and served as its board of directors. They are assisted by a woman who does company bookkeeping, answers the phone, and handles customer inquiries in the Suarez' absence. The company also employs a plant superintendent and 18 shop employees.

Humberto testified the most important function of the company [148 Ill.App.3d 854] was the repair of locomotive radiators because in order to get the new radiator business "[y]ou first have to become established as a repairman." The company

also sells filters which he invented for radiators, but he testified that filter sales were "down to nothing right now." When he and Alina had disagreements concerning the operation of the business in 1984, they agreed to submit their disputes to an arbitrator. One of the decisions made by the arbitrator was that Diesel should proceed to contract with the New York and New Jersey Transit Authorities in connection with a new aspect of the business which Humberto testified involves supplying the radiators and manufacturing and designing the structure where the radiators are going to be contained to be applied to the locomotive. He testified the prototype unit had been supplied to New Jersey and the New York prototype was being produced.

The record shows Humberto and Alina each received substantial salaries and benefits from Diesel for the fiscal years March 31, 1980, through March 31, 1984; respectively, $54,000, $42,000, $77,000, $78,000 and $140,000. The total salary of each for the 1984 calendar year amounted to $173,000.

Two expert witnesses testified as to the value of the stock of Diesel Radiator. Humberto presented the testimony of Hugh B. McCulloch who had valued the stock at the request of Humberto's attorney and Alina's former attorney with the view that it might serve as the basis for discussions leading toward one party's acquisition of the interest of the other. In McCulloch's opinion, the fair market value of the stock was $600,000. Alina's expert, Patrick M. Dutcher, testified that the stock was worth $2,832,532. The trial court's judgment valued the company at $2,000,000.

Mr. McCulloch, a business appraiser for over 20 years, prepared a 13-page written valuation report, dated April 27, 1984, which was admitted in evidence. It showed McCulloch's opinion included consideration of a number of factors such as the nature and history of the business, the products and services it offers, the economic outlook, the outlook for the company and the industries served by the company, its financial condition, competition, management and earnings capacity. In developing his opinion he also reviewed Diesel Radiator's unaudited financial statements and Federal income tax returns for the fiscal years which ended on March 31, 1979, through March 31, 1983, inclusive, and the unaudited interim financial statements covering the accounting periods which ended on November 30, 1983, and on February 29, 1984. In addition, he visited the company facilities in Melrose Park, Illinois, observed its operations, and met separately with both the [148 Ill.App.3d 855] Suarezes. McCulloch testified at trial that in evaluating a business "[You] don't start with numbers * * *. [You] come with more than 20 years' experience in the field of selling businesses and valuating businesses and knowing how you look at a business and meld all these factors together in your mind and come up with a judgment, not a mathematical process. * * * It is an art."

Alina presented the testimony of Patrick Dutcher, a certified public accountant specializing in the valuation of businesses. He testified he began his valuation of the company in late January 1985. He reviewed five years' past corporate income tax returns and associated financial statements, the latest monthly financial statement being an October 1984 report, other various documents and McCulloch's evaluation of the company. He visited the Diesel Radiator

Page 646

[102 Ill.Dec. 89] plant, and talked with Alina. He did not speak with Humberto, although he thought that would have been a prudent thing to do. He did not talk with any of Diesel's customers and attempted to but did not talk to any of Diesel's competitors.

Dutcher testified he valued the company using two different methods which he felt

fastcase smarter legal research

proved one another out. The first was the "formula method." Dutcher explained that under that method, he determined the current value of assets on hand plus intangibles such as goodwill or excess earning capacity, and compared that value to the statistics compiled through corporate income tax returns filed by similar businesses in the same industry. The second method Dutcher used was called the "net present value discounted cash flow" method. Under that method, he attempts to forecast a corporation's future stream of earnings based upon the earnings actually realized by the corporation in the recent past and then reduces this stream to its present day equivalent using a reasonable and acceptable discount rate. Dutcher explained:

"The essence of the net present value method is that over a period of time, in the future, if the business can generate X number of dollars, what's that worth today? We use capitalization rates based on the risk associated with that uncertainty of the future period in time, the risk in the industry, and so forth."

He testified the net present value method was probably the most acceptable method for determining whether or not to buy a business. He felt the "book value" was inappropriate in this case since book value generally has application to a liquidation-type situation, whereas Diesel has substantial earnings capacity. He also found inappropriate the price/earnings ratio method since the company has no publicly [148 Ill.App.3d 856] traded stock.

Using the net present value discounted cash flow method, Dutcher arrived at a value of $2,832,532. A 12-year cash flow forecast was calculated for the period 1984 to 1995. The cash flow was reduced to today's present value by applying a growth rate of 9 1/2% (comprised of 4 1/2% real growth in the industry plus a 5% inflation rate) and a present value discount rate of 20%. Using the formula method, Dutcher arrived at a value of $2,222,079. Dutcher testified he was confident the value of the corporation was certainly within that range of values, and that in his opinion Diesel Radiator's value was $2,832,532.

Dutcher acknowledged that Diesel Radiator's main customer was the Burlington Northern Railroad Company. McCulloch's report, which Dutcher reviewed, indicated that for the fiscal year 1983, 62.9% of Diesel Radiator's sales were to the Burlington Northern. That constituted 62.5% of Diesel Radiator's net sales in new radiators, 35.7% of its radiator repair income, and more than 95% of its filter sales. Dutcher testified that it is significant that one particular customer is such a large purchaser, and that his valuation would change if Diesel Radiator lost the Burlington Northern account and could not replace those lost sales. He chose the 20% present value discount factor based on his opinion of the risks of uncertainties in the future. He agreed that someone else might use a 15% discount factor and that someone else again might use a 30% discount factor.

Humberto testified in rebuttal that 50% of Diesel Radiator's profits in 1984 resulted from filter sales and that filter sales had since ended because the Burlington Northern and a smaller customer cancelled their orders. Those lost profits totaled $243,246. Humberto also testified that the contract for the sale of new radiators to the Burlington Northern is renewable on a yearly basis and can be revoked at any time. Furthermore, Diesel Radiator's repair business is going to decrease because of the invention of a new type of radiator that does not need repairs. McCulloch's report identified this competitive influence as "a premium-priced radiator made from seamless tubing which is mechanically bonded to the radiator header, thus eliminating the use of solder, the source of most of the problems leading to radiator repairs." McCulloch's

fastcase

Page 647

[102 Ill.Dec. 90] report also indicated that the manufacturers of this new radiator are selling them directly to locomotive manufacturers and selling them directly to railroads to cover their replacements needs, as well. Diesel Radiator is only able to offer the traditional and less expensive soldered radiators.

After the court distributed to the parties its handwritten notes indicating[148 Ill.App.3d 857] what its decision was, but before entry of the judgment order drafted by Alina's attorney, Humberto filed a motion to reopen proofs inter alia to show that the Burlington Northern had recently decided not to purchase its new radiators from Diesel for 1985, resulting in a substantial loss of business to the company. The court denied the motion to reopen the proofs, and on June 20, 1985, entered the judgment submitted by Alina's attorney. The judgment did not become final, however, until August 12, 1985, when the reserved issue of attorney fees was finally settled.

In his post-trial motion, Humberto again argued that the trial court should reconsider its decision in light of Diesel Radiator's substantial loss of business from Burlington Northern. The court refused to consider any new evidence, but did allow Humberto to make an offer of proof. The offer of proof showed (1) Burlington Northern's May 22, 1985, notice to Diesel Radiator that it would not be purchasing new radiators from it in 1985; (2) that Diesel Radiator's 1984 profits from the sale of such new radiators to the Burlington Northern totaled $106,346; (3) that filter sales profits dropped to zero after April 1985, down from $94,540 for the period April 1984 through March 31, 1985, and down from $246,238 for the previous fiscal year; and (4) a recalculation of the value of Diesel Radiator Company in light of the loss of the Burlington Northern sales. The recalculation utilized the same two valuation methods used by Dutcher, but excluded past profits (and related taxes) attributed to the lost filter and radiator sales, and excluded the value of the Diesel Radiator Melrose Park building which was otherwise included separately in the court's listing of marital property. The recalculation of the net present value discounted cash flow method yielded a value of $786,210, and the recalculation of the formula method yielded a value of $511,272. The trial court refused to consider the offered evidence and denied Humberto's post-trial motion.

Humberto contends that because marital property must be valued as of the date of the dissolution of the marriage (In re Marriage of Frazier (1984), 125 Ill.App.3d 473, 80 Ill.Dec. 838, 466 N.E.2d 290; see also In re Marriage of Rubinstein (1986), 145 Ill.App.3d 31, 99 Ill.Dec. 212, 495 N.E.2d 659; In re Marriage of Rossi (1983), 113 Ill.App.3d 55, 68 Ill.Dec. 801, 446 N.E.2d 1198), the court committed reversible error in denying his motion to reopen proofs to consider the new, current evidence as to the value of the business, and the court's error resulted in an overvaluation of Diesel Radiator of at least $1,213,790. Humberto asserts that the court, in effect, abused its discretion by failing to exercise its discretion in denying the motion to reopen, since the court erroneously concluded that it could not consider evidence of an event which [148 Ill.App.3d 858] occurred subsequent to the trial.

Alina argues the court was correct in refusing to reopen the case for the submission of new additional testimony as to an event which occurred subsequent to the date of trial. She asserts Humberto surely must have been negotiating a contract with the Burlington Northern prior to the close of proofs here on February 15, 1985, and could have testified as to the progress of the negotiations. She contends Humberto cannot be allowed to bring forward new evidence after the court renders a decision with which he is not satisfied. Further, she contends Humberto has not been caused any

fastcase

substantial injustice by the court's refusal to admit the new evidence since Diesel has other customers, and Dutcher's use of a 20% present value discount rate took into consideration the substantial amount of income earned from the small number of business customers. Alina argues Humberto had ample opportunity to present evidence at trial, and that permission to present new evidence would

Page 648

[102 Ill.Dec. 91] have subjected the parties and the trial court to lengthy procedures which would lead to a retrial of the entire case. Finally, she asserts Humberto failed to present credible testimony as to the value of Diesel Radiator and may not be allowed to benefit on remand from his failure to do so.

Generally, in considering a motion to reopen proofs, the trial court should take into account whether there is some excuse for the failure to introduce the evidence at trial, whether the adverse party will be surprised or unfairly prejudiced by the new evidence, and whether there are the most cogent reasons to deny the motion. (In re Marriage of Weinstein (1984), 128 Ill.App.3d 234, 249, 83 Ill.Dec. 425, 470 N.E.2d 551.) The decision to deny such motions is within the sound discretion of the trial court and will not be disturbed on review absent a clear abuse thereof (128 Ill.App.3d 234, 249, 83 Ill.Dec. 425, 470 N.E.2d 551), and where the failure to reopen the proofs resulted in substantial injustice (In re Marriage of Holder (1985), 137 Ill.App.3d 596, 603, 91 Ill.Dec. 926, 484 N.E.2d 485; In re Marriage of Smith (1983), 114 Ill.App.3d 47, 52, 69 Ill.Dec. 827, 448 N.E.2d 545). As Humberto notes, greater liberty should be allowed in the matter of opening the proofs when the case is tried before the court without a jury as was the case here. Harper v. Johnson (1978), 61 Ill.App.3d 190, 193, 18 Ill.Dec. 652, 377 N.E.2d 1288; citing People ex rel. J. Hillis Boos v. St. Louis, Iron Mountain & Southern Ry. Co. (1917), 278 Ill. 25, 28-29, 115 N.E. 854.

Although we agree that parties should not be allowed to benefit on review from their failure to introduce evidence at trial (In re Marriage of Mullins (1984), 121 Ill.App.3d 86, 90, 76 Ill.Dec. 560, 458 N.E.2d 1360; In re Marriage of McCartney (1983), 116 Ill.App.3d 512, 72 Ill.Dec. 182, 452 N.E.2d 114; In re Marriage of Smith (1983), 114 Ill.App.3d 47, 54-55, 69 Ill.Dec. 827, 448 N.E.2d 545), it is clear that the evidence of the loss of the Burlington Northern new radiator bid occurred in the interim period[148 Ill.App.3d 859] between the close of proofs and the entry of the judgment of dissolution, and there is no evidence whatever that Humberto was "negotiating" with the Burlington Northern on the contract prior to the trial as opposed to simply participating in competitive bidding.

We note that Alina appears to construe the "valuation" date at bar as the date of the hearing in February 1985, rather than the date on which the court's judgment of dissolution was entered on June 20, 1985. In In re Marriage of Rossi (1983), 113 Ill.App.3d 55, 60, 68 Ill.Dec. 801, 446 N.E.2d 1198, the court noted that facts existing on the valuation date should be the only ones taken into account because "[t]o hold otherwise would have the effect of treating appreciation of the corporation subsequent to the dissolution as marital property contrary to section 503(c)(3) of the [Illinois Marriage and Dissolution of Marriage] Act. Ill.Rev.Stat.1981, ch. 40, par. 503(c)(3)." (Accord In re Marriage of Brooks (1985), 138 Ill.App.3d 252, 260, 93 Ill.Dec. 166, 486 N.E.2d 267.) Rossi found the proper valuation date there to be January 30, 1979, the date on which the judgment of dissolution of marriage was entered in that case, and not the later date of June 22, 1981, or December 1, 1981, on which dates supplemental judgments concerning property settlement, maintenance and attorney fees were entered.

fastcase

In this case, the court did not enter a judgment of dissolution after the hearing in February and then later enter a supplemental judgment after property division issues had been resolved. It entered both its judgment dissolving the marriage and settling the matters of custody, child support, maintenance and property division on June 20, 1985. Its reservation of the issue of attorney fees was later decided on August 12, 1985. Accordingly, the proper valuation date here was June 20, 1985, and the loss of the Burlington Northern business was an occurrence which had a bearing on the value of Diesel Radiator as of the date of dissolution.

As to whether the court's refusal to reopen caused Humberto substantial injustice, we note that although Dutcher testified

Page 649

[102 Ill.Dec. 92] the 20% present value discount factor he chose took into consideration the substantial amount of income generated yearly from the small number of business customers, he also acknowledged the subjective nature of the selection of that particular factor as opposed to a lower or higher one. The proffered recalculations of the net present value discounted cash flow method and the formula method, adjusted in part to reflect the loss of this Burlington Northern business, show a tremendous difference in the valuation thereby derived from the valuations arrived at by Dutcher. In Dutcher's original valuations, the net present value discounted cash flow method yielded a valuation of $2,832,532 compared[148 Ill.App.3d 860] with the revised valuation of $786,210; Dutcher's original valuation using the formula method yielded a value of $2,242,079, and the revised valuation was $511,272. The notable difference between these figures suggests that the 20% present value discount factor chosen by Dutcher was perhaps not realistic enough to account for the intense concentration of business attributable to this one customer, particularly in light of the relatively limited range of products and service offered by the company.

Dutcher acknowledged that lost sales from the loss of any one client, if they were not picked up by someone else to generate similar earning streams, would certainly affect his valuation figures. While Diesel Radiator does have customers other than the Burlington Northern, the evidence showed that for the 1984 base year--which year was an integral part of Dutcher's net present value discounted cash flow method--Burlington Northern's business accounted for 62.5% of Diesel's new radiator sales and for 95% of its total filter sales. Moreover, according to Humberto's testimony, 1984 was also Diesel Radiator's "best year ever." Humberto testified at trial concerning the total loss of the filter business since Diesel had lost the accounts of both Burlington Northern and its one other filter customer. The only evidence that some of these lost profits may be recaptured was the two new contracts with the New York and the New Jersey Transit Authorities which were expected to produce perhaps $25,000 in profits in 1985. Further, the Milwaukee Road recently purchased 10 filters. Although two of the railroads, the Illinois Central and the Santa Fe, have been considering use of Diesel's filters for the past three years and for the past two years, respectively, Humberto testified they have been unable to make a decision to buy or not. Humberto testified also he had been talking with a lot of people trying to promote his products, and that he had made a proposal in September 1984 to the General Motors Diesel Division in Canada relative to filters. Other evidence tending to offset those potential profits was offered regarding the new type of radiators being manufactured that do not require repairs, and which come out of the factory with a filter already applied. We note McCulloch's valuation also recognized that although there was then "no present reason to

fastcase

be concerned about the relationship" between Burlington Northern and Diesel Radiator, "with one customer taking over 60% of Diesel Radiator's net sales, the 'fair market value' of Diesel's Radiator stock would be somewhat adversely affected by the business concentration." McCulloch's report also noted that the number of Diesel's competitors has tripled since its inception in 1970.

[148 Ill.App.3d 861] The issue of reopening proofs in the context of a dissolution proceeding in an Illinois case was recently presented in In re Marriage of Weinstein (1984), 128 Ill.App.3d 234, 83 Ill.Dec. 425, 470 N.E.2d 551. The wife there argued the court erred in denying her post-trial motion to reopen proofs to hear additional evidence which required a modification of the court's dissolution judgment. Specifically, she wished to reopen proofs to present evidence that she had lost her job, that the husband was about to enter the job market as a surgeon, and that the husband had breached an out-of-court agreement to obtain a Jewish divorce. After reviewing the general rules relating to the reopening of proofs, the Weinstein court concluded the trial court did not abuse its discretion in denying the

Page 650

[102 Ill.Dec. 93] motion, since it determined that the evidence the wife sought to introduce was not of the utmost importance to her case and likely would not have materially altered the trial court's judgment. The trial court had already awarded her substantial marital assets (62% of the marital estate) in light of the parties' disparate earning capacities, and the record showed her loss of employment was only a temporary set back in her several years of professional experience which was occasioned by economic reversals of the company where she had been employed. We find the facts of the instant case distinguish it from Weinstein, however, in that we believe the evidence of the loss of the Burlington Northern radiator business was a significant factor which both experts agreed would affect the value of the business. We note also the evidence offered in Weinstein occurred subsequent to the entry of the judgment of dissolution, whereas the evidence offered here occurred prior to the entry of the dissolution judgment.

Two out-of-state cases have considered the reopening of proofs under circumstances very similar to those presented here, and we find them persuasive. The first one, cited by Humberto, is In re Marriage of Rives (1982), 130 Cal.App.3d 138, 181 Cal.Rptr. 572. The court in Rives found it was error for the trial court to refuse to reopen proofs after submission of the case, but prior to entry of the judgment, to consider the devaluation of the parties' queen bee business due to the wife's neglect. Also, in F. v. F. (Del.1976), 358 A.2d 714, the court found that where, after the trial court valued the corporation owned by the husband as sole stockholder, the husband entered into an agreement to sell the corporation for about four times the value used by the court as the basis for the property division, the trial court erred in refusing the wife's application to reopen the hearing to submit evidence as to the sale. The court wrote:

"Given the equitable nature of the proceeding, the time at which the application was made (before final order), the total [148 Ill.App.3d 862] amount of property involved in the proceeding, and the substantial difference between the asset and sale value of the business, we conclude that the application [to reopen proofs] should have been granted. We emphasize that not every post-hearing change in asset value requires reexamination, or an evidentiary hearing, but the difference here was so substantial that the Court, which was still attempting to finally settle the property issues, should have determined to what extent, if any, the sale price required a change in its award. Failure to do so was, in our view,

fastcase

an abuse of discretion." F. v. F. (Del.1976), 358 A.2d 714, 716.

We find the reasons underlying the court's decision in that case are readily applicable to the case presently before us. We believe evidence of the loss of the Burlington Northern radiator sales, which was not available at the time of the hearing but which became known before the judgment of dissolution was entered, was a significant factor which had a substantial bearing on the valuation of the company as of the date of the dissolution, and it was an abuse of the trial court's discretion to deny the opening of the proofs.

Accordingly, the judgment concerning property division will be vacated and the cause remanded for rehearing to reconsider valuation of the business in light of the loss of the Burlington Northern new radiator sales. Because the trial court's reconsideration of the evidence of valuation may affect its ultimate division of marital property between the parties, other portions of the judgment awarding maintenance and child support will also be vacated for redetermination after division of the marital property is effected. In re Marriage of Rubinstein (1986), 145 Ill.App.3d 31, 38, 99 Ill.Dec. 212, 495 N.E.2d 659; In re Marriage of Rapacz (1985), 135 Ill.App.3d 1045; 1051, 90 Ill.Dec. 622, 482 N.E.2d 441; In re Marriage of Malters (1985), 133 Ill.App.3d 168, 183, 88 Ill.Dec. 460, 478 N.E.2d 1068; In re Marriage of Wilson (1982), 110 Ill.App.3d 809, 815-16, 66 Ill.Dec. 508, 443 N.E.2d 31.

Page 651

[102 Ill.Dec. 94] Because the cause is being remanded, we find it necessary to address several errors raised by Humberto with regard to the alleged overvaluation of Diesel Radiator. He argues that Dutcher's formula method--net tangible assets ($515,479) plus goodwill ($1,726,600) equals value $2,242,079)--erroneously included the parties' personally owned real estate (the Melrose Park building valued at $185,000) as a corporate asset. The record shows the Melrose Park building was also valued separately as a marital asset awarded to Alina. Similar double-counting of the same asset has been found to be reversible error, since it causes an overstatement of the parties' assets. (In re Marriage of Malters (1985), 133 Ill.App.3d 168, 180-81, 88 Ill.Dec. 460, 478 N.E.2d 1068; see also In re Marriage [148 Ill.App.3d 863] of Wilson (1982), 110 Ill.App.3d 809, 815, 66 Ill.Dec. 508, 443 N.E.2d 31.) We agree the Melrose Park building should not have been included as part of the corporation's net tangible assets. Alina's argument that Diesel derives economic value by having this asset available to itself is without merit. The record is clear that the corporation pays substantial, even excessive, rent for the use of the building pursuant to lease. As such, the building lease represents a liability of the corporation, not an asset.

Humberto next contends that Dutcher's formula and net present value discounted cash flow methods of valuation were further invalidated by the failure of each of those methods to take into account the cost of hiring qualified personnel to replace Humberto and Alina. He contends failure to incorporate this cost into the valuation methods caused a greatly inflated estimation of Diesel's adjusted taxable income. This, in turn, affected the goodwill factor included in the formula method and his valuation based on the net present value discounted cash flow method.

Humberto points out that McCulloch's report indicated that if Diesel Radiator were to be sold to an investor/owner who would not be involved in the day-to-day operations of the business, that person would necessarily be required to retain management personnel possessing engineering and sales skills at an estimated total compensation package of $200,000. McCulloch also opined that if one

fastcase

or the other of the Suarezes were to continue the business without the assistance of the other, either a highly skilled engineer or a highly skilled salesperson would undoubtedly need to be hired to replace the Suarez no longer with the company. However, the compensation paid to that person would be far less than the compensation previously paid to either one of the Suarezes. McCulloch's report did not suggest what the range of such compensation might be.

Humberto asserts the trial court's judgment "correctly" found fault with Dutcher's valuation since it "[failed] to consider the loss of one of the two major employees and the value of the services performed by the other." Humberto points out, and we agree, that the opinion of an expert is of value only when it is based upon and in harmony with facts which are capable of verification by the court. (Yowell v. Hunter (1949), 403 Ill. 202, 214, 85 N.E.2d 674; St. Paul Fire & Marine Insurance Co. v. Michelin Tire Corp. (1973), 12 Ill.App.3d 165, 179, 298 N.E.2d 289.) According to the record at trial, however, Humberto testified he found it unnecessary to hire anyone to replace Alina during her extended absence from the company, and that he and the clerk were able to assume her responsibilities. He testified that during the last year, he carried on all the functions that Alina did in the past, and [148 Ill.App.3d 864] testified that he could do it in the future as well. In view of these facts, we cannot find error in Dutcher's failure to take replacement compensation into account.

Humberto also charges that Dutcher's opinion as to the value of Diesel Radiator was deficient not only because he was unaware of the loss of the Burlington Northern radiator sales and the loss of the filter sales, but because his use of such valuation methods did not allow consideration of factors such as the history of the business, the lack of management depth, and the company's position relative to its competitors.

Page 652

[102 Ill.Dec. 95] He points out such factors are termed "fundamental" in Revenue Ruling 59-60 (Rev.Rul. 59-60, 1959-1 C.B. 237).

In In re Marriage of Rossi (1983), 113 Ill.App.3d 55, 60, 68 Ill.Dec. 801, 446 N.E.2d 1198, the court acknowledged that:

"The Internal Revenue Service has recognized that the general approach, method and factors outlined in Revenue Ruling 59-60 may be relevant in determining the fair market value of business interests of any type. (Rev.Rul. 59-60 1959-1 C.B. 237.)"

Coincidentally, Hugh McCulloch was petitioner's expert in that case, and he relied on Revenue Ruling 59-60 in formulating his opinion of the value of the closely held corporation which was at issue there. Although the court apparently found no fault with use of the Revenue Ruling factors in valuing the corporation, it noted that it has been held that precise rules for determining the value of closely held stock cannot be laid down, citing In re Marriage of Mitchell (1981), 103 Ill.App.3d 242, 248, 58 Ill.Dec. 684, 430 N.E.2d 716. The court found that in valuing the corporation, McCulloch failed to consider several of the factors or directly contravened them, and determined the cause should be remanded where the respondent's certified public accountant placed the corporation's net worth at slightly over one-half of McCulloch's valuation.

We believe the extent to which Dutcher's valuation of Diesel Radiator did or did not take into account the history of the company, management depth, and so forth, was fully covered on Humberto's cross-examination of him and it was within the trial court's discretion to accept or reject it. In the Mitchell case, which was cited by the Rossi court (In re Marriage of Mitchell (1981), 103 Ill.App.3d 242, 248, 58 Ill.Dec. 684, 430 N.E.2d 716), it was stated that "every relevant

fastcase

evidential fact entering into the value of the corporate property reflecting itself in the worth of the corporate stock should be considered." The Mitchell court also emphasized the court's broad discretion in the disposition of property. Clearly, the trial court here heard the evidence, and ultimately discounted Dutcher's valuation by some $832,000 due in part, perhaps, [148 Ill.App.3d 865] to the shortcomings alleged here.

Humberto also contends the court's valuation of Diesel Radiator was excessive for the additional reason that it improperly included the value of income to be generated by Humberto's post-dissolution labor. He cites in support In re Marriage of Frazier (1984), 125 Ill.App.3d 473, 80 Ill.Dec. 838, 466 N.E.2d 290. In that case, the court assigned a value of $144,491 to the husband's insurance agency which it had classified as marital property. It awarded the agency to the husband, and ordered him to execute a $40,000 note, payable over five years at 10 1/2% interest as the wife's share of that asset.

The $144,491 value assigned was based on the testimony of Dr. James P. Jennings who used what is known as the "capitalization of earnings technique" in arriving at the worth of the agency. Jennings noted in his testimony:

"[The capitalization of earnings technique] is a broadly accepted method of determining value. Its premise is that the value of any income producing resource is not the historic cost of assets, nor is it the historic cost of assets minus liabilities. It is instead the discounted present value of the future stream of earnings, estimated by the use of recent past earnings." 125 Ill.App.3d 473, 475, 80 Ill.Dec. 838, 466 N.E.2d 290.

Clearly, the technique used by Jennings is essentially the same method used by Dutcher in arriving at his $2,832,532 valuation of Diesel Radiator. A major distinction between the calculations used in Frazier and those used here appears to be that Jennings used as a factor in his calculations Frazier's average annual net after-tax income for the five-year period 1976-1980. In contrast, Dutcher used not only the combined "officer compensation" of the Suarezes, but also did not use a five-year average of those combined salaries; instead, he used only the 1984 "best year ever" figure.

Page 653

[102 Ill.Dec. 96] Cf. In re Marriage of Kapusta (1986), 141 Ill.App.3d 1010, 96 Ill.Dec. 234, 491 N.E.2d 48 (best to make capitalization of earnings calculation using an average of annual earnings over a period of several years to reduce the impact of unusual financial successes or set-backs).

That aside, the Frazier court determined that:

"In valuing the agency at the discounted present value of the respondent's expected future earnings, Dr. Jennings ignored the fact that those earnings will be due in large part to the respondent's activity following dissolution. In failing to reduce the value of the agency to account for that activity, the court effectively classified as marital property the results of the respondent's future efforts to maintain his current accounts. Furthermore,[148 Ill.App.3d 866] the twin assumptions, implicit in Dr. Jennings' calculations, that the respondent's office expenses and commissions from policies written or assigned during marriage will remain constant, seem to be unwarranted. These shortcomings produced, in our opinion, a grossly excessive valuation of the agency as a marital asset. This cause must therefore be remanded for revaluation and redistribution of the value of the agency in accordance with the views expressed herein." 125 Ill.App.3d 473, 476-77, 80 Ill.Dec. 838, 466 N.E.2d 290.

fastcase

Humberto contends that because Diesel Radiator's future earnings will depend largely on his post-dissolution efforts, the court should have discounted the value of the company to reflect that fact. Alina argues the Frazier rationale is inapplicable, however, since Diesel Radiator is not a service-oriented business like the insurance agency in Frazier or like a dentist's, doctor's or lawyer's practice which relies solely upon the continuous "personally produced" services of one person. Rather, as a similar distinction was recognized in the case In re Marriage of Rowe (1985), 130 Ill.App.3d 689, 85 Ill.Dec. 894, 474 N.E.2d 854, appeal denied (1985), 106 Ill.2d 559, Diesel Radiator is a well established on-going business with inventory, equipment, and employees which would not disappear as an entity if Humberto sold and left the business. Stated otherwise, as in Rowe, Alina contends Diesel Radiator is marketable and would have a present value if offered for sale at the time of dissolution. The Rowe court found that the rationale of Frazier was not applicable to the valuation of the uniform businesses at issue before it given these differences.

Humberto suggests that Diesel Radiator falls somewhere between Frazier and Rowe, and asserts that application of Frazier would not require the trial court to disregard Diesel's earning potential entirely, but it would, however, preclude the court from including the value of Humberto's post-dissolution efforts in its valuation of the company. He notes that all businesses depend to some extent on personal efforts. Some businesses, such as the insurance agency in Frazier, might depend entirely or almost entirely on a particular person whereas other businesses, such as the one in Rowe, may depend primarily on particular products. Diesel Radiator depends partly on Humberto's future personal efforts and partly on the particular products produced by the company.

We agree with Humberto's reading of Frazier, since it is clear the court intended that the appreciation in value of an asset which is accomplished by the post-dissolution efforts of one party should not inure to the benefit of the other party. We decline to read [148 Ill.App.3d 867] Rowe to mean that such post-dissolution efforts may be treated as part of the marital property to be divided at dissolution. Rather, we believe the "earning potential" which may be considered properly by the court is that potential which may be said to have arisen out of the parties' past joint efforts and which, in sum, constitutes the business's goodwill.

"Good-will value is based upon earning potentiality in excess of normal return on tangible assets. It means the existence of intangible values in the business, such as a trade name of good repute, location,

Page 654

[102 Ill.Dec. 97] or uniqueness of product." Securities Realization Co. v. Peabody & Co. (1939), 300 Ill.App. 156, 171, 20 N.E.2d 874.

Calculation of the goodwill factor using the potential income approach, based entirely upon the expectation of future efforts of one of the parties, was also disapproved in In re Marriage of Rives (1982), 130 Cal.App.3d 138, 149-50, 181 Cal.Rptr. 572, 577-78. That court stated:

"The concept of goodwill in a marital dissolution context is elusive. * * * Essentially, goodwill in a dissolution context is a portion of the value of the [business] as a going concern." 130 Cal.App.3d 138, 149, 181 Cal.Rptr. 572, 577.

One reason the court in that case found that the expectancy of future interests should not be the basis for determining the value of goodwill in a business which is marital property was because such marital property "may be acquired only during the marriage

fastcase

and it would be inconsistent with that philosphy to assign value to the post-marital efforts of either spouse." (130 Cal.App.3d 138, 150, 181 Cal.Rptr. 572, 578.) The court also found the accountant's valuation of goodwill was based upon assumptions which were not proved in the record, and that the potential income approach completely ignores important considerations which may be said reasonably to contribute to, diminish, or affect the intangible value of goodwill at the time of dissolution.

Although we agree that the value of Humberto's post-dissolution efforts should not be included in the valuation of the business as a marital asset, we are unable to find the trial court's judgment here was erroneous on that basis, however, since it is not clear that the court's $2,000,000 valuation did include Humberto's post-dissolution efforts. Obviously the court did not blindly accept Dutcher's net present value discounted cash flow valuation ($2,832,532), nor did it accept entirely Dutcher's "formula" method which included calculation of goodwill on historical production and income figures ($2,242,079). Accordingly, no reversal on this basis would be warranted.

[148 Ill.App.3d 868] For the reasons above, the judgment of the circuit court of Lake County is reversed, and the cause is remanded for further proceedings consistent with this opinion.

JUDGMENT REVERSED; CAUSE REMANDED.

HOPF and SCHNAKE, JJ., concur.

Page 330

652 N.E.2d 330
166 Ill.2d 232, 209 Ill.Dec. 790, 64 USLW 2047

In re MARRIAGE OF Helen J. TALTY, Appellee, and William F. Talty, Appellant.

No. 76770.
Supreme Court of Illinois.
June 22, 1995.

Page 331

[166 Ill.2d 233] [209 Ill.Dec. 791] White, Marsh, Anderson, Brusatte, Vickers & Deobler (Robert E. White, of counsel), and Herbolsheimer, Lannon, Henson, Duncan & Reagan, P.C. (Michael T. Reagan, of counsel), all of Ottawa, for appellant.

Michael H. Massino, Ltd., Morris, IL, for appellee.

Justice MILLER delivered the opinion of the court:

The petitioner, Helen J. Talty, brought the present action in the circuit court of Grundy County seeking the dissolution of her marriage to the respondent, William F. Talty. The circuit court entered a decree dissolving the marriage and disposing of the parties' property. The court awarded Helen a lump sum of $750,000 and the condominium where she was living. The court assigned the couple's remaining assets to William. No award of maintenance was made. In a post-decree order, Helen was awarded $15,000 in prospective attorney fees for the defense of the present appeal. The appellate court affirmed the judgment. (252 Ill.App.3d 80.) We allowed William's petition for leave to appeal (145 Ill.2d R. [166 Ill.2d 234] 315(a)), and we now reverse the judgments of the courts below and remand the matter to the circuit court for further proceedings.

The parties were married in 1961 and had three children, all of whom were emancipated by the time the order of dissolution was entered. Helen Talty filed a petition for separate maintenance in April 1983. In February 1984, Helen amended the action to one for dissolution of the marriage. Before the separation, Helen worked in the home; after the separation, Helen was employed as a pharmacy technician at a drug store in Coal City. At the time of the dissolution, Helen was earning $4.50 an hour and was working about 38 hours per week.

William and his brother were co-owners of Talty Chevrolet, Cadillac, Buick, Inc., an automobile dealership located in Morris. William became a partner in the business in 1975, a year after his brother acquired it; William had other employment before that time. William has also farmed throughout his life, and, at the time of the dissolution, he was farming about 460 acres in partnership with his brother.

During the separation, William made monthly payments of maintenance to Helen. These payments were originally about $950 a month, and they were later increased to about $1,450 a month. In addition, William provided Helen with the use of a new automobile. In 1989, William was ordered to furnish Helen with $20,000 for the purchase of a condominium apartment.

After a lengthy period of inaction by the parties, the matter proceeded to trial in October 1992. The principal issue at trial centered on the valuation of the car dealership that William owned and operated in conjunction

Page 332

[209 Ill.Dec. 792] with his brother. Helen's expert witness, William Evenson, a lawyer and accountant, testified that the fair market value of the business was $1,375,000, making William's[166 Ill.2d 235] half interest worth

fastcase smarter legal research

$687,500. William's expert witness, Carl Woodward, an accountant, testified that the value of the business was approximately $800,000, and that William's share was therefore worth about $400,000. Woodward's figures were net of taxes that would be owed on a sale of the business; Woodward's pre-tax valuation of the dealership was $1,053,000. Both experts included goodwill in their calculations. The parties agree that William's interest in the car dealership, acquired by him in 1975, is marital property.

For a number of years preceding the 1992 dissolution order, William earned between $200,000 and $300,000 in annual salary and bonus from his position at the car dealership, where he was vice president and sales manager. At the time of trial, William had several bank accounts and certificates of deposit worth more than $700,000. Including the bank accounts, the farm land, and William's half interest in the car dealership, the total value of the marital estate was estimated to be about $2 million.

After the close of evidence, the court entered an order dissolving the marriage and dividing the marital assets. The court awarded Helen a lump sum of $750,000 in cash and the condominium apartment where she was then living, subject to the existing mortgage. The court assigned to William the couple's remaining marital assets. In view of the substantial cash award made to Helen, the court did not grant maintenance. Both parties filed notices of appeal from the circuit court judgment.

In a post-decree petition, Helen later requested an award of prospective attorney fees to defend against William's appeal. The judge who heard the case had retired in the interim, and Helen's request was heard by a different judge. Following a hearing, the second judge awarded Helen $15,000 in prospective attorney fees for the defense of the appeal.

[166 Ill.2d 236] The appellate court affirmed the circuit court judgment. (252 Ill.App.3d 80, 191 Ill.Dec. 451, 623 N.E.2d 1041.) Regarding the issues raised before this court, the appellate court rejected William's challenges to the trial court's treatment of the goodwill of the car dealership, the award to Helen of prospective attorney fees for the defense of the appeal, and the denial of a motion for automatic substitution of judge. The appellate court also upheld the trial judge's division of the marital estate, which both William and Helen challenged on appeal. Finally, the appellate court rejected William's objections to the opinion testimony of Helen's expert witness and to the trial court's valuation of certain farm equipment. We allowed William's petition for leave to appeal (145 Ill.2d R. 315(a)).

William's principal contention in the present appeal involves the treatment of the goodwill in the business he operated with his brother. As we have stated, the valuations offered by the parties' expert witnesses included amounts representing the goodwill of the business. Relying on In re Marriage of Zells (1991), 143 Ill.2d 251, 157 Ill.Dec. 480, 572 N.E.2d 944. William argues that the trial judge improperly considered goodwill in valuing the business. William believes that the trial judge's treatment of goodwill in this case resulted in an impermissible double counting of its value--first when it was considered as part of the value of the business, and again later in the division of the marital assets, when the judge assessed the circumstances of the parties, particularly William's superior earnings capacity. The effect of the asserted error would be to overstate the value of the property assigned to William. In response, Helen asserts that the appellate court correctly concluded that Zells is limited to professional practices and professional corporations and thus is inapplicable to the car dealership at issue here.

fastcase

In In re Marriage of Zells (1991), 143 Ill.2d 251, 157 Ill.Dec. 480, 572 N.E.2d 944, this court considered the appropriate treatment of the [166 Ill.2d 237] goodwill of a professional practice in a division of property under the Illinois Marriage and Dissolution of Marriage Act. Zells noted the conflicting appellate court decisions on the question whether the goodwill of a professional corporation should be considered a marital asset. The court

Page 333

[209 Ill.Dec. 793] agreed with the cases that have held that goodwill is already reflected in a number of the circumstances that must be considered by a judge in making an equitable division of property under the Act. Zells concluded:

"Adequate attention to the relevant factors in the Dissolution Act results in an appropriate consideration of professional goodwill as an aspect of income potential. The goodwill value is then reflected in the maintenance and support awards. Any additional consideration of goodwill value is duplicative and improper." Zells, 143 Ill.2d at 256, 157 Ill.Dec. 480, 572 N.E.2d 944.

We believe that the same concerns noted in Zells are present here. The Illinois Marriage and Dissolution of Marriage Act embodies a partnership theory of marriage. This court has previously described the general purpose of the scheme of property division set forth in the Act and the goals those provisions are designed to achieve:

"The primary legislative objective is to create a system of property division upon dissolution of marriage that is more equitable than that which previously existed in this State. It is evident that the legislature recognized glaring inequities in the earlier law and favored change. For instance, by giving both spouses an interest in 'marital property' upon dissolution of marriage, the legislature sought to award economic credit in the distribution of property for indirect or domestic contributions to the accumulation of property and sought to replace the concept of post-marital support through alimony with one of post-marital stability through a just distribution of marital property and assets." Kujawinski v. Kujawinski (1978), 71 Ill.2d 563, 576, 17 Ill.Dec. 801, 376 N.E.2d 1382.

In furtherance of those goals, section 503(d) of the [166 Ill.2d 238] Act directs the trial judge to "divide the marital property without regard to marital misconduct in just proportions." (Ill.Rev.Stat.1991, ch. 40, par. 503(d).) In doing so, the court is to consider "all relevant factors," including:

"(4) the relevant economic circumstances of each spouse when the division of property is to become effective * * *;

* * * * * *

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

* * * * * *

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income." Ill.Rev.Stat.1991, ch. 40, pars. 503(d)(4), (d)(7), (d)(10).

As required by statute, the trial judge in the present case considered the various circumstances listed in section 503(d) in dividing the couple's marital estate. In essence, William contends that these circumstances overlap to some degree the elements that underlie the valuation of the personal goodwill of the car dealership. We agree with William that the judge's consideration of these matters might have caused the judge to duplicate some of the elements already considered in placing a

fastcase

value on the car dealership, including its goodwill.

"A workable definition of goodwill is that 'goodwill is the value of a business or practice that exceeds the combined value of the physical assets.' (2 Valuation and Distribution of Marital Property, sec. 23.04 (M. Bender ed. 1984).)" (In re Marriage of White (1986), 151 Ill.App.3d 778, 780, 104 Ill.Dec. 424, 502 N.E.2d 1084.) "Goodwill represents merely the ability to acquire future income." (Zells, 143 Ill.2d at 254, 157 Ill.Dec. 480, 572 N.E.2d 944.) To the extent that the goodwill of the car dealership depends on William's personal efforts, the same elements that underlie that calculation were also considered by the court in its assessment of the criteria contained in section 503(d). (Zells, 143 Ill.2d at 254-56, 157 Ill.Dec. 480, 572 N.E.2d 944; In re Marriage of Courtright (1987), 155 Ill.App.3d 55, [166 Ill.2d 239] 58-59, 107 Ill.Dec. 738, 507 N.E.2d 891; In re Marriage of Wilder (1983), 122 Ill.App.3d 338, 346-48, 77 Ill.Dec. 824, 461 N.E.2d 447; see generally Note, Family Law--Division of Property Upon Marital Dissolution--The Illinois Appellate Court Grapples with Goodwill

Page 334

[209 Ill.Dec. 794] in a Professional Practice--Is it Property or Just Another Factor?, 1985 S.Ill.U.L.J. 285.) We agree with William that the present case must be remanded to the circuit court for further consideration of this issue. Thus, although the present case does not involve a professional practice, the same concerns that motivated our decision in Zells are present here. (See in rE marriage oF brenner (1992), 235 ilL.app.3d 840, 847, 176 ilL.dec. 572, 601 N.E.2d 1270 (valuation of woodworking business); see also In re Marriage of Suarez (1986), 148 Ill.App.3d 849, 865-67, 102 Ill.Dec. 85, 499 N.E.2d 642 (valuation of business that sells and repairs diesel radiators and filters for locomotives).) We agree with William that the cause must be remanded to the circuit court for further consideration of this issue.

This is not to say that the entire amount of goodwill of the Talty dealership will be personal in nature and hence attributable wholly to the efforts of William and his brother. Zells involved a professional practice, whose goodwill is generally personal in nature, and we were not called upon in that case to distinguish between personal goodwill and enterprise goodwill. Such a distinction may be appropriate here, however, if on remand the court determines that the goodwill of the business comprises a combination of personal and enterprise goodwill. See Kalcheim & Plante, Professional Goodwill in Divorce After Zells, 79 Ill.B.J. 624, 624-25 (1991).

Thus, the evidence may disclose that some portion of the goodwill attributable to the dealership will be based not on the brothers' personal efforts, but on the intangible value of the enterprise, including the products it sells. Our concern over duplication of the criteria contained in section 503(d) is, of course, limited to [166 Ill.2d 240] personal goodwill--that attributable to William--and not with that of the enterprise. To the extent that goodwill inheres in the business, existing independently of William's personal efforts, and will outlast his involvement with the enterprise, it should be considered an asset of the business, and hence of the marriage. In contrast, to the extent that goodwill of the business is personal to William, depends on his efforts, and will cease when his involvement with the dealership ends, it should not be considered property. The same elements that constitute personal goodwill are considered under section 503(d) in the division of the parties' marital property.

William next argues that the award to Helen of prospective attorney fees of $15,000 for the defense of the present appeal was erroneous because Helen was prosecuting a

fastcase

cross-appeal from the circuit court judgment. Alternatively, William contends that the correct procedure for awarding appellate counsel's fees is to make the award in the circuit court after the conclusion of the appeal.

Section 508(a) expressly authorizes a circuit court to make a prospective award of attorney fees to a party for the defense of an appeal. That section provides:

"The court from time to time, after due notice and hearing, and after considering the financial resources of the parties, may order any party to pay a reasonable amount for his own costs and attorney's fees and for the costs and attorney's fees necessarily incurred or, for the purpose of enabling a party lacking sufficient financial resources to obtain or retain legal representation, expected to be incurred by any party, which award shall be made in connection with the following:

* * * * * *

(3) The defense of an appeal of any order or judgment under this Act * * *." Ill.Rev.Stat.1991, ch. 40, par. 508(a).

William first argues that an award of prospective attorney fees was not appropriate in this case because [166 Ill.2d 241] Helen herself had filed a cross-appeal from the circuit court judgment. William maintains that a prospective award of fees is not permitted when the party requesting the award is also pursuing an appeal from the same underlying judgment.

While we agree with William that the statutory provision at issue here, section 508(a)(3), speaks only of awards of fees for the defense of an appeal, we do not believe that the award made here runs afoul of the statute. In presenting Helen's request for an award of prospective fees, Helen's attorney distinguished the time he would spend in responding to William's appeal from the time

Page 335

[209 Ill.Dec. 795] he would spend in prosecuting Helen's cross-appeal. In granting Helen's request for the prospective award and in later denying William's motion to vacate the order, the judge emphasized that the fee was being awarded only for counsel's work in the defense of the appeal and not for counsel's separate efforts challenging the circuit court judgment. Notably, the court in In re Marriage of Wentink (1984), 132 Ill.App.3d 71, 81, 87 Ill.Dec. 117, 476 N.E.2d 1109, on which William relies for the proposition that prospective fees for the defense of an appeal may not be awarded to a party who has also filed a cross-appeal, did not consider whether counsel's work on the appeal in that case was divisible. (Cf. In re Marriage of Pick (1988), 167 Ill.App.3d 294, 305, 118 Ill.Dec. 53, 521 N.E.2d 121 (rejecting Wentink and concluding that fees may be awarded for successful prosecution of appeal).) Helen's lawyer requested fees for only that portion of the work that would be involved in defending the appeal, and the court sought to limit the award to that amount. We find no error in the trial court's award in the present case.

William further contends that the correct procedure in awarding appellate fees is for the circuit court to make the award after the appeal has been resolved, citing In re Marriage of Divarco (1988), 167 Ill.App.3d [166 Ill.2d 242] 1014, 1022, 118 Ill.Dec. 949, 522 N.E.2d 619. We note, however, that Divarco was a decision under prior law. Effective January 1, 1988, language was added to section 508(a) of the Act to expressly authorize the circuit court to enter an award for "the purpose of enabling a party lacking sufficient financial resources to obtain or retain legal representation, expected to be incurred." (Pub. Act 85--357, § 1, eff. January 1, 1988.) Prior to the amendment, the districts of the appellate court were divided on the question whether the Act permitted prospective awards of attorney fees, including fees for the defense of an appeal. (See In re

fastcase

Marriage of Pagano (1992), 154 Ill.2d 174, 188, 180 Ill.Dec. 729, 607 N.E.2d 1242; In re Marriage of Brent (1994), 263 Ill.App.3d 916, 927-28, 200 Ill.Dec. 799, 635 N.E.2d 1382.) With that amendment, the legislature has now made clear that prospective fees may be awarded under the Act. Pagano, 154 Ill.2d at 188, 180 Ill.Dec. 729, 607 N.E.2d 1242.

To be sure, a prospective award of fees should be made only upon a record adequate to support the award. (In re Marriage of Pittman (1991), 213 Ill.App.3d 60, 63, 157 Ill.Dec. 177, 571 N.E.2d 1196.) In the present case, it is clear that Helen lacked sufficient resources to bear the cost of her attorney fees during the appeal and that William had the means to pay the fees of both his own attorney and opposing counsel. William does not challenge the amount of the fee awarded. We find no abuse of discretion in the trial court's decision to award a prospective fee.

As a final matter, William argues that the trial court erred in failing to allow his motion for automatic substitution of judge pursuant to section 2--1001(a)(2) of the Code of Civil Procedure (Ill.Rev.Stat.1991, ch. 110, par. 2--1001(a)(2)). Because we have concluded that the cause must be remanded to the circuit court for a new trial, and because it appears from the record that the judge whom William unsuccessfully attempted to remove from the case has since retired, we need not address this additional argument.

[166 Ill.2d 243] For the reasons stated, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court of Grundy County for further proceedings.

Reversed and remanded.

Justice HARRISON, dissenting:

Mr. Talty should not be granted a new trial regarding division of the marital estate. Section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat.1991, ch. 40, par. 503(d)) requires the trial court to divide marital property in "just proportions." The trial court has broad discretion in determining what apportionment is equitable under this standard, and its judgment will not be disturbed absent an abuse of discretion. An abuse of discretion will be found only when no reasonable person could take the view adopted by the trial court. (See In re Marriage of Morris (1994), 266

Page 336

[209 Ill.Dec. 796] Ill.App.3d 277, 281, 203 Ill.Dec. 685, 640 N.E.2d 344.) This is not such a case.

In assailing the trial court's judgment, Mr. Talty relies on certain comments made by the circuit judge when explaining his decision. According to Talty, the judge's comments indicate that he may have considered the element of goodwill twice, resulting in an erroneous overvaluation of Talty's automobile dealership. Such a claim is manifestly incorrect. The trial court's valuation of the business was based on the testimony of the parties' expert witnesses. That testimony did include an amount for goodwill, but there was no duplication in the expert's calculations, and the trial court added nothing to the experts' figures.

The remarks cited by Talty pertain to distribution of the marital assets, not their valuation. Rather than establishing error, those remarks indicate that the trial judge understood the relevant statutory factors and applied them correctly. In any case, it is the trial court's ultimate conclusion and not his rationale that are dispositive. [166 Ill.2d 244] A trial judge's explanation for his decision is not what determines whether a judgment should be set aside on review. A reviewing court is not bound to accept the reasons given by the trial court for its judgment. (People ex rel. Waller v. 1990 Ford Bronco (1994), 158 Ill.2d 460, 463, 199 Ill.Dec. 694, 634 N.E.2d

fastcase

747.) To the contrary, the reasons given by a trial judge for an order, or the findings on which an order is based, are not material if the order is correct. (See Board of Managers of Dominion Plaza One Condominium Association No. 1-A v. Chase Manhattan Bank, N.A. (1983), 116 Ill.App.3d 690, 694, 72 Ill.Dec. 257, 452 N.E.2d 382.) If there is any basis in the record to support the judgment of the trial judge sitting without a jury, that judgment should be affirmed. See Cronin v. McCarthy (1994), 264 Ill.App.3d 514, 523-24, 202 Ill.Dec. 129, 637 N.E.2d 668.

The majority opinion outlines the financial circumstances of the parties at the time of trial. As its discussion shows, the marital estate was worth approximately $2 million. Talty had a partnership interest in a major farming operation and retained ownership of a car dealership that promised to make him richer than he already was. By contrast, after more than 30 years of marriage, Helen was left with a condominium apartment, a modest job that barely paid a living wage, no prospects, and no maintenance. Based on this record, there is abundant support for an award of $750,000 to Helen after taking into account the factors enumerated in section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat.1991, ch. 40, par. 503(d)). To send the case back for further consideration based on Talty's claim that he was, in effect, overcharged, defies understanding. The circuit court did not abuse its discretion, and its judgment should be affirmed.

In reaching a contrary conclusion, the majority relies on In re Marriage of Zells (1991), 143 Ill.2d 251, 157 Ill.Dec. 480, 572 N.E.2d 944, but that case is inapposite. In Zells, our court correctly [166 Ill.2d 245] recognized that the goodwill value of a law practice cannot be considered both as a marital asset subject to division and as an aspect of income potential for the purposes of establishing maintenance and support awards. Because goodwill is nothing more than the ability to acquire future income, taking it into account for both purposes would result in an improper duplication of the same factor in both calculations. A spouse would receive a greater amount of assets as well as a larger award of maintenance, when she should receive only one or the other.

To eliminate the possibility of such overpayments in the context of professional businesses, this court did not prohibit the consideration of goodwill. In Zells, 143 Ill.2d 251, 157 Ill.Dec. 480, 572 N.E.2d 944, it merely specified that the element of goodwill should be reflected in the maintenance and support awards, rather than in valuation of the marital assets subject to division.

The situation before us here is distinguishable. Talty owned a car dealership, not a professional business. Unlike a legal or medical practice, the goodwill of a dealership is not solely dependant on the owner's professional skills. Dealerships, as most corporate commercial enterprises, exist independently of their owners and continue to function as new owners come and go. Except in

Page 337

[209 Ill.Dec. 797] exceptional circumstances, which the record does not show to exist here, the goodwill will be attributable to the enterprise, not the personality who happens to own it. The goodwill is therefore properly included in the value of the enterprise when determining how marital assets should be distributed.

A second, and more fundamental distinction from Zells, 143 Ill.2d 251, 157 Ill.Dec. 480, 572 N.E.2d 944, is that in this case there was no possibility of a duplicate enhancement of the property distribution and maintenance awards. The reason is simple. Unlike Zells, there was no maintenance award. [166 Ill.2d 246] All Helen received was a property distribution. When only a

fastcase

distribution of marital assets is involved, valuation of the business is the only place where goodwill can be considered. The trial court therefore did not err when it refused to deduct that element from its appraisal of the dealership's value.

What really concerns my colleagues is an issue not involved in Zells at all, namely, how a trial judge should handle the interplay between the various factors enumerated in section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Ill.Rev.Stat.1991, ch. 40, par. 503(d)) where, as here, an amount for goodwill is included in the value of the marital assets subject to division. The majority asserts that the value of goodwill must be subtracted from the value of the assets, at least to the extent that such goodwill is personal to Talty, because the elements that comprise the goodwill overlap some of the other considerations enumerated in section 503(d), such as the "amount and sources of income" of each of the parties (Ill.Rev.Stat.1991, ch. 40, par. 503(d)(7)) and "the reasonable opportunity of each spouse for future acquisition of capital assets and income" (Ill.Rev.Stat.1991, ch. 40, par. 503(d)(10)).

The flaw in the majority's argument is that it fails to see that there is always going to be overlap between the value of a couple's assets and these other factors, whether the asset value is derived from goodwill or not. Whatever the type of assets a couple may have, be it real estate holdings, bank accounts, shares of stock, or something else, and by whatever means those assets may have appreciated, their value will affect the couple's income and opportunity for future income and acquisition of additional capital. This is so whether the value comes from professional skill, hard labor, business acumen, or dumb luck in the lottery. The more resources a person has, the more he is likely to be able to acquire. [166 Ill.2d 247] The fewer assets he has, the less promising his financial prospects.

These are not profound insights. They are simple truisms which the General Assembly was trying to express when it established the guidelines for the disposition of marital property under section 503(d). The guidelines reflect economic reality and were designed to give trial courts broad discretion in fashioning arrangements that deal with that reality in an equitable fashion. There is nothing unfair or unjust in this. To the contrary, the General Assembly's approach is as reasonable as it is practical. The construction placed on the law by the majority today is neither. In my view, it draws distinctions that are meaningless and that will be impossible for the circuit courts to apply. I therefore dissent.

McMORROW, J., joins in this dissent.

fastcase

UNDERSTANDING FINANCIAL STATEMENTS

TYPES OF FINANCIAL STATEMENTS & TERMINOLOGY:

1. Balance Sheets - A balance sheet provides detailed information about a company's assets, liabilities and shareholders' equity.
    a. Assets include physical property, such as plants, trucks, equipment and inventory, trademarks and patents, cash and investments.
    b. Liabilities include all kinds of obligations, like money borrowed from a bank, rent, money owed to suppliers payroll, taxes owed to the government, and obligations to provide goods or services to customers in the future.
    c. Shareholders' equity (also "capital" or "net worth"). It's the money that would be left if a company sold all of its assets and paid off all of its liabilities. This leftover money belongs to the shareholders, or the owners, of the company.
    d. Shows a snapshot of a company's assets, liabilities and shareholders' equity at the end of the reporting period. It does not show the flows into and out of the accounts during the period.
2. Income Statements
    a. A report that shows how much revenue a company earned over a specific time period (usually for a year or some portion of a year).
    b. Also shows the costs and expenses associated with earning that revenue.
    c. The bottom line of the statement usually shows the company's net earnings or losses, telling you how much the company earned or lost over the period.
    d. Report earnings per share (or "EPS"). This calculation tells you how much money shareholders would receive if the company decided to distribute all of the net earnings for the period.
3. Cash Flow Statements
    a. Report a company's inflows and outflows of cash. While an income statement can tell you whether a company made a profit, a cash flow statement can tell you whether the company generated cash.
    b. Shows changes over time rather than absolute dollar amounts at a point in time.
    c. The bottom line of the cash flow statement shows the net increase or decrease in cash for the period. Generally, cash flow statements are divided into three main parts.

1. Operating activities;
2. Investing activities; and
3. Financing activities

4. Book Value
   a. An accounting term which is the difference between total assets (net of accumulated depreciation, depletion, and amortization) and total liabilities.
   b. Appears on the balance sheet of the company
   c. Not related to economic value. May be higher or lower than market value.
   d. Won't include goodwill or other intangible assets.
   e. Won't include contingent liabilities.

5. EBIT – "Earnings before Interest and Taxes"
   a. A measure of a firm's profit that includes all expenses except interest and income tax expenses.
   b. It is the difference between operating revenues and operating expenses
   c. Also called the Operating Income

6. EBITDA – "Earnings before Interest, Taxes, Depreciation, and Amortization
   a. is an accounting measure calculated using a company's net earnings, before interest expenses, taxes, depreciation and amortization are subtracted
   b. widely used in many areas of finance when assessing the performance of a company
   c. A negative EBITDA indicates that a business has fundamental problems with profitability and with cash flow

7. Reasonable Compensation
   a. Normalizations adjustment taken when a key employee or officers is found to be underpaid or overpaid
   b. This is an adjustment used in a business valuation
   c. Important when the key person is also a shareholder, when there is a family relationship and when personal versus enterprise goodwill is an issue
   d. Taken when a controlling interest is being valued
   e. Determined by taking the total compensation being paid to the employee in question and compare that to the compensation needed to attract an employee(s) of similar skill
   f. Not an evaluation of skill of the specific person – a question of what it would cost the company for a hypothetical replacement for the position in question.
   g. Includes all payments and perquisites, such as salary, bonus, stock and stock options, retirement plans, medical benefits, and personal expense benefits.

8. Retained Earnings
   a. The portion of the company's net income which is retained by the company instead of being distributed to shareholders.
   b. Found on the shareholder equity portion of the company's Balance Sheet
   c. Usually reinvested in the business or used to payoff debt

d. Represents cumulative earnings since formation of the company
e. Can be negative

Lisa M Nyuli, Esq.
Ariano, Hardy, Ritt, Nyuli, Richmond, Lytle & Goettel, P.C.
2000 McDonald Road, Suite 200
South Elgin, IL 60177
(847) 695-2400
lmn@attorneys-illinois.com

Cash Flow Statements

- The official name for the cash flow statement is the Statement of Cash Flows.
- The cash flow statement reports the cash generated and used during the time interval specified in its heading.
- The period of time that the statement covers is chosen by the company. For example, the heading may state "For the Three Months Ended December 31, 2016" or "The Fiscal Year Ended September 30, 2016".
- It can be used to understand the trends of a company's performance that can't be understood through the Balance Sheet or Statement of Operations.
- Consider the following illustration. Would you be satisfied with the Current Year performance below?

Income Statement	Current Year
Sales	$1,000,000
Expenses	100,000
Net Income	900,000

Balance Sheet

Assets	Current Year	Prior Year
Cash	$ 100,000	$ 200,000
AR	1,000,000	-
Total assets	1,100,000	200,000
Total liabilities	-	-
Total equity	1,100,000	200,000
Total liabilities and equity	$ 1,100,000	$ 200,000

Statement of Cash Flows

Cash Flows From Operating Activities	Current Year
Net Income (Loss)	$ 900,000
(Increase) in AR	(1,000,000)
Net Cash Provided By (Used In) Operating Activities	(100,000)
Net Increase (Decrease) in Cash	(100,000)
Cash - Beginning	200,000
Cash – Ending	$ 100,000

- Although the Company has net income of $900,000 and equity of $1,100,000, the Statement Cash Flows shows that the Company didn't actually receive any cash, as all the sales are reflected in the increase in accounts receivable.
- The cash flow statement organizes and reports the cash generated and used in the following sections:
    - Operating activities - converts the items reported on the income statement from the accrual basis of accounting to cash.
    - Investing activities - reports the purchase and sale of long-term investments and property, plant and equipment.
    - Financing activities - reports external activities that allow a firm to raise capital and repay investors, including the issuance and repurchase of the company's own bonds and stock, adding or repayment of loans and the payment of dividends/distributions.
    - Supplemental information - reports the exchange of significant items that did not involve cash and reports the amount of income taxes paid and interest paid.

XYZ Corporation, Inc.
Statement of Cash Flows
For The Year Ended

	December 31, 2012	December 31, 2011
Cash Flows From Operating Activities		
Net Income (Loss)	$ 61,492	$ 20,469
Non Cash Items Included in Net Income:		
Depreciation	43,943	48,297
CSV Life Insurance (net)	31,569	-
(Increases) Decreases in Assets:		
Accounts Receivable	(1,043,010)	255,058
Inventory	(4,708)	(747,142)
Prepaid Expenses	8,530	2,422
Prepaid Taxes	20,454	(1,050)
Increases (Decreases) in Liabilities:		
Deferred Taxes	(1,530)	(807)
Accounts Payable	827,166	716,841
Accrued Expenses	144,580	4,711
Net Cash Provided By (Used In) Operating Activities	88,486	298,799
Cash Flows From Investing Activities		
Purchases of Property & Equipment (net)	(16,757)	(43,129)
Net Cash Flows From Investing Activities	(18,757)	(43,129)
Cash Flows From Financing Activities		
Dividend Distributions	(1,000,000)	(100,000)
Increase (Decrease) in Long Term Debt	740,208	(105,291)
Net Cash Flows From Financing Activities	(259,792)	(205,291)
Net Increase (Decrease) in Cash	(190,063)	50,379
Cash -Beginning	489,949	439,570
Cash - Ending	$ 299,886	$ 489,949

Supplemental Cash Flow Information

Amount Paid for Interest Expense	$ 8,117	$ 14,446
Amount Paid for Taxes	$ 20,454	$ 5,642

XYZ Corporation, Inc.
Balance Sheet
For The Year Ended

	December 31, 2012	December 31, 2011
Assets	$ 13,946,275	$ 9,873,711
Current Assets		
Cash	$ 299,886	$ 489,949
Accounts Receivable	1,444,520	401,510
Inventories - Raw Materials	713,279	914,085
Inventories - Work in Process & Finished Goods	827,019	621,505
Prepaid Expenses	16,677	25,207
Prepaid Taxes	43,704	64,158
Total Current Assets	3,345,085	2,516,414
Property & Equipment	460,858	517,613
Other Assets		
Deposits	1,939,306	1,860,290
Total Assets	$ 5,745,249	$ 4,894,317
Liabilities & Stockholder's Equity		
Current Liabilities		
Accounts Payable	$ 2,285,092	$ 1,457,926
Accrued Expenses	119,166	34,586
Deferred Income Taxes	24,446	25,976
Profit sharing Payable	500,000	440,000
Current Portion of Long Term Debt	506,907	110,697
Total Current Liabilities	3,435,611	2,069,185
Long Term Liabilities		
Long Term Debt	424,236	80,238
Total liabilities	3,859,847	2,149,423
Stockholder's Equity		
Common Stock	19,162	19,162
Retained Earnings	1,866,240	2,725,732
Total Stockholder's Equity	1,885,402	2,744,894
Total Liabilities & Stockholder's Equity	**$ 5,745,249**	**$ 4,894,317**

XYZ Corporation, Inc.
Statement of Income
For The Year Ended

	December 31, 2012	December 31, 2011
Sales	$ 13,946,275	$ 9,873,711
Cost of Goods Sold		
Production Costs	$ 6,178,835	$ 4,138,472
Material Consumed	2,760,880	2,188,056
Manufacturing Expenses	231,041	179,281
Total production Costs	9,170,756	6,505,809
Add: Beginning inventory	621,505	262,675
Less: Ending inventory	(827,019)	(621,505)
Cost of Goods Sold	8,965,242	6,146,979
Gross Profit	4,981,033	3,726,732
Operating Expenses		
Selling Expenses	905,156	824,094
General & Administrative Expenses	3,976,998	2,861,088
Total Operating Expenses	4,882,154	3,685,182
Income (Loss) Before Other Income & Expenses	98,879	41,550
Other Income & Expense		
Interest & Miscellaneous Income	7,683	10,893
Interest Expense & Bank Fees	(25,923)	(26,944)
Total Other Income & Expense	(18,240)	(16,051)
Income (Loss) Before Income Tax	80,639	25,499
Provision For Taxes		
Federal	13,413	2,589
State	5,734	2,441
Total Provision For Taxes	19,147	5,030
Net Income	**$ 61,492**	**$ 20,469**

What are you looking for – Income?

Different types of income:

- Revenue (sales)
- Gross profit
- Net income
- Earnings before interest, tax, depreciation and amortization (EBITDA)
- Dividends/Distributions
- Cash flow
- Seller's Discretionary Earnings (SDE)

According to economists Paul A. Samuelson and William D. Nordhaus, economic income is defined as "*The flow of wages, interest, payments, dividends, and other receipts accruing to an individual or nation during a period of time (usually a year)*." Therefore, economic income is basically any relevant financial measurement of a company's performance. It could be a company's dividend-paying capacity. Or, it may be any of the types of income listed above.

It may be necessary to adjust the financial statements to ascertain the true economic income attributable to an owner. Financial statements are typically adjusted for any extraordinary or non-recurring expenses. In addition, the subject entity may have incurred expenses that are not for corporate purposes, such as expenditures for the personal benefit of a shareholder (non-reimbursable expenses), and may be disregarded in determining the corporation's net earnings.[1]

For the 12 months ended		**12/31/2012**
Net income	$	61,492
Adjustments		
Less: Interest & miscellaneous income		(7,683)
Less: Other income		(29,986)
Officer's compensation adjustment		500,000
Rent adjustment		500,000
Total adjustments	$	962,331
Plus: Depreciation and amortization		43,943
Adjusted EBITDA	$	1,067,766

[1] *J.R. Williams v Commr*, 32 TCM 759, Dec. 32,050(M), TC Memo. 1973-154; *Consolidated Brick Co. v Commr*, 17 BTA 831, Dec. 5497 (1929).