2019 IL App (2d) 170621-U
Nos. 2-17-0621, 2-17-0812, 2-17-0879 cons.
Order filed July 31, 2019
Modified Upon Denial of Rehearing March 18, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF STACY GOODMAN,	)	Appeal from the Circuit Court
	)	of Lake County.
Petitioner-Appellant and	)	
Cross-Appellee,	)	
	)	
and	)	Nos. 13-D-2139
	)	17-OP-486
DRU GOODMAN,	)	
	)	
Respondent-Appellee and	)	
Cross-Appellant.	)	
	)	Honorable
(Illinois Department of State Police,	)	Joseph V. Salvi,
Intervenor-Appellant).	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Trial court did not err in granting husband's motion for summary judgment and finding that trust and trust's holdings constituted husband's non-marital property; (2) trial court did not err in finding that retained earnings of certain entities constituted husband's non-marital property; (3) trial court did not err in awarding wife periodic maintenance in lieu of maintenance in gross; (4) trial court did not err in entering plenary order of protection against husband; (5) trial court erred in granting wife's petition for contribution to attorney fees where wife failed to present sufficient evidence that amount of attorney fees requested was reasonable; (6) reviewing court would not address whether trial court improperly classified

husband's interest in business as marital property where interest was awarded to husband and husband did not request a reallocation in the event classification of husband's interest by the trial court was found to be erroneous; and (7) trial court erred in dismissing for lack of jurisdiction the petition to intervene filed by the Illinois Department of State Police.

¶ 2 Petitioner, Stacy Goodman, and respondent, Dru Goodman, each appeal aspects of the judgment of the circuit court of Lake County dissolving their marriage. Stacy raises three issues on appeal. First, she argues that the trial court erred in granting respondent's motion for summary judgment and finding that a trust known as the Dru Goodman CXG Investment Trust (CXG Trust) and the holdings of the CXG Trust constitute Dru's non-marital property. Second, she challenges the trial court's classification of the retained earnings of certain entities as Dru's non-marital property. Third, she contends that the trial court erred in awarding her periodic maintenance in lieu of maintenance in gross. In his cross-appeal, Dru argues that the trial court erred in entering a plenary order of protection against him, granting Stacy's motion for contribution to her attorney fees, and classifying as marital property his interest in an entity known as DDG, Inc. (DDG). In addition, the Illinois Department of State Police (Department) filed a petition to intervene in the trial court requesting permission to file a motion to vacate an order entered by the trial court in conjunction with the plenary order of protection requiring Dru's firearm owners' identification (FOID) card be reinstated and returned to him. The Department argued that the court's order directed it to violate the plain language of section 8.2 of the FOID Card Act (430 ILCS 65/8.2 (West 2016)). Following a hearing, the trial court dismissed the Department's petition to intervene for lack of jurisdiction. This court, however, subsequently granted the Department's petition to intervene in this appeal. For the reasons that follow, we hold that the trial court erred in ordering Dru to pay the interest requested in Stacy's contribution petition. We also hold that the trial court erred in ordering Dru to pay the attorney fees requested in Stacy's contribution petition in the

absence of an appropriate hearing. We reverse that portion of the judgment awarding Stacy interest and vacate that portion of the judgment awarding Stacy attorney fees. In addition, we hold that the trial court erred in dismissing the Department's petition to intervene for lack of jurisdiction and we grant the Department's petition to intervene in the trial court. We otherwise affirm the judgment of the trial court and remand the case to the trial court to hold an appropriate hearing on the reasonableness of the attorney fees requested in Stacy's contribution petition and to conduct further proceedings on the Department's motion to vacate the order requiring it to reinstate and return Dru's FOID card to him.

¶ 3 I. INTRODUCTION

¶ 4 At the outset, we note that the record on appeal is extensive, consisting of almost 17,000 pages. To place the issues in context, we initially provide a summary of the facts leading to this appeal. We will provide a more detailed discussion of the facts necessary to resolve the issues presented as those issues are addressed.

¶ 5 Stacy and Dru were married on October 19, 1996. Three children were born of the marriage. On November 27, 2013, Stacy filed a petition for dissolution of marriage. On December 18, 2013, Dru filed his response to Stacy's petition for dissolution of marriage as well as a counterpetition for dissolution of marriage. On November 24, 2014, a "Joint Parenting Agreement and Final Custody Judgment" was entered by the trial court. The trial court subsequently granted Stacy's motion to voluntarily dismiss her petition for dissolution of marriage without prejudice, and the case proceeded on Dru's counterpetition.

¶ 6 At the time the parties filed their petitions for dissolution of marriage, Stacy was 44 years old and Dru was 48 years old. Stacy last worked outside the home 17 years prior to filing her petition for dissolution of marriage. Dru began working for DDG in January 1990 and became the

company's president in 1999. Dru continued to be employed by DDG during the pendency of these proceedings. DDG is a holding company and sole member of various limited liability companies, including Tubular Services, LLC (Tubular) and Bulnit, LLC (Bulnit). Dru owns 0.1% of DDG's stock. The remainder of DDG's stock is owned by the CXG Trust. Of the various entities held by DDG, Tubular generates most of the net income.

¶ 7 On November 19, 2015, Dru filed a motion pursuant to section 2-1005(d) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005(d) (West 2014)) for summary judgment that the CXG Trust and its holdings are not marital property. On June 7, 2016, the trial court granted Dru's motion. Upon reconsideration, the trial court vacated the June 7, 2016, order. On March 23, 2017, the trial court reversed course once again, reinstating the June 7, 2016, order granting Dru's motion for summary judgment and finding that the CXG Trust and its holdings are non-marital property. The case eventually proceeded to an 11-day trial in May and June 2017.

¶ 8 Meanwhile, on March 22, 2017, Stacy filed a verified petition for an order of protection pursuant to the Illinois Domestic Violence Act of 1986 (Domestic Violence Act) (750 ILCS 60/101 *et seq*. (West 2016)). In an affidavit attached to the petition, Stacy alleged that for more than two years, Dru had a private investigator surveil her. Stacy's petition was docketed in the trial court as case No. 17 OP 486 and consolidated with the dissolution action. On April 12, 2017, the trial court entered an agreed interim order of protection that, among other things, prohibited Dru or any investigator or agent on his behalf from harassing or stalking Stacy. Pursuant to section 8.2 of the FOID Card Act (430 ILCS 65/8.2 (West 2016)), the Department revoked Dru's FOID card after entry of the agreed interim order of protection. The agreed interim order, which was set to expire in May 2017, was extended multiple times. On June 7, 2017, Stacy filed a petition for contribution to attorney fees and costs pursuant to sections 503(j) and 508(a) of the Illinois Marriage and

Dissolution of Marriage Act (Act) (750 ILCS 5/503(j), 508(a) (West 2016)).

¶ 9 On July 26, 2017, the trial court entered a judgment of dissolution of marriage. Relevant here, the trial court awarded Dru the following assets as his non-marital property: (1) the CXG Trust and the entities it holds (per the motion for summary judgment); and (2) the retained earnings held by various entities, including DDG, Tubular, and the CXG Trust. The trial court awarded Stacy the following assets as her non-marital property: (1) a 2012 Aston Martin automobile; and (2) various items of jewelry. The trial court valued Dru's non-marital estate at $187,636,231 and Stacy's non-marital estate at $244,450. The trial court determined that the marital estate consisted of the following property: (1) Dru's residence; (2) Dru's 0.1% interest in DDG; (3) Stacy's residence; (4) certain personal property; (5) certain banking and investment accounts; (6) various pre-distributions from the marital estate; and (7) various retirement accounts. The trial court valued the marital estate at $4,739,162, and awarded Stacy 72% of the marital estate (valued at $3,388,400) and Dru 28% of the marital estate (valued at $1,350,762).

¶ 10 The trial court also determined that an award of maintenance was appropriate, but that the statutory maintenance guidelines did not apply. Ultimately, the court ordered Dru to pay Stacy maintenance in the amount of $65,000 per month commencing July 1, 2017, and continuing thereafter indefinitely until the occurrence of the first of the following events: (1) Dru's death; (2) Stacy's death; (3) Stacy's remarriage; or (4) the cohabitation by Stacy on a resident, continuing conjugal basis. In so ordering, the court acknowledged that Stacy was in a "dating relationship" with an individual named Matt Kornick, but rejected Dru's allegation that Stacy and Kornick were cohabiting. In this regard, the court found that Kornick stays with Stacy only when the children are not with her and there was no evidence of shared day-to-day existence or shared use and maintenance of any meaningful day-to-day material resources. See *In re Marriage of Miller*, 2015

IL App (2d) 140530.

¶ 11 With respect to the issue of contribution to attorney fees, the court noted that Stacy's petition referenced a total of $3,163,234 incurred for attorney fees and costs. After an earlier award of $1.1 million in interim and prospective legal fees, Stacy claimed that $2,063,234 was still outstanding. Pursuant to section 503(j) of the Act (750 ILCS 5/503(j) (West 2016)), the trial court ordered Dru to contribute $2.4 million toward Stacy's attorney fees. On August 9, 2017, Stacy filed a notice of appeal from the trial court's July 26, 2017, order. We docketed the appeal as No. 2-17-0621. On August 21, 2017, Dru filed a notice of cross-appeal from the July 26, 2017, order.

¶ 12 Meanwhile, a hearing was held on Stacy's petition for a plenary order of protection over three dates in August and September 2017. On September 6, 2017, the trial court entered a two-year plenary order of protection prohibiting Dru from "engaging in surveillance of [Stacy], either personally or through his agents, assigns, or any other person or company on his behalf." In conjunction with the plenary order of protection, the trial court, at Dru's request, entered an order providing that "Dru Goodman's FOID card shall be reinstated and returned to Dru Goodman with no restrictions." On October 3, 2017, Stacy filed a notice of appeal from the trial court's July 26, 2017, order and the September 6, 2017, plenary order of protection. We docketed the appeal as No. 2-17-0812. On October 6, 2017, Dru filed a notice of cross-appeal from the same orders.

¶ 13 Stacy also filed a petition for attorney fees and costs incurred in connection with the order of protection. On October 30, 2017, the trial court denied Stacy's motion. On November 1, 2017, Stacy filed a notice of appeal from the trial court's orders of July 26, 2017, September 6, 2017, and October 30, 2017. We docketed Stacy's third notice of appeal as case No. 2-18-0879. On November 9, 2017, Dru filed his third notice of cross-appeal. We subsequently granted the parties'

joint motion to consolidate the appeals. In addition, on March 12, 2018, we granted the Department leave to intervene in this appeal.

¶ 14 II. ANALYSIS

¶ 15 A. Stacy's Appeal

¶ 16 Stacy raises three issues on appeal. First, she argues that the trial court erred in granting Dru's motion for summary judgment and finding that the CXG Trust and its holdings constitute Dru's non-marital property. Second, she challenges the trial court's classification of the retained earnings of certain entities as Dru's non-marital property. Third, she contends that the trial court erred in awarding her periodic maintenance in lieu of maintenance in gross. We address each contention in turn.

¶ 17 1. Dru's Motion for Summary Judgment

¶ 18 a. Background

¶ 19 As noted above, on November 19, 2015, Dru filed a motion pursuant to section 2-1005(d) of the Code (735 ILCS 5/2-1005(d) (West 2014)) for a summary determination that the CXG Trust is not marital property. The motion contained three parts: (1) the motion itself; (2) a statement of material facts; and (3) a memorandum of law. Dru's motion, which was accompanied by two affidavits and supporting documentation, alleged as follows.

¶ 20 On or about December 15, 1989, Dru's father, Elmer "Bud" Goodman (Bud), formed DDG, a Delaware corporation, to purchase certain non-utility assets from El Paso Electric Company (El Paso Electric). At that time, DDG's sole shareholder was CXG, Inc., an Illinois corporation formed on December 14, 1989, of which Bud was the sole shareholder. On December 27, 1989, Bud and attorney Marc Simon (Simon) created an irrevocable trust called the ECD Trust, with Bud as the grantor and Simon as the trustee, for the benefit of Bud's wife, Eileen Goodman

(Eileen), and Bud's descendants. Contemporaneous with the formation of the ECD Trust, Bud irrevocably conveyed all of the shares of CXG, Inc. to the ECD Trust. In or around January 1990, DDG purchased the non-utility assets from El Paso Electric, consisting of the assets comprising Tubular as well as real estate and other property. Because CXG, Inc. was DDG's sole shareholder, the ECD Trust held all of the assets of El Paso Electric acquired by DDG.

¶ 21 Simon served as the sole trustee of the ECD Trust from its formation until October 20, 1997, when Bud appointed Eileen and Arthur Blumenthal (Arthur) to serve as successor co-trustees. Section 3.2 of the ECD Trust Agreement provided Eileen, during her lifetime or upon her death, with the power to appoint all or any part of the trust principal to any or all of Bud's descendants, whether outright or in trust. On or about June 19, 2002, Eileen exercised her power of appointment to appoint "one-tenth of one percent of each and every asset" of the ECD Trust to Dru personally. On or about October 28, 2006, Eileen formed the CXG Trust pursuant to her power of appointment and designated Dru as the initial trustee and the beneficiary. Contemporaneously with her formation of the CXG Trust, Eileen exercised her power of appointment to allocate a 59.9% interest in the ECD Trust assets to the CXG Trust. On or about March 1, 2009, Dru designated Eileen and Arthur as co-trustees of the CXG Trust.[1] On or about March 10, 2009, Eileen exercised her power of appointment to allocate the remaining ECD Trust assets to the CXG Trust. On April 24, 2009, Bud passed away and the ECD Trust terminated with all of its assets having been allocated by Eileen to the CXG Trust. In December 2011, Arthur

[1] The document effectuating this change is attached to the motion, but specifies that Dru designated Eileen and Arthur as co-trustees of the CXG Trust on March 1, 2010. This discrepancy does not affect our analysis.

passed away and was succeeded as one of the trustees of the CXG Trust by his son, Steven Blumenthal (Steven).

¶ 22 Dru is the current beneficiary of the CXG Trust. Bud's other descendants, including Dru's children and Dru's brother, Cary Goodman (Cary), are contingent beneficiaries of the CXG Trust. The CXG Trust owns cash, government-backed financial instruments, and 99.9% of the stock of DDG. As the CXG Trust beneficiary, Dru is eligible to receive distributions of CXG Trust income and principal to the extent the trustees of the CXG Trust determine, in their sole discretion, that such distributions are in Dru's best interest. The trustees of the CXG Trust have exercised their discretion to authorize and issue certain distributions to Dru from the CXG Trust. Likewise, the trustees of the CXG Trust have exercised their discretion to decline Dru's requests for distributions. Even though he is a trustee of the CXG Trust, Dru does not participate in the voting on his own distribution requests. Moreover, Dru did not receive distributions from the CXG Trust while he served as the sole trustee.

¶ 23 Dru's motion further alleged the following regarding DDG. DDG functions as a holding company for various entities. Over the years, DDG and its operating entities have been reorganized for tax and succession planning, which culminated in the conversion of DDG and the operating entities into their current form as limited liability companies (LLC). DDG is the sole member LLCs comprised of the El Paso Electric non-utility assets and certain other assets that DDG acquired between January 1990 and April 2009. These LLCs include: (1) Tubular, a material processor based in Texas that tempers and threads pipe for oil drillers; (2) Bulnit, the owner of a commercial building in El Paso, Texas purchased by DDG in 1990 from El Paso Electric; (3) KSDC, LLC, the manager of the Bulnit property; and (4) KSD Properties, LLC, the owner of two office buildings in Northbrook, Illinois, one of which houses DDG's headquarters and the other of

which is rented to third-party tenants.

¶ 24 In the memorandum of law accompanying his motion for summary determination, Dru asserted that, as a matter of law, the assets held by the CXG Trust constitute his non-marital property pursuant to section 503 of the Act (750 ILCS 5/503 (West 2014)). Dru maintained that he lacked a vested interest in the trust *res* because his ability to receive distributions or otherwise make use of the trust principal is subject to the discretion of the trustees and restrictions imposed by Eileen's power of appointment, including spendthrift restrictions. To the extent Dru, as a beneficiary of the CXG Trust, has a present personal property interest in the trust *res*, Dru argued that his interest in the CXG Trust was his non-marital property because it was inherited from Bud through Eileen pursuant to Eileen's exercise of her power of appointment. See 750 ILCS 5/503(a)(1) (providing that "marital property" means all property acquired by either spouse subsequent to the marriage except property acquired by certain means, such as by gift, legacy, or descent or property acquired in exchange for such property, which is classified as "non-marital property"). Dru further argued that Bud's estate plan, as implemented by Eileen's power of appointment, prevents transmutation and that there has been no commingling or any other manifestations of Dru's intent to convert any part of the CXG Trust *res* into marital property.

¶ 25 As noted, Dru's motion was supported by two affidavits—his own and one from Steven. In turn, Steven's affidavit incorporated by reference seven exhibits, including the ECD Trust agreement, various powers of appointment (including Eileen's October 28, 2006, power of appointment forming the CXG Trust), and several charts illustrating the ownership and reorganization of DDG's assets from the time of their acquisition through the date of Steven's affidavit.

¶ 26 On April 12, 2016, Stacy filed a response to Dru's motion. Stacy attached to her response

her own "affidavit for want of knowledge" as well as a dozen exhibits, including many of the same documents attached to Dru's motion for summary judgment. In her response, Stacy asserted that Dru's claim that his interest in the CXG Trust is non-marital property "raises many questions of material fact." For instance, Stacy claimed that Tubular was established in 1997, during the parties' marriage, and was therefore presumptively marital. She also questioned the validity of the CXG Trust, arguing that Eileen's exercise of her power of appointment, which purported to allocate all of the ECD Trust's assets to the CXG Trust, was not permitted under the explicit terms of the ECD Trust. In addition, Stacy argued that summary judgment was premature and that forcing her to respond before she had compliance on her outstanding discovery requests on the subject matter of Dru's motion resulted in substantial prejudice and a denial of due process. Among other things, Stacy maintained that she should be permitted to take the deposition of Dru's mother, Eileen. In this regard, Stacy submitted that a March 10, 2009, affidavit, which was used in Cary's divorce proceeding, was critical. In the affidavit, Eileen averred that she removed and permanently eliminated Cary and all of his descendants as discretionary beneficiaries of the ECD Trust and each trust created thereafter. Eileen further averred that among the reasons she made this change was because "Dru has spent almost 20 years of his life working extremely hard, along with my husband before he became very sick, to make DDG, Inc. and its subsidiaries a successful business and I want him to be rewarded for his efforts and to keep working hard to make sure the business continues to succeed." According to Stacy, Eileen's affidavit undermined Dru's claim that his interest in DDG (the company allegedly owned by the CXG Trust) is a non-marital gift and supports her position that such interest was obtained by Dru as compensation for his marital efforts at DDG and is therefore marital property. Stacy also asserted that the two affidavits forming the basis of Dru's summary-judgment motion, those of Dru and Steven, were flawed and

ineffectual.

¶ 27 On May 31, 2016, Dru filed a reply. Among other things, Dru argued that Stacy's claim that Tubular was acquired during the marriage was unsupported and that Stacy did not controvert any of the evidence tracing Tubular back to 1990, when Bud acquired it from El Paso Electric and placed it in the ECD Trust. According to Dru, Stacy confused Tubular with an Illinois company that was formed to act as a general partner with a Texas corporation as limited partner when Tubular converted to a limited partnership in 1997 to minimize franchise taxes. Moreover, Dru asserted that the chronology is immaterial because Tubular was not purchased with Dru's or Stacy's funds, but with Bud's. Dru also argued that Stacy's speculation regarding Eileen's motives did not create a material issue of fact because Eileen's intent is immaterial as a matter of law and Eileen was not Dru's employer. Finally, Dru argued that Stacy's claim that the CXG Trust is a nullity is based on a misinterpretation of the ECD Trust.

¶ 28 On June 7, 2016, the trial court held a hearing on Dru's motion. At the hearing, Dru reiterated his position that the facts proved that all relevant transactions transpired under the estate plan Bud created in 1989, years before Dru met Stacy. Dru also contended that if the trusts were not properly established, then he owns nothing because the assignments "are a nullity and didn't happen and they revert back to where they started which is with [Bud]." Stacy's attorney did not dispute the transactions occurred, but suggested that the transactions "didn't happen properly, legally."

¶ 29 The trial court remarked that if the transactions did not happen "properly," then the property never transferred to Dru. Nevertheless, the court expressed concern that statements from Eileen's March 10, 2009, affidavit contradicted that the property was acquired by gift, legacy, or descent, observing as follows:

> "Well, part of my concern is, and you [Dru's counsel] can address this is that the underlying point in your motion is that this was some type of an estate planning mechanism.
>
> And let me read you something from [Eileen] which implies the complete opposite.
>
> ***
>
> All right. Among the reasons that I've decided to make these changes is because my son Dru has spent almost 20 years of his life working extremely hard along with my husband before he became very sick to make DDG and its subsidiaries as a successful business. I want him to be rewarded for his efforts and to keep working hard to make sure the business continues to succeed. I love my son Cary dearly, but he has not worked in or has been committed to the business of DDG.
>
> That implies this whole arrangement is to compensate Dru, not—An estate plan would be dividing it amongst descendants. It wouldn't be devised to reimburse Dru's hard work which caused the value of DDG and ultimately CXG Trust [*sic*]. So the whole idea that this was an estate plan sort of undermined by the power—by Mom [*sic*]."

After listening to further argument by the parties, the court took a recess. Upon the court's return, it stated, "[T]he Court has no doubt that the assets of CXG is nonmarital. I'm going to grant [Dru's] motion to that effect." Accordingly, the court entered a minute order granting Dru's motion for summary judgment.

¶ 30 On June 29, 2016, Stacy filed a motion to reconsider the June 7, 2016, order granting Dru's motion for summary judgment. In her motion, Stacy reiterated the arguments made in her response to Dru's motion for summary judgment and at the hearing on that matter, including her claim that

Tubular was acquired during the marriage and is therefore presumptively marital property. In addition, Stacy argued that Dru's interest in Bulnit, an entity held by the CXG Trust, is marital property because it was formed as Bulnit, Inc., on July 25, 2000, during the parties' marriage, and its 1000 shares of common stock (representing 100% of the equity) were originally issued to Dru individually. Stacy further submitted that on September 27, 2002, Dru gratuitously transferred all of those shares to DDG. Then, in 2008, Bulnit, Inc., merged into Bulnit, which in turn is held by the CXG Trust. Thus, Stacy submitted that the genesis of Bulnit, *i.e.*, Bulnit, Inc., was marital as it was acquired during the marriage and, consequently, a disputed issue of material fact existed on that question.

¶ 31 On July 29, 2016, Dru filed a response to Stacy's motion to reconsider the order of June 7, 2016. Among other things, Dru argued that Stacy's motion to reconsider should be denied because it was not based on newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. Significantly, Dru contended that deposition testimony from David Sinclair, DDG's former president, "demolished Stacy's allegations about [Tubular's formation] by confirming the facts contained in Dru's and [Steven's] affidavits." In his deposition, Sinclair testified that the assets comprising Tubular were acquired as part of Bud's acquisition of El Paso Electric. Sinclair testified that DDG "spun out" Tubular as a "separate corporation" in 1992 and that in 1997 DDG restructured Tubular as a partnership to avoid Texas franchise taxes. Dru also contended that Eileen's March 10, 2009, affidavit, in which she explained why she eliminated Cary as a discretionary beneficiary, does not rebut the fact that the assets of the CXG Trust were acquired by gift, legacy, or descent, especially since Dru was otherwise adequately compensated by way of salary for his efforts in working for DDG.

¶ 32 On August 8, 2016, Stacy filed a reply in support of her motion to reconsider. In her reply,

Stacy argued that Dru's response misrepresented his burden of proof on summary judgment under section 503(b)(1) of the Act (750 ILCS 5/503(b)(1) (West 2016)) (*i.e.*, clear and convincing evidence) and improperly shifted the burden of proof to her. Moreover, Stacy urged that a genuine issue of material fact was created as to: (1) whether Eileen intended to make a gift of DDG to Dru as part of an estate plan or whether she intended to transfer that property to him as compensation for his personal efforts and services; and (2) the circumstances surrounding the acquisition of Tubular. Stacy also contended that it was irrelevant at this juncture who would own certain assets if the CXG Trust were found invalid.

¶ 33 On August 18, 2016, the trial court held a hearing on Stacy's motion to reconsider. During the hearing, the court expressed that the "Bulnit thing" causes some concern because "Dru is treating this trust as his own." The court took the matter under advisement. Meanwhile, on August 31, 2016, in response to questions posed at the August 18, 2016, hearing, Stacy filed a "bench memorandum" in support of her motion to reconsider the order of June 7, 2016. Citing to *In re Marriage of Perlmutter*, 225 Ill. App. 3d 362 (1992), and *In re Marriage of Kennedy*, 94 Ill. App. 3d 537 (1981), Stacy argued that any property "obtained by Dru after the marriage and deposited into his receptacle trust [is] necessarily marital, or, at the very least, create[d] an issue of disputed material fact, which precluded summary judgment." Stacy argued that "all sorts of business entities were created after the parties' marriage," including Tubular and Bulnit, and are therefore presumptively marital. Additionally, Stacy filed a "Combined Motion to Dismiss" the affidavits of Dru and Steven which Dru filed in support of his summary judgment motion.

¶ 34 Also on August 31, 2016, Dru filed a supplemental response to Stacy's motion to reconsider, addressing the Bulnit issue. Dru's supplemental response consisted of a supplemental affidavit from Steven. In his supplemental affidavit, Steven averred that although DDG paid all

related legal fees, organizing expenses, and upkeep, the law firm Much Shelist prepared the stock certificate for Bulnit, Inc., in Dru's name, rather than that of DDG. Steven further averred that on September 27, 2002, Dru signed over the Bulnit stock to DDG. Before the Bulnit stock certificate issued to DDG, Steven personally confirmed that Bulnit had remained dormant since its formation and that it held no assets and had no bank accounts in its name. Steven stated that the foregoing facts demonstrated that the Much Shelist law firm erroneously prepared the original stock certificate in Dru's name. DDG later conveyed to Bulnit a building it had acquired from El Paso Electric in 1990. In 2008, DDG converted Bulnit to an LLC and became the sole member, when DDG and its operating entities were reorganized for tax and succession planning purposes.

¶ 35 The trial court reconvened a hearing on Stacy's motion to reconsider on September 2, 2016. At the hearing, Dru's attorney reiterated that the Bulnit stock certificate was erroneously created in Dru's name. Dru's attorney acknowledged that the word "error" generally connotes that there is a genuine issue of material fact. He argued, however, that in this case the error is irrelevant because Bulnit never owned anything or had any income. It was just a stock certificate created in Dru's name. Moreover, when the stock certificate was transferred to DDG, Bulnit still did not own anything. Stacy's attorney argued that Bulnit was acquired during the marriage and therefore is presumptively marital property. The court expressed concern about the nature of Bulnit, remarking:

> "And this Bulnit thing was really sort of troubling for the Court, because clearly [Dru] was treating this trust as his own. By taking in—or by direction of his own. I don't know.
>
> And this whole argument like, oh, it was a mistake, he didn't—in the—and that transcript on the deposition was bad. I mean, for a guy who runs sophisticated

businesses, for him to be like, well, made a mistake, let me restate it. I don't know. It seems like—it seems like at least there's some question of fact.

Mr. Warren [Dru's attorney], I mean, it couldn't be a better argument, but I think it's an argument to be made at trial. I am going to grant the motion to reconsider. I hate to do it, but I'm going to do it."

Accordingly, the trial court vacated the June 7, 2016, order granting Dru's motion for summary judgment and the finding that the CXG Trust and its holdings are non-marital property.

¶ 36 On January 4, 2017, Stacy filed a motion for partial summary judgment and declaratory relief. Stacy requested a ruling as a matter of law that the assets held in DDG, Tubular in particular, were marital property. Specifically, Stacy argued that Dru's interest in DDG was transferred to him "as compensation for past services and as [an] incentive to render future services" and therefore marital property. Stacy relied in part on the statement from Eileen in the March 10, 2009, affidavit. In addition, Stacy asserted that the CXG Trust was void due to its failure to meet the requirements of an express trust under Illinois law and its failure to meet the requirements of a descendant's trust to be formed by a separate trust as mandated by the ECD Trust. On February 2, 2017, Dru filed a response opposing Stacy's motion. Dru argued that if the trust were invalid, Dru would have only a possible inheritance instead of a revocable beneficial interest in a spendthrift trust. Either way, Dru asserted, the property at issue is not marital as a matter of law.

¶ 37 On February 17, 2017, Dru filed a motion for "Reconsideration of Reconsideration Order and Reinstatement of Partial Summary Judgment." In support of his motion, Dru cited *In re Marriage of Asta and Pappas*, 2016 IL App (2d) 150160, a case decided after the court initially granted his motion for summary judgment. According to Dru, *Asta* stands for the proposition that property acquired during marriage by a trust beneficiary is non-marital when authorized by an

estate plan. *Asta*, 2016 IL App (2d) 150160, ¶¶ 25-36. Dru asserted that all property in the CXG Trust derived from Bud's estate plan and remains in trust. Dru further argued that Stacy acknowledged that there were no issues of material fact, thereby admitting that Dru never paid for any CXG Trust assets (including Bulnit) and any interest he acquired was through Eileen's exercise of her power of appointment.

¶ 38 On March 9, 2017, Stacy filed a response to Dru's motion for reconsideration. In her response, Stacy argued that Eileen's March 10, 2009, affidavit was the "controlling fact" in the classification of DDG as marital property. Stacy also asserted that the facts in *Asta*, 2016 IL App (2d) 150160, are distinguishable from those in the case at hand. Specifically, Stacy argued that *Asta* "arose from an anomalous and complex factual situation involving the settlement of a family dispute over the alleged mismanagement of a decedent's probate estate and residuary trust." Stacy also complained that any suggestion that Dru's interest in the CXG Trust is a mere expectancy is disingenuous. Further, Stacy reiterated her position that Bulnit is marital property. Stacy agreed with Dru that there is no issue of material fact and argued that the court should make an independent determination of whether there are questions of material fact in light of the parties' cross motions for summary judgment. Finally, Stacy complained that Dru's reconsideration motion is not a proper motion to reconsider.

¶ 39 On March 23, 2017, the trial court held a hearing on both Stacy's motion for partial summary judgment and declaratory relief and Dru's motion for reconsideration. The court found that that the CXG Trust remained in trust as Bud had planned and if the trust was void, the court "almost *** doesn't even have to weigh in on who owns the property." The court stated that it had "looked at this [from] a thousand different angles" and that its "instincts originally were correct as to this" and that "there is no path to this being marital property." Accordingly, the court entered

an order denying Stacy's motion for partial summary judgment, reinstating summary judgment in Dru's favor, and finding that all of the property in the CXG Trust was not marital.

¶ 40 b. Summary Judgment and Section 503 of the Act

¶ 41 Stacy argues that the trial court erred in granting Dru's motion for summary judgment and finding that the CXG Trust and its holdings are Dru's non-marital property. Summary judgment is a drastic means of disposing of litigation and, therefore, should be granted only when the movant's right to judgment is clear and free from doubt. *McDonald's Corp. v. American Motorists Insurance Co.*, 321 Ill. App. 3d 972, 978 (2001). " 'The purpose of summary judgment is to determine whether a genuine issue of material fact exists.' " *In re Marriage of Dann*, 2012 IL App (2d) 100343, ¶ 62 (quoting *Adames v. Sheahan*, 233 Ill. 2d 276, 295 (2009)). Thus, summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). Where the material facts are disputed or where reasonable people could draw different inferences from the undisputed facts, summary judgment is not proper. *In re Marriage of LaRocque*, 2018 IL App (2d) 160973, ¶ 43; *Dann*, 2012 IL App (2d) 100343, ¶ 62. In ruling on a motion for summary judgment, the court must construe the pleadings, depositions, admissions, and affidavits liberally in favor of the party opposing the motion. *LaRocque*, 2018 IL App (2d) 160973, ¶ 43; *Dann*, 2012 IL App (2d) 100343, ¶ 62.

¶ 42 "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28; see also *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. "However, the mere filing of cross-motions for summary judgment does not establish that

there is no issue of material fact, nor does it obligate a court to render summary judgment." *Pielet*, 2012 IL 112064, ¶ 28. We review *de novo* the trial court's order granting summary judgment. *In re Estate of Case*, 2016 IL App (2d) 151147, ¶ 25.

¶ 43 The issue raised by Stacy is also informed by section 503 of the Act (750 ILCS 5/503 (West 2016)), which governs the disposition of property in a dissolution of marriage proceeding. *In re Marriage of James*, 2018 IL App (2d) 170627, ¶ 20. Before a court may dispose of property upon the dissolution of the marriage, it must determine whether that property is marital or non-marital. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 166 (2000). Section 503 of the Act creates a rebuttable presumption that all property acquired after the date of the marriage and before a judgment of dissolution of marriage is marital property regardless of the manner in which title is held. 750 ILCS 5/503(a), (b)(1) (West 2016); *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 45. The presumption may be overcome by a showing of clear and convincing evidence that the property was acquired by a method listed in section 503(a) of the Act (750 ILCS 5/503(a) (West 2016)) or was nonmarital property transferred into some form of co-ownership for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift. 750 ILCS 5/503(b)(1) (West 2016); *James*, 2018 IL App (2d) 170627, ¶¶ 25-26. The exceptions listed in section 503(a) include:

> "(1) property acquired by gift, legacy or descent or property acquired in exchange for such property;
>
> (2) property acquired in exchange for property acquired before the marriage;
>
> * * *
>
> (6) property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics;

* * *

(7) the increase in value of non-marital property, 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." 750 ILCS 5/503(a) (West 2016).

¶ 44 We note that the clear-and-convincing evidence standard required to overcome the presumption that property acquired during the marriage is marital property is a higher burden of proof than preponderance of the evidence but not quite as high as the beyond-a-reasonable-doubt burden in criminal cases. *In re Marriage of Wechselberger*, 115 Ill. App. 3d 779, 786 (1983). The burden of proof is on the party claiming that the property is non-marital. *James*, 2018 IL App (2d) 170627, ¶ 28. Any doubts as to the nature of the property are resolved in favor of a finding that the property is marital. *In re Marriage of Dhillon*, 2014 IL App (3d) 130653, ¶ 24. When clear and convincing evidence is the burden of proof for an issue at trial, it is also the burden of proof when seeking summary judgment. See *Lozman v. Putnam*, 379 Ill. App. 3d 807, 828 (2008).

¶ 45 At the outset, we note that the basis for the trial court's decision to grant Dru's motion for summary judgment and find that the CXG Trust and its holdings are his non-marital property is not clear. Although the trial court held a comprehensive hearing on Dru's motion, it did not explain the rationale for its decision. And the minute order entered on June 7, 2016, merely states that the motion was "granted" and that the CXG Trust "and the entities and assets it holds are non-marital property." Similarly, the court's remarks on and order of March 23, 2017, when it granted Dru's

motion to reconsider the order vacating the June 7, 2016, order shed little light on the trial court's rationale. While it would have been helpful to have a detailed explanation of the trial court's rationale, we may affirm on any basis supported by the record and regardless of the trial court's reasoning. *Case*, 2016 IL App (2d) 151147, ¶ 25; *Romano*, 2012 IL App (2d) 091339, ¶ 48.

¶ 46 We also note that in the proceedings before the trial court, Dru contended that he lacked a vested interest in the *res* of the CXG Trust on the basis that his ability to receive distributions or otherwise make use of the trust principal is subject to the discretion of the trustees and restrictions imposed by Eileen's power of appointment, including spendthrift restrictions. In order to constitute property within the ambit of the Act, " 'the res must be in the nature of a present property interest, rather than a mere expectancy interest.' " *In re Marriage of Centioli*, 335 Ill. App. 3d 650, 656 (2002) (quoting *In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 244 (1984)). "An expectancy interest is the ' "interest of a person who merely foresees that he might receive a future beneficence, such as the interest of an heir apparent *** or a beneficiary designated by a living insured who has a right to change the beneficiary." ' " *Centioli*, 335 Ill. App. 3d at 656 (quoting *Weinstein*, 128 Ill. App. 3d at 244 (quoting *In re Marriage of Peshek*, 89 Ill. App. 3d 959, 964 (1980))). "Potential inheritances *** are not property which can be valued and awarded to a spouse." *In re Marriage of Eddy*, 210 Ill. App. 3d 450, 460 (1991). In her brief, Stacy insists that Dru's interest in the CXG Trust is not a potential inheritance because he is the sole present beneficiary and therefore fully seized of the assets contained in the CXG Trust. For purposes of our analysis, we accept Stacy's position that Dru has a personal property interest in the CXG Trust. Even so, we find that Dru's interest is non-marital pursuant to section 503(a)(1) of the Act (750 ILCS 5/503(a)(1) (West 2016)). *Asta*, 2016 IL App (2d) 150160, is instructive on this point.

¶ 47 At issue in *Asta* was the classification of stock in Olsun Electrics Corporation (Olsun)

acquired by Cathy Asta during her marriage to James Pappas. The Olsun stock was previously owned by Cathy's father, August, one of the founders of Olsun. Cathy asserted that the stock was nonmarital because it was inherited and thus was her nonmarital property pursuant to section 503(a)(1) of the Act. James argued that Cathy did not inherit the stock, but purchased it with the assistance of marital collateral and the parties' personal guarantees.

¶ 48 The record in *Asta* revealed that August's estate plan consisted of a will and multiple trusts. August's will named Mary Jane Asta (his ex-wife and Cathy's mother) as executor. In his will, August left his personal effects to Mary Jane while the residuary estate passed to the August F. Asta Revocable Trust (AFA Trust). August designated himself as the trustee of the AFA Trust and Mary Jane as the successor trustee. Under the terms of the AFA Trust, upon August's death, any property not used for the payment of debts, taxes, and expenses would be allocated to a residuary trust. Mary Jane was a beneficiary of the residuary trust as were Cathy and her two brothers. Mary Jane was to receive all of the net income from the residuary trust during her lifetime. With respect to the distribution of principal from the residuary trust, the AFA Trust authorized the trustee "to distribute to any one or more of the beneficiaries of the Residuary Trust, at any time and from time to time during their lifetimes, all or as much of the principal of such trust as the Trustee deems to be in the best interests of said beneficiaries," provided that "the Trustee shall only make such distributions as the Trustee deems necessary for the support of Mary Jane Asta during her lifetime." The AFA Trust also stated that upon the latter of the death of August or Mary Jane, "the Trustee shall distribute any unappointed portion of the then remaining trust estate of the Residuary Trust in separate shares *per stirpes* to the descendants of the Grantor who shall be living on such date."

¶ 49 August died in September 1996, prior to the parties' marriage in 1999. However, due to

estate-tax liability issues, the Olsun stock was not transferred into the AFA Trust pursuant to the pourover will until 2005. Moreover, in the years following August's death, questions arose as to whether Mary Jane misappropriated funds and otherwise violated the terms of August's will and the AFA Trust. This resulted in litigation. Mary Jane, Cathy, and Cathy's brothers eventually negotiated a settlement agreement whereby Cathy agreed to "purchase" from the AFA Trust all of the Olsun stock for $2 million. The transaction was funded by money in August's estate and the AFA Trust as well as loans to Olsun. Among the security for the loans were real estate properties that were titled to Cathy individually. Both Cathy and James signed as mortgagors with respect to the personal real estate. Moreover, the bank required Cathy and James to guaranty the loans as a tertiary form of payment. In December 2005, the terms of the settlement agreement were effectuated and Cathy acquired all of the Olsun stock.

¶ 50 The trial court recognized that because the Olsun stock was acquired during the marriage, it was presumed to be marital property and Cathy bore the burden of proving by clear and convincing evidence that she obtained it by inheritance. The trial court concluded that Cathy failed to meet her burden, reasoning that Mary Jane's death "was an express condition precedent under the will and trust to any future disposition of property to the children." Cathy appealed, arguing that the Olsun stock was her nonmarital property pursuant to section 503(a)(1) of the Act.

¶ 51 In addressing Cathy's claim, the *Asta* court initially noted that section 503(a)(1) may apply where a spouse receives property as his or her share of a trust. *Asta*, 2016 IL App (2d) 150160, ¶ 16 (citing *In re Marriage of Tatham*, 173 Ill. App. 3d 1072, 1080 (1988)). The court then rejected the trial court's rationale that Mary Jane's death was an express condition precedent to the future disposition of the property to the children, noting that under the express terms of the residuary trust, the trustee had the authority to distribute all or some of the trust principal to the Asta children

and there was nothing in August's estate plan that he intended for his children to receive his property only if they survived their mother. *Asta*, 2016 IL App (2d) 150160, ¶¶ 19-20. The *Asta* court also rejected James's claim that Cathy did not inherit the Olsun stock, but purchased it as part of an arm's length transaction, noting that although the settlement agreement provided that Cathy would "purchase" the Olsun stock, she "never spent a dime to acquire the stock, either in December 2005 or at any point thereafter." *Asta*, 2016 IL App (2d) 150160, ¶ 25. Instead, the transaction was funded by money in August's estate and trust as well as loans to Olsun, and the testimony at trial showed that Olsun made all of the payments toward those loans. *Asta*, 2016 IL App (2d) 150160, ¶ 25. Finally, the *Asta* court rejected the proposition that Cathy did not acquire the stock by inheritance because the transaction was funded in part by loans that were guaranteed by the parties and secured with some marital collateral. In support of this determination, the court emphasized that the parties never personally took out the loans at issue, contributed toward the repayment of the loans, or expended any of their own money for Cathy to acquire the Olsun stock. *Asta*, 2016 IL App (2d) 150160, ¶¶ 26, 34. In conclusion the court stated:

> "We therefore reject James's argument that the use of certain marital collateral and the parties' personal guaranties in facilitating the December 2005 transaction made Cathy's acquisition anything other than an inheritance. August founded Olsun more than 30 years before his daughter met James, and it is clear from August's estate plan that he intended to keep the company in his family. *** Despite what James argues, Cathy acquired the Olsun stock pursuant to her father's trust; she did not purchase the stock. Cathy met her burden to prove by clear and convincing evidence that she acquired the Olsun stock by 'gift, legacy or descent' such that it is her nonmarital property pursuant to section 503(a)(1) of the Act." *Asta*, 2016 IL App (2d) 150160, ¶ 36.

¶ 52 Similar to *Asta*, we conclude that Dru's property interest in the CXG Trust and its holdings is non-marital because it was acquired pursuant to a comprehensive estate plan developed by Bud, as implemented by Eileen. It was undisputed that the assets of the CXG Trust originated with the estate plan Bud initiated in December 1989, more than six years before Stacy and Dru married. To this end, Bud established the ECD trust for the benefit of his wife and his descendants and irrevocably conveyed to the trust all the shares of CXG, Inc., DDG's sole shareholder. In January 1990, DDG purchased the assets comprising Tubular as well as certain real estate and other property. In October 2006, Eileen formed the CXG Trust pursuant to her power of appointment under the ECD Trust agreement, named Dru as the sole beneficiary of the CXG Trust, and allocated 59.9% of the ECD Trust assets to the CXG Trust. In March 2009, Eileen exercised her power of appointment to appoint the remaining ECD Trust assets to the CXG Trust.[2] In April 2009, after Bud passed away, the ECD Trust terminated. As a result, the CXG Trust holds the assets Eileen allocated to it from the ECD Trust pursuant to her power of appointment. Since Dru's interest in the CXG Trust and its holdings were obtained pursuant to an estate plan for the benefit of Bud's wife and his descendants, his property interest was acquired by "gift, legacy, or descent" (750 ILCS 5/503(a)(1) (West 2016)), and the trial court properly found that the CXG Trust and its holdings were not part of the marital estate. *Asta*, 2016 IL App (2d) 150160, ¶¶ 25-36; see also *LaRoque*, 2018 IL App (2d) 160973, ¶ 50 (affirming summary judgment finding that trusts were not part of the marital estate where the trusts "were funded as part of a comprehensive estate plan designed to provide an orderly disposition of property upon the parties' deaths while minimizing exposure to estate taxation").

[2] Except for the 0.1% interest Eileen had appointed to Dru personally in June 2002.

¶ 53 In so holding, we reject Stacy's claim that Eileen's March 10, 2009, affidavit compels a different result. Recall that in her affidavit, Eileen stated that she eliminated Dru's brother as a beneficiary of the ECD Trust and each trust created thereafter because "Dru spent almost 20 years of his life working extremely hard *** to make DDG *** a successful business" and she wanted Dru "to be rewarded for his efforts and to keep working hard to make sure the business continues to succeed." According to Stacy, Eileen's affidavit undermines any claim that Dru's interest in the CXG Trust and its holdings is non-marital and supports a finding that such interest was obtained by Dru as remuneration for his marital efforts at DDG. We disagree for the simple reason that Eileen had no duty to compensate Dru as he was employed by DDG, not Eileen. See *In re Marriage of Johnson*, 856 S.W.2d 921, 926-27 (Mo. App. 1993) (acknowledging that while shareholders in business had a "motive" to keep younger employee involved in the company, transfer of stock to employee was not intended as compensation). Besides, Dru presented evidence that he was well compensated by way of salary for his efforts in working for DDG. In this regard, Dru averred in his affidavit, he receives an annual salary from DDG in the amount of approximately $600,000, and, depending on financial performance, a bonus according to a formula set by professionals, which, during certain years ranged from $300,000 to $350,000.

¶ 54 Stacy, nevertheless contends that a contrary result is dictated by *Kennedy*, 94 Ill. App. 3d 537, and *Perlmutter*, 225 Ill. App. 3d 362. In *Kennedy*, the husband owned four music stores prior to the marriage. After the marriage, the business expanded and the husband opened additional stores. Title to the stores was in several corporations of which the husband held most of the stock. Although the new stores were bought primarily on the credit of the business, the collateral included the new stores and the lender insisted on personal guarantees from both the husband and the wife. The trial court awarded the entire music store business to the husband. On appeal, the reviewing

court agreed that the stores the husband owned prior to the marriage, including the increase in value of those stores, were the husband's non-marital property. *Kennedy*, 94 Ill. App. 3d at 547-48. However, the court classified the stores acquired after the marriage as "new and distinguishable property." *Kennedy*, 94 Ill. App. 3d at 548. The court found that these latter-acquired stores did not fall under any exception to the rule that property acquired during the marriage is marital. *Kennedy*, 94 Ill. App. 3d at 548. The court acknowledged that the new stores were bought largely with funds borrowed on the credit of the business, but found that the money was raised "substantially on marital credit" in that the collateral for the loans "seems to have included the new stores, and the lender insisted on personal guarantees not only from [the husband] but also from [the wife]." *Kennedy*, 94 Ill. App. 3d at 548. Hence, the court classified the new stores as marital property. *Kennedy*, 94 Ill. App. 3d at 548.

¶ 55 In *Perlmutter*, the parties met on September 1, 1977. At that time, the husband was the chief executive officer of Heitman, a real-estate company. The husband also served on the board of directors of Cordura Corporation, a publicly-owned company that owned Heitman. The day after the parties met, Cordura announced that it was selling Heitman to a group of investors, including the husband. The transaction closed in November 1977. The H.C. Partnership was formed in 1977 to acquire stock in Heitman Financial Services, Ltd., the corporation which purchased Heitman from Cordura. The parties married in January 1978. Following the marriage, the H.C. Partnership acquired other investments, including hotels in Chicago and New York, a condominium in Colorado, and several real-estate ventures. The trial court classified the husband's interest in the H.C. Partnership and its assets as marital property and the husband appealed.

¶ 56 The reviewing court disagreed with the trial court in part, concluding that the husband's

interest in the H.C. Partnership was his non-marital property. *Perlmutter*, 225 Ill. App. 3d at 369-70. However, the court agreed with the trial court's finding that the assets of the H.C. Partnership acquired after the marriage constituted marital property. *Perlmutter*, 225 Ill. App. 3d at 374-75. The *Perlmutter* court relied on *Kennedy* in support of its position. *Perlmutter*, 225 Ill. App. 3d at 374-75. Specifically, the court found the assets acquired by the H.C. Partnership after the parties' marriage to be "new and distinguishable property." *Perlmutter*, 225 Ill. App. 3d at 375. The court further found that the assets are sufficiently separate and distinct from one another, and their acquisition clearly constituted more than an increase in value in the H.C. Partnership. *Perlmutter*, 225 Ill. App. 3d at 375.

¶ 57 Stacy argues that the import of *Kennedy* and *Perlmutter* is that properties obtained by Dru after the marriage and "deposited into his receptacle trust" are necessarily marital, or, at the very least, create an issue of disputed material fact which precluded summary judgment. Stacy asserts that after she and Dru married in October 1996, "a myriad of business entities were created *** which were ultimately dropped, directly or indirectly, into the giant bucket that is [the CXG] trust, which was created after the marriage." Specifically, Stacy asserts that the entities now known as Tubular, Bulnit, KSD Properties, and KSDC were formed after the parties' marriage. Stacy asserts that pursuant to the controlling mandate of *Kennedy* and *Perlmutter*, it was incumbent upon Dru to prove that each and every one of those entities individually deserved to be classified as non-marital, but Dru failed to do so.

¶ 58 At the outset, we find Stacy's reliance on *Kennedy* and *Perlmutter* misplaced. Neither of those cases involved assets placed in a trust as part of a comprehensive estate plan devised by the beneficiary's parents. Additionally, we disagree with Stacy's claim that Dru failed to prove that Tubular, Bulnit, KSD Properties, and KSDC deserved to be classified as non-marital property.

¶ 59 Stacy posits that Bulnit presents "a prime example of Dru's failure to prove his claim on summary judgment." Regarding Bulnit, Stacy asserts the following. Bulnit, Inc., was incorporated in Illinois on July 25, 2000, with all 1000 shares of its common stock issued to Dru individually. On September 27, 2002, Dru gratuitously transferred 100% of his interest in Bulnit, Inc., to DDG. In 2008, Bulnit, Inc., merged into Bulnit, which is held by DDG, Inc./CXG Trust. Based on the foregoing, Stacy concludes that the genesis of Bulnit was marital as it was acquired during the marriage. However, Dru rebutted Stacy's position by presenting Steven's supplemental affidavit. Steven's supplemental affidavit included a chronology of events regarding the formation of Bulnit with supporting documentation. In the affidavit, Steven averred that the law firm of Much Shelist erroneously named Dru in the original stock certificate despite the fact that DDG paid for all related legal fees, organizing expenses, and upkeep. Even so, Bulnit was an empty shell with no assets. When the lawyers caught their error, Dru signed over the stock to DDG and a new certificate issued so that DDG could convey into the shell a building it had acquired from El Paso Electric in 1990. Subsequently, in 2008, DDG converted Bulnit to an LLC. Stacy presented no evidence to counter Steven's affidavit. Thus, the only reasonable inference that may be drawn by this evidence is that Bulnit was not "obtained" by Dru. See *Asta*, 2016 IL App (2d) 150160, ¶ 25 (rejecting proposition that the wife "purchased" stock where she "never spent a dime of her own money to acquire the stock").

¶ 60 Aside from Bulnit, Stacy cites no evidence that any of the other DDG entities she references were titled in Dru's name. Nevertheless, she claims that Tubular, KSD Properties, and KSDC, are necessarily marital because these entities were "obtained" by Dru after the marriage and dropped into the CXG Trust. Stacy does not devote any comprehensive analysis to her argument. She simply lists each entity and the date the entity was allegedly "formed" followed by a citation to a

page of her January 4, 2017, motion for partial summary judgment or one of the charts Steven appended to his initial affidavit. In any event, Dru's pleadings, affidavits, and supporting documents demonstrate that he did not "obtain" any of these entities. As noted, there was no evidence that these entities were ever titled in Dru's name. Moreover, Dru stated in his affidavit that other than his 0.1% interest in DDG, he has never enjoyed any personal ownership of any of the assets held in the CXG Trust and that he never commingled any funds belonging to the ECD Trust, the CXG Trust, CXG, Inc., or DDG with his personal accounts or the accounts he shared with Stacy. Stacy presented no evidence to counter these statements. Indeed, Dru established that the assets comprising Tubular were acquired by DDG in 1990 as part of its purchase of the non-utility assets of El Paso Electric. KSD Properties was incorporated in 1989 and owns real estate. KSDC was incorporated in 2001 and manages Bulnit. It is undisputed that all of these entities functioned as operating entities of DDG and were held in the ECD Trust until Eileen appointed 0.1% of the ECD Trust assets to Dru personally in 2002 and the remainder to the CXG Trust between 2006 and 2009. Aside from his fractional share of ECD Trust assets allocated by Eileen, Dru never owned any of the assets that were in the ECD Trust. Accordingly, at no time did Dru "obtain" these entities or drop them into the CXG Trust. And while the entities were restructured for tax and succession planning reasons between 1997 and 2008, we find no authority for the proposition that restructuring an entity for such reasons converts the asset into marital property. *Cf. In re Marriage of Wilder*, 122 Ill. App. 3d 338, 344-46 (1983) (holding that the husband's interest in ophthalmology practice remained non-marital even where he converted practice from a sole proprietorship to a professional corporation two years after the marriage and transferred 50% of the corporate stock to another doctor).

¶ 61 Stacy also complains that the affidavits of Dru and Steven violate Illinois Supreme Court

Rule 191(a) (eff. Jan. 4, 2013). Rule 191(a) provides in relevant part that affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code:

> "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

"If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied." *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999).

¶ 62 With respect to Dru's affidavit, Stacy claims that it is not based on personal knowledge with "particularity" and did not explain the basis for his knowledge. Instead, Stacy asserts, Dru "simply set forth his self-serving narrative without any foundation for it, attached a jurat to that story—with no supporting documents (e.g. corporate records, stock certificates, etc.) whatsoever regarding Bulnit, LLC, Tubular Services, LLC, Bulnit, Inc., KSDC, LLC and/or KSD Properties, LLC—and called it 'evidence.' " As a general matter, Stacy's claim that Dru's narrative is "self-serving" is essentially meaningless because any testimony is self-serving to the proponent. See *People v. Nyberg*, 275 Ill. App. 3d 570, 586 (Wolfson, J., specially concurring) (noting that a party does not offer evidence on his own behalf unless it is self-serving). Moreover, Dru specifically averred that he had personal knowledge of the facts stated in the affidavit. He stated that he is the son of Bud and Eileen, one of three trustees and the current beneficiary of the CXG Trust, he has

been employed at DDG since January 1990, and became president of DDG in June 1999 (a position he continues to hold). Given Dru's roles, and in light of his affidavit as a whole, a reasonable conclusion is that Dru's affidavit is based upon the personal knowledge of Dru and that he could competently testify to its contents at trial. See *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶¶ 52-62 (affirming denial of motion to strike affidavit under Rule 191(a), concluding that although exhibits were omitted, the affiant's "experience, in combination with the facts contained in [his] affidavit, including his specific statement that the affidavit was based on his 'own personal knowledge,' [was] sufficient to establish that he had personal knowledge of the facts contained in his affidavit"); *F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, LLC*, 372 Ill. App. 3d 89, 93 (2007) (noting that a reasonable inference can be drawn that the president of firm would have personal knowledge of firm's transactions).

¶ 63 Stacy also complains that Dru's affidavit regarding the trusts and his business interests was contradicted by the March 25, 2009, deposition testimony he gave in Cary's divorce proceeding. According to Stacy, Dru testified at that time that he had no knowledge of the CXG Trust, thought that it was "gone," and told counsel for Cary's ex-wife that they would have to ask his business lawyers about it. Contrary to Stacy's claim, the passages she cites from the deposition do not specifically reference the CXG *Trust* but only "CXG." As explained in Steven's affidavit in support of Dru's motion for summary judgment, CXG, Inc., was the sole shareholder of DDG before the two companies merged in April 2008. Since DDG was the surviving entity, CXG, Inc., was essentially "gone" at the time Dru was deposed in March 2009. Moreover, at the same deposition, Dru was specifically asked about the CXG Trust and identified the beneficiaries thereto. Stacy's argument therefore lacks merit.

¶ 64 Stacy also contends that Steven's affidavit demonstrates that he had no personal knowledge

of the events he related in his affidavit. In his affidavit, Steven stated that he has been a practicing attorney in Illinois since 1978. He described his relationship with the Goodman family, noting that his father (Arthur) and Bud were business associates and that he has been personally acquainted with Bud, Eileen, and Dru since his early twenties. Steven further stated that he has served as one of three trustees of the CXG Trust since January 2012, he has represented operating entities held in the CXG Trust, including DDG, in connection with various legal matters, and that he has represented Dru in connection with "certain personal legal matters since the late 1990s or early 2000s." Steven then explained that he acquired personal knowledge for his affidavit:

> "[I]n the course of serving as a trustee for the CXG Trust and through my representation of DDG, which included personally examining the business records that are herein referenced, directly or indirectly, and which document the acquisition and composition of the CXG Trust assets and Bud's estate plan. The aforementioned records have been maintained by the CXG Trust and/or DDG, which is the sole member of the various LLCs held in the CXG Trust, in the ordinary course of their business activities. I am familiar with these types of records based on my experience as a practicing attorney. I am also familiar with the signatures of my father, Bud, Eileen, and Dru through my years as a CXG Trust trustee and counsel to Dru and DDG, and believe that their signatures on the various business records that I have reviewed are genuine."

Stacy asserts that because Steven represented that he did not begin representing Dru "until the late 1990s or early 2000s" and then only "in connection with certain legal matters," Steven could not have had any personal knowledge of the ECD Trust, which was formed in 1989.

¶ 65 We find Stacy's argument unpersuasive and conclude that Steven's affidavit satisfies the "personal knowledge" requirement of Rule 191(a). In particular, the affidavit demonstrates

longstanding familiarity with DDG, the CXG Trust, and the Goodman family. Moreover, Steven averred that in his roles as a trustee and attorney for DDG, he had access to the trust documents, he personally examined business records documenting the acquisition and composition of the CXG Trust assets and Bud's estate plan, he is familiar with these types of records, and that the records were maintained in the ordinary course of business. Thus, the entirety of Steven's affidavit reflects that it is based upon the personal knowledge of Steven and that he could competently testify to its contents at trial. See *Nichols*, 2015 IL App (1st) 122994, ¶¶ 52-62; see also *PennyMac Corp v. Colley*, 2015 IL App (3d) 140964, ¶18 ("The Gerrish affidavit established that the affiant has access to the loan records, had personally examined them, had personal knowledge of how the records were kept and maintained, and that the records were maintained in the ordinary course of business made at or near the time of the loan servicing by or from information that was provided by a person with the applicable knowledge."); *Centro Medico Panamericano v. Laborers' Welfare Fund of the Health & Welfare Department of the Construction & General Laborers' District Council of Chicago & Vicinity*, 2015 IL App (1st) 141690, ¶¶ 8, 17 (affirming denial of motion to strike affidavits pursuant to Rule 191(a) over objection that affiants offered hearsay which contradicted deposition testimony, holding that the affiant, as the defendant's claims director, had personal knowledge of the standard practice of the defendant's service representatives in responding to provider's calls and therefore could "testify to this standard practice even though she was not a party to the calls, as well as the common business practices within the company"); *F.H. Paschen/S.N. Nielsen, Inc.*, 372 Ill. App. 3d at 92-93 (holding that the affiant, as president of architectural firm, had personal knowledge of his company's transactions and despite the fact that the affiant failed to provide any facts surrounding the agreement at issue, there was sufficient information in the affidavit to establish its "essential purpose"); *Kugler*, 309 Ill. App. 3d at 795-

96 (1999) (rejecting argument that affidavit was inadmissible under Rule 191(a) on the basis that the records relied upon by the affiant were neither "proved up" as business records nor authenticated where the affiant, a paralegal for class counsel, calculated defendants' liability from computer records and data supplied by defendants' former counsel).

¶ 66 Stacy also claims that the trial court's grant of summary judgment was premature because she was not permitted to conduct adequate discovery in advance. In particular, Stacy complains that the trial court failed to allow her to take Eileen's deposition prior to answering or defending against Dru's summary judgment motion despite the "crucial nature" of Eileen's March 10, 2009, affidavit. We disagree.

¶ 67 After Dru filed his motion for summary judgment, Stacy's counsel caused a deposition subpoena to be issued to Eileen. In response, Dru filed a "Motion for Protective Order and Other Relief," which sought to block Stacy from deposing Eileen. On February 16, 2016, the trial court entered an order granting Dru's motion for a protective order, but allowing Stacy leave to file an affidavit pursuant to Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013). Stacy subsequently filed a "Motion for Leave to Issue Deposition Subpoena to Eileen Goodman," accompanied by an affidavit pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013).

¶ 68 In her Rule 191(b) affidavit, Stacy averred that Eileen's testimony was "critical" because she was the only living individual "who may have had actual, first-hand knowledge" of the CXG Trust and the ECD Trust. In support of her claim, Stacy asserted that Dru had no knowledge of the CXG Trust as evidenced by his March 25, 2009 deposition testimony in Cary's divorce and that Steven's knowledge of the trusts derived "only from 'examining the business records *** referenced' in Dru's Motion." Stacy also claimed that Eileen's deposition would be "significant" because the statements Eileen made in the March 10, 2009, affidavit executed in relation to Cary's

divorce proceedings, undermined Dru's claim that his interest in DDG is a non-marital gift and support her position that such interest was obtained by Dru as remuneration for his marital efforts at DDG. Stacy further asserted that Dru "has done everything that he can to obstruct and block [her] ability to effectively respond to his summary-judgment motion. The concluding paragraph of Stacy's affidavit provides:

> "Eileen's testimony—as the only living person with first-hand knowledge of the of the two trusts creation [*sic*]—is clearly relevant to Dru's claim that his DDG, Inc. interest is his non-marital property and my submission that Dru's interest was obtained by him as remuneration for his marital efforts at the company. Indeed, Eileen's testimony will either tend to prove one party's theory of the case or the other's regarding the DDG, Inc., stock. Accordingly, I need to have my counsel take Eileen's deposition in order to effectively respond to Dru's Summary-Judgment Motion. Therefore, in the interests of justice and fair play, this Court should grant me leave to cause the issue of a deposition subpoena to Eileen."

Dru filed a response to Stacy's motion, and Eileen filed an objection thereto.

¶ 69 A hearing on Stacy's motion was held before the trial court on June 3, 2016. At that hearing, Dru argued that Stacy's request to depose Eileen constituted "an exercise in abusing someone's octogenarian mother." Dru also contended that Stacy's affidavit did not comply with Rule 191(b) in that she did not identify the specific testimony that Eileen would provide. Dru offered to allow Stacy to submit interrogatories to Eileen, but Stacy's attorney deemed interrogatories "insufficient." Following additional argument, the court indicated that it was ready to rule, but stated that it would give Stacy the opportunity to submit interrogatories to Eileen. The court added that it would "leave open the right to depose [Eileen]" until after Stacy receives the

answers to the interrogatories. Stacy's counsel hesitated to accept the offer because he did not know how many interrogatories he would be allowed. In response, the trial court denied Stacy's motion to depose Eileen.

¶ 70 Discovery rulings are within the trial court's discretion and will not be overturned absent an abuse of that discretion. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 96. A trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court. *Village of Woodridge v. Board of Education of Community High School District 99*, 403 Ill. App. 3d 559, 570 (2010). In this case, we cannot say that the trial court abused its discretion in denying Stacy's request to depose Eileen.

¶ 71 Rule 191(b) governs the procedure to be followed where additional discovery is needed in regard to summary judgment proceedings. Rule 191(b) provides:

> "(b) When Material Facts are not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

¶ 72 Stacy contends the trial court "severely prejudiced and hamstrung [her] by denying her the discovery that she needed to respond to Dru's Summary Judgment Motion." According to Stacy, a "critical piece of evidence" was Eileen's March 10, 2009, affidavit, in which Eileen contradicts the notion that Dru acquired his interest in the CXG Trust assets as part of Bud's estate plan. Thus, she contends, the court erred in denying her request to depose Eileen prior to answering Dru's motion for summary judgment. However, Stacy's affidavit failed to comply with the requirements of Rule 191(b). Significantly, although Stacy asserted that Eileen's testimony would be "significant" and "critical," she never indicated what she believed Eileen would testify to or her reasons for that belief. Instead, she simply claimed that Eileen's testimony "will tend to prove one party's theory of the case or the others." "Failure to comply with Rule 191(b) defeats an objection on appeal that insufficient time for discovery was allowed." *Giannoble v. P & M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1064 (1992). Accordingly, we conclude that the trial court did not abuse its discretion in denying Stacy's motion for leave to issue a deposition subpoena to Eileen. See *Janda*, 2011 IL App (1st) 103552, ¶ 98 (affirming denial of the plaintiff's motion to depose witnesses where the plaintiff did not specify what he believed the witnesses would testify to if deposed); see also *Wynne v. Loyola University of Chicago*, 318 Ill. App. 3d 443, 455-56 (2000) (holding that the trial court properly denied the plaintiff's motion for additional discovery where the Rule 191(b) affidavit did not contain the necessary disclosures).

¶ 73 Finally, Stacy argues that there exists a question as to whether the CXG Trust even exists as a legally cognizable entity. Even if Stacy is correct, she does not explain how such a finding would benefit her. Indeed, such a finding would serve to extinguish even Dru's fractional interest in DDG because nullification would result in all of the trust assets reverting to Bud's estate. See *Wagner v. Clauson*, 399 Ill. 403, 416 (1948) (holding that failure of an express trust places title in

those who would take it in the event there was no will); *Daniels v. Belvidere Cemetery Ass'n*, 193 Ill. 181, 184-85 (1901) ("If the assignment *** was a nullity *** the title which she attempted to transfer would remain in her"); *BMO Harris Bank, N.A. v. Towers*, 2015 IL App (1st) 133351, ¶ 30 (holding that defective exercise of power of appointment voids conveyance so that property reverts to trust); *Steburg v. Swanson*, 198 Ill. App. 3d 636, 641 (1990) (Heiple, P.J., dissenting) (noting generally that where an express trust is created, every interest not embraced in the trust reverts to the settlor of the trust). Thus, the legal effect of voiding the trusts is that Dru's beneficial interest in the CXG Trust would revert rather than vest.

¶ 74 In short, we find none of Stacy's arguments for reversing the trial court's summary judgment ruling persuasive. To the contrary, Dru met his burden to prove by clear and convincing evidence that he acquired his interest in the CXG Trust and its holdings by gift, legacy, or decent, such that it is his non-marital property under section 503(a)(1) of the Act. Because there is no genuine issue of material fact as to the classification of Dru's interest in the CXG Trust and its holdings, the trial court properly granted Dru's motion for partial summary judgment.

¶ 75 2. Retained Earnings

¶ 76 Next, Stacy argues that the trial court erred in finding that the retained earnings held in DDG, Tubular, and the CXG Trust are Dru's non-marital property. To place Stacy's argument in context, we provide the following additional evidence presented at the dissolution proceeding regarding the retained earnings issue.

¶ 77 a. Background

¶ 78 Dru testified that he is 51 years old. He has a degree in psychology from Drake University, but has no formal training in finance or accounting. After college, Dru worked briefly as a bouncer at a restaurant and a runner at the Chicago Board of Trade. Bud later obtained a job for Dru at a

seafood company, but Dru quit after less than a year. Dru also traded at the Mid Am Exchange, but testified he was not good at it. In January 1990, after a year with a home remodeling company, Bud brought Dru into DDG. Dru testified that when he started at DDG, he had no specific duties. Dru described his role at DDG in the 1990s as "training mode." He would work with Bud, learn how Bud prospected for new deals, and talk with management.

¶ 79 When Dru started working for DDG, David Sinclair was the company's president. Bud fired Sinclair in 1999 and named Dru as president because Dru is his son. At that time, Dru had no training in running a business, managing companies, or overseeing a real-estate portfolio. Between 1990, when Dru was hired by Bud, and 2009, when Bud passed away, Dru never "outranked" Bud in terms of decision making and he never would have gone "rogue" by making a decision without Bud's approval. Moreover, during this 19-year period, Dru was never in charge of any operating companies and he never performed any function of a chief financial officer (CFO). Dru further testified that he has never been chief executive officer (CEO) or CFO of Tubular and that he has never been responsible for managing Tubular, generating revenue at the company, or making personnel decisions at Tubular. According to Dru, prior to Bud's death, Bud made the decisions regarding DDG, Tubular, and the other entities, even while Dru was president of DDG. Dru attributed DDG's success to Bud, even after his death, because Bud "set the model up" and Dru just followed Bud's instructions.

¶ 80 Dru testified that his responsibilities at DDG are to ensure that everybody comes to work and does his or her job. Although Dru rarely meets with customers, he does examine new deals and is involved in acquiring insurance. On a typical day, Dru will arrive at the DDG office mid-morning, check the price of oil, and make sure everything is harmonious in the office. Sometimes Grady Vogt, a DDG employee, will tell him about a possible deal or about insurance and he will

review that. In addition to being president of DDG, Dru is the chairman of the company's board of directors. The board of directors, which also consists of Dru's mother Eileen, makes all of the personnel and executive compensation decisions for DDG's operating entities, including Tubular.

¶ 81 Dru testified that he goes to Houston 8 to 10 times a year to visit Tubular's facilities. Dru testified that each time he goes to Houston, he receives $10,000 in cash. This practice started with Bud. Dru puts the funds into a safe at home, and uses them for family expenses. This practice was also employed when Stacy and Dru were together. Dru also has access to a credit card from Tubular. The idea for the credit card originated with Bud. Dru uses the card for travel and entertainment, primarily to Houston. Dru occasionally uses the credit card for purchases for himself or DDG.

¶ 82 According to Dru, Tubular makes money based on the price of crude oil. Thus, when the price of oil is high, Tubular makes a lot of money. When the price of oil is low, Tubular loses money. Dru testified that Russell Rhodes was the president of Tubular when Bud bought the company. Rhodes remained president until his death in 2008, when he was succeeded by Rick Hickman. Hickman's duties include sales, equipment and personnel oversight, and attending to "any other issues that arise that a President would take care of." Robert Sherrill is the CFO of Tubular and has been in that role since Bud bought the company. As CFO, Sherrill puts together financial statements and helps run the company. Dru testified that Hickman and Sherrill are the managers of Tubular and he does not tell them how to run the company. Dru has contact with Hickman about once a week and with Sherrill about three times a week.

¶ 83 Dru explained that if the management of Tubular makes a recommendation regarding the company, he will listen to what they have to say and then contact his attorneys and advisors before making a decision. Dru has never denied a request by Tubular management for an infusion of

capital or for the purchase of real estate or equipment. Dru testified that over the preceding seven or eight years, Tubular has purchased several parcels of real estate. Dru testified that the idea to purchase the real estate came from Hickman and Sherrill. To this end, DDG lent Tubular $5 million in 2010 and $6 million a few years later. Dru testified that his role was limited to authorizing DDG to lend Tubular funds to execute the transactions.

¶ 84 Dru's annual salary is $650,000 and was set by Bud. Dru testified that his salary has not changed since Bud passed away. Dru is also eligible for bonuses. Prior to Bud's death, Dru spoke to Bud if he wanted a bonus. Following Bud's death, Dru contacts Steven if he feels that a bonus is "deserved or needed." Steven will approve or deny the bonus. Dru testified that he signed a power of appointment designating his mother (Eileen) and Steven as trustees of the CXG Trust. Dru testified that he requests trust distributions "through [Eileen] and Steve Blumenthal, but mostly Steve Blumenthal." They will approve, deny, or modify the funds requested by Dru.

¶ 85 Stacy testified that following the birth of the parties' first child, Dru would go to the office at 9 or 10 a.m. and return home around 6 p.m. Dru would typically not work on weekends. Stacy testified that Dru's work schedule changed "dramatically" around 2002, after Sinclair and Brad Ginsberg (a former DDG executive) left the business. According to Stacy, if Dru arrived home between 8 and 10 p.m., it was early, and he would often come home on weekdays between midnight and 3 a.m. Stacy also testified that Dru would work on weekends and during vacations by talking with colleagues over the telephone.

¶ 86 Eileen's March 10, 2009, affidavit was admitted into evidence. Eileen also testified at trial that Bud owned DDG when he was alive. When asked whether she and Dru own the business now, Eileen responded, "I imagine so." Eileen further testified that she is a director of DDG and a trustee. Eileen testified that she divides her time between Florida and Illinois. She lives in

Florida between November and May. When in Illinois, Eileen visits the DDG office once or twice a week for birthdays, to see how everyone is doing, and to ensure that things are running smoothly. Eileen acknowledged she does not work at the office every day. Eileen receives $800,000 per year from DDG for her services, which Bud arranged. Eileen testified that Dru took over DDG after Bud died. Eileen attributed the success of the business after Bud's death to Dru. Eileen acknowledged that she did not know what Dru does for DDG when she is in Florida as she is not at DDG's office and does not see what Dru is doing. Nevertheless, she believed that Dru works hard and is the best-qualified person to run DDG. Eileen was not aware of anyone else who could run DDG.

¶ 87 Steven testified that he is a corporate attorney who started working professionally with Bud in 1978, before Bud formally retained him and the Much Shelist law firm in 1998 or 1999. Steven testified that Dru's involvement with DDG is limited to checking in with people at the company regarding bank balances, the investment portfolio, leases, and tenants. Dru has no training in accounting or finance, so he does not perform such services for DDG. In addition, Dru has never been involved in the management of DDG's buildings.

¶ 88 Steven testified that Sherrill is responsible for Tubular's financials. Rhodes and then Hickman oversaw Tubular's operations. Steven testified that Tubular is tied to the oil business, so as the oil business grows, so does Tubular. Tubular's profits are "up-streamed" to DDG, which flows some of it to its shareholders while retaining the rest for reserves and operational needs. Sherrill makes the decision regarding what Tubular keeps and what it remits to DDG each month. Steven testified that Dru calls Houston to see how Tubular is doing. If Tubular needs another plant or more equipment, Hickman and Sherill will advise Dru. However, Dru has nothing to do with Tubular's day-to-day operations, accounting, financials, or customer marketing.

¶ 89 Steven testified that the CXG Trust owns 99.9% of DDG and Dru individually owns the other "one-hundredth of a percent [*sic*]." Steven testified that Dru was the sole trustee of the CXG Trust for a period between 2006 and 2010. During this time, Dru's ability to receive disbursements was limited to funds necessary for his support. Dru later named Eileen and Arthur as additional trustees. After Arthur died, Steven replaced him as trustee. Steven testified that the advantage to Dru naming other trustees was that instead of the restrictive limitation on distributions which were only for support when Dru was the sole trustee, Dru would be allowed discretionary distributions from time to time by the trustees if in the best interest of Dru and Dru abstained from voting.

¶ 90 Steven testified that in his capacity as trustee, he has fiduciary duties "to be responsible for knowing what's going on with DDG and its various operating companies." As such, Steven meets with the accountants and company personnel and reviews bank records and tax returns for the CXG Trust and DDG. Steven also testified that Dru has made requests for distributions from the CXG Trust, including money for a car, which he and Eileen have denied. Steven testified that the distributions are taxed at the trust level. Thus, when the distributions are made from the trust, the tax has already been paid before Dru receives his share.

¶ 91 Steven testified that Dru is an at-will employee subject to the discretion of the board of directors of DDG. Steven testified that before Bud died, he set Dru's annual DDG salary at $675,000. As co-trustees of the CXG Trust, Steven and Eileen determine Dru's bonus because the trust requires that Dru abstain from decisions regarding his own compensation. Aside from his salary and bonus, Dru has been eligible to receive distributions from the CXG Trust since it was created in 2006. Prior to 2006, Dru was eligible to receive bonuses from the ECD Trust. Steven prepared Dru's exhibit number three, which was a chart of all payments to Dru from all sources between 1997 and 2016. Dru's W-2 income ranged from $92,692 in 1999 to $1,994,257 in 2016.

The total payments of $30,838,793 included $7,448,627 in dividends from the CXG Trust in 2006 and 2007 and $9,733,074 in distributions from the CXG Trust between 2009 and 2014.[3] Steven acknowledged that Eileen earns a salary of $800,000 for doing "not that much." According to Steven, Eileen's salary was established by Bud, who provided for its payment after his death.

¶ 92 Robert Sherrill testified that he has been the CFO and vice-president of Tubular since 1989. Sherrill testified that Tubular performs oil pipe casing, threading, upsetting, quenching, and tempting at its properties in Texas. Sherrill testified that the sole driver of Tubular's revenue is the price of oil because the incentive to drill depends on that price being high enough. Sherrill and the president of Tubular are responsible for running the day-to-day operations of the business.

¶ 93 Sherrill testified that DDG owns but does not manage Tubular. DDG gets distributions from Tubular's income, and the rest goes into Tubular's retained earnings. Bud set DDG's distribution from Tubular at $220,000 per month. However, Dru can authorize additional distributions.

¶ 94 Sherril testified that although Dru is his boss, Dru has never been the president, CFO, or CEO of Tubular and has nothing to do with its operations, books and records, or customer responsibilities. Moreover, Dru has never asked to see Tubular's books or other documents and he makes no personnel decisions. Dru visits Houston (where Tubular is located) about 10 times a year for 2 days at a time. Sherrill testified that during Dru's visits, any discussion about business is usually limited to 30 minutes. The rest of the time is spent talking about family and showing

[3] Steven explained that until 2008, DDG was a subchapter C corporation and distributed profits as dividends. Thereafter, DDG became a subchapter S corporation and distributed profits directly to shareholders.

Dru the facilities. Dru will also occasionally meet with customers. Sherril gives Dru $10,000 in cash every time he comes to visit Houston. The funds come from Tubular's bank account and are recorded as a distribution. Sherrill testified that when Tubular wanted to purchase a plant, Dru authorized DDG to loan it $5 million. That loan was paid back in less than a year. Further, when Sherrill and Hickman decided Tubular needed a new $18 million facility, they asked Dru for a $6 million loan from DDG's reserves and Dru agreed. The other $12 million came from Tubular's reserves.

¶ 95 David Sinclair testified that he preceded Dru as president of DDG. In this capacity, Sinclair managed DDG's financial affairs and all of its employees, including the presidents and CFOs of the operating companies. While Sinclair worked for DDG, Dru was a consultant with the company, Rhodes ran Tubular, and Sherrill was the CFO of Tubular. Sinclair testified that Tubular generates revenues based on the performance of energy and that the price of a barrel of oil is directly tied to the profits of Tubular.

¶ 96 Grady Vogt testified that he began working for DDG in 2013. Vogt was hired to examine the liquid assets of the business and to find other private equity investments for DDG. Vogt testified that Dru runs DDG, Dru is his boss, and Dru can fire him. Vogt meets with Dru on a daily basis to discuss business. They discuss topics such as where money should be invested, where to find companies to purchase, and where to look for real-estate opportunities. Vogt testified that Dru comes into the office late and leaves late. Vogt testified that because of the volatile nature of the oil industry, DDG's investable assets are conservative and mostly in cash. Vogt explained that he likes to have cash on hand in case Tubular needs to borrow money from DDG.

¶ 97 Jessica Franzen testified that she has been employed at DDG for 10 years and that Dru is her boss. Franzen's duties involve answering telephones, opening mail, paying bills, maintaining

the general ledger, collecting rent from tenants, keeping Dru organized, and scheduling appointments. Franzen's work hours are 9 a.m. to 6 p.m. Franzen testified that Dru's work hours vary, but he generally arrives at the office between 10 and 11 a.m. and leaves after Franzen.

¶ 98 Craig Stout was retained by Dru to value DDG and its operating entities, including Tubular. In valuing Tubular, Stout noted that the business's performance "is very tied to the price of oil" and that Tubular generally makes money when oil is $50 a barrel.

¶ 99 Lee Gould, Stacy's expert lifestyle analyst and business valuator, agreed that Tubular's revenues are driven by the price of oil. He observed, however, that while Tubular is more profitable when the price of oil is high, it can still be profitable at lower oil prices. Gould admitted that neither Dru, Hickman, nor Sherrill has anything to do with the price of oil or the market for the commodity. Gould noted that according to Sherrill, Tubular reaches profitability when oil is in the range of $50 to $55 per barrel.

¶ 100 Dru retained Steve Cross to assess the reasonableness of his compensation from DDG. Cross has a bachelor's degree in business from the University of Houston. He has been an executive compensation consultant for 28 years and is the managing director of the Houston office of Frederic W. Cook & Co. Cross has written about 50 articles on executive compensation and presented about 50 lectures on the topic. He has also been qualified as an expert in executive compensation in litigation. Cross testified that his entire career has been focused on the oil and gas industry. Cross prepared a report of his findings, which was admitted into evidence.

¶ 101 In assessing the reasonableness of Dru's compensation, Cross followed the "typical steps" used to assess the market value of jobs. This involved both examining data from publicly-traded energy-services companies comparable to Tubular and gathering survey information specific to the energy industry for companies comparable to Tubular. Cross also considered Dru's duties and

responsibilities, salary, bonuses, and trust distributions. Cross limited his comparison to Tubular because it represented the majority of DDG's profitability. Cross looked at the time period from 2009 to 2014 because, after Bud died in 2009, Dru's compensation was no longer set by his father. The 2014 year was selected because, at the time the report was being prepared, that was the last year for which Cross had complete data. In assessing Dru's compensation, Cross considered Dru's total direct compensation, which is the aggregate of Dru's base salary, bonuses, and trust distributions. He compared Dru's total direct compensation to that of members of the comparable groups. The total direct compensation of the comparable groups consisted of base salary, bonuses, and long-term incentives (in lieu of trust distributions). Cross noted that compensation received by Dru as salary and bonuses has different tax implications than compensation received by Dru as trust distributions in that the former (salary and bonuses) is taxable to Dru whereas the latter (trust distributions) is not. Cross ultimately concluded that Dru was not only reasonably compensated for the services he provided, but that his compensation was above the high end of the range for his role as non-executive chairman of DDG. For instance, Cross testified that in 2010, Dru's total direct compensation was 1,129% of the median for a non-executive chairman in the marketplace.[4] Cross explained that he compared Dru's income to that of non-executive chairmen because Dru basically had oversight functions.

¶ 102 Cross also compared Dru's income to that of the Tubular executives, Hickman (Tubular's CEO) and Sherrill (Tubular's CFO). For instance, Cross testified that in 2010, Dru's total direct

[4] According to Cook's report, this figure was 1,256% for 2011, 820% for 2012, 1,738% for 2013, and 535% for 2014.

compensation was 97% of the combined compensation of Hickman and Sherrill.[5] Cross also compared the income of Dru, Hickman, and Sherrill to the pay at companies with much higher revenue. Cross determined that Tubular's executive compensation was similar to that of much larger companies, including one with $473 million in revenue as compared to Tubular's $82 million. Cross stated that he would expect companies that are smaller to pay less and companies that are larger to pay more. Thus, in assessing the reasonableness of compensation, the peer set used would not overstate compensation at Tubular.

¶ 103 On cross-examination, Cross testified that if an individual serves in all three roles—as non-executive chairman, CEO, and CFO of a company—the standard approach to determining the individual's compensation would be to take the highest compensated of those roles and add a premium of between 15% and 20%.

¶ 104 In light of the foregoing evidence, the trial court concluded that the evidence weighed in favor of holding that the retained earnings of DDG, Tubular, and the CXG Trust should not be imputed to Dru as marital income. As discussed more thoroughly below, the trial court, in reaching this conclusion, examined the evidence in light of the factors discussed in *In re Marriage of Lundahl*, 396 Ill. App. 3d 495 (2009), and *In re Marriage of Joynt*, 375 Ill. App. 3d 817 (2007). The court also determined that the Dru was adequately and reasonably compensated by DDG over the term of the marriage. As such, the court concluded that the marital estate was not entitled to reimbursement for Dru's personal efforts. See 750 ILCS 5/503(c)(2)(B) (West 2016) (providing that "[w]hen a spouse contributes personal effort to non-marital property, it shall be deemed a

[5] According to Cook's report, this figure was 80% for 2011, 49% for 2012, 65% for 2013, and 22% for 2014.

contribution from the marital estate, which shall receive reimbursement for the efforts if the efforts are significant and result in substantial appreciation to the non-marital property except that if the marital estate reasonably has been compensated for his or her efforts, it shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate").

¶ 105 b. Argument

¶ 106 Stacy argues that the trial court erred in finding that the retained earnings held in DDG, Tubular, and the CXG Trust are Dru's non-marital property. As noted earlier, the classification and disposition of property is governed by section 503 of the Act. *James*, 2018 IL App (2d) 170627, ¶ 20. A trial court's classification of property will not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Jelinek*, 244 Ill. App. 3d 496, 503 (1993). A court's decision is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent or where its findings are unreasonable, arbitrary, or not based on the evidence presented. *In re Marriage of Kavchak*, 2018 IL App (2d) 170853, ¶ 65.

¶ 107 Retained earnings are corporate net income which would be available for distribution as dividends, for payment of wages, salaries and bonuses, and other proper corporate purposes. *Lundahl*, 396 Ill. App. 3d at 504 (citing *Ramon v. Ramon*, 963 A.2d 128, 133 (Del. 2008)). As a general rule, retained earnings are not considered income to a spouse until distributed. *Dann*, 2012 IL App (2d) 100343, ¶ 78 (quoting *Joynt*, 375 Ill. App. 3d at 820-21). Thus, undistributed retained earnings typically constitute non-marital property. *Joynt*, 375 Ill. App. 3d at 819-21. Under certain circumstances, however, retained earnings may be considered marital property. *Joynt*, 375 Ill. App. 3d at 819. The *Joynt* court identified two primary factors to classify retained earnings as marital property. *Joynt*, 375 Ill. App. 3d at 819. The first factor examines the nature and extent of the stock holdings, *i.e.*, is a majority of the stock held by a single shareholder with the power to

distribute the retained earnings. *Joynt*, 375 Ill. App. 3d at 819; see also *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 63 (noting that under the first *Joynt* factor, the court looks at the extent of the spouse's ability to distribute the retained earnings to himself or herself); *Lundahl*, 396 Ill. App. 3d at 503-04. Thus, "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." *Joynt*, 375 Ill. App. 3d at 820 (discussing *Metz-Keener v. Keener*, 573 N.W. 2d 865, 869 (Wis. 1997) and *Heineman v. Heineman*, 768 S.W. 2d 130 (Mo. App. W. D. 1989)). The second factor concerns the extent to which the retained earnings are considered in the value of the corporation and used to fund the corporation's business. *Joynt*, 375 Ill. App. 3d at 819; see also *Steel*, 2011 IL App (2d) 080974, ¶ 63; *Lundahl*, 396 Ill. App. 3d at 503-04. Additional relevant considerations include the extent of the shareholder spouse's responsibility for paying income taxes on retained corporate earnings and the extent to which the shareholder spouse's salary from the corporation was reasonable and fair for the services provided. *Lundahl*, 396 Ill. App. 3d at 504; *Joynt*, 375 Ill. App. 3d at 821. The factors identified in *Joynt* were later invoked by the court in *Lundahl*, 396 Ill. App. 3d at 499-504. We refer to these four factors as the *Joynt*/*Lundahl* factors.

¶ 108 As noted above, the trial court in this case applied the framework set forth in *Joynt* and *Lundahl* and concluded that the retained earnings at issue did not constitute marital property. Because Stacy devotes a large part of her argument on the first two *Joynt*/*Lundahl* factors, we focus our analysis on those factors.

¶ 109 The first *Joynt*/*Lundahl* factor considers the nature and extent of the stock holdings, *i.e.*, is a majority of the stock held by a single stockholder with the power to distribute the retained earnings. *Lundahl*, 396 Ill. App. 3d at 503-04; *Joynt*, 375 Ill. App. 3d at 819. The trial court found

that this factor weighed against holding that the retained earnings at issue constituted income to Dru. In support of this finding, the trial court determined that Dru was a minority shareholder of DDG since he owns only 0.1% of the corporate stock while the CXG Trust owns the remaining shares of DDG stock. The trial court further concluded that Dru "did not have complete control of and access to the DDG and Tubular funds held by CXG" because of restrictions placed on disbursements from the CXG Trust. Stacy contests these findings. According to Stacy, since the trial court granted Dru's motion for summary judgment that the CXG Trust and the entities it holds are Dru's non-marital property and because Dru is a trustee and the sole beneficiary of the CXG Trust, the trial court's finding that Dru was only a minority shareholder of DDG is illusory. However, Stacy overlooks important aspects of the terms of the CXG Trust.

¶ 110 Significantly, as the trial court recognized, the CXG Trust documents place restrictions on the disbursement of the retained earnings of DDG and Tubular held by the CXG Trust. While Dru served as the CXG Trust's beneficiary and sole trustee at its inception, Dru's ability to receive disbursements during this time was limited to funds necessary for his support. See *Steel*, 2011 IL App (2d) 080974, ¶¶ 68-69 (allowing that the corporation's policy on distributions was unclear, but noting that there were external restrictions on the husband's ability to disburse retained earnings). Dru later designated Eileen and Arthur (later succeeded by Steven) as co-trustees of the CXG Trust. While the addition of co-trustees allowed for the distribution of funds other than for Dru's support, such distributions had to be approved by a vote of the other trustees, a vote from which Dru was required to abstain. Moreover, as recounted by Steven, he and Eileen have denied distribution requests by Dru, including money for a car. In light of these restrictions on disbursements from the CXG Trust, the trial court could reasonably conclude that Dru did not have unfettered access to the retained earnings as Stacy suggests.

¶ 111 Stacy claims however, that if Eileen or Steven were to disagree with Dru regarding the CXG Trust, Dru "could simply remove them from their positions" pursuant to his power as "Trustee Remover." According to Stacy, Dru's power to remove the co-trustees also demonstrates that he had "unfettered control" over the CXG Trust. However, Stacy does not cite any express provision in the CXG Trust document to support her claim that Dru possesses the power to remove trustees from the CXG Trust. Instead, she directs us to a document dated July 31, 2006 (prior to the formation of the CXG Trust), in which Arthur designated Dru to succeed him as "Trustee Remover" of the *ECD Trust*. She then asserts that Dru's power as "Trustee Remover" for the CXG Trust is derived from the ECD Trust because the ECD Trust's " 'terms, conditions and provisions' remain an organic part of the CXG Trust today." Stacy, however, cites no testimony at trial or other evidence that would support her position. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (requiring that the argument section of an appellant's brief contain "the contentions of the appellant and the reasons therefor, with citations of the authorities and the pages of the record relied on"); *In re Marriage of Pavlovich*, 2019 IL App (1st) 172859, ¶ 18. In light of Stacy's failure to cite any relevant authority for this proposition, we find that Stacy has forfeited this argument.[6]

[6] At trial, Stacy's attorney suggested that Dru had the power to remove Eileen and Steven as trustees pursuant to paragraph 6 of article 12.1 of the CXG Trust. Stacy does not renew this argument on appeal. Nevertheless, we address it here in the interest of clarity. Article XII of the CXG Trust provides certain "powers and discretions" upon the trustee. Among these are those in paragraph 6 of article 12.1, which provides the trustee with the power and discretion "to transfer the situs of the trust property to such other place as the Trustee deems to be for the best interests

¶ 112 Stacy also alleges that it is "laughable for Dru to suggest that his octogenarian mother, Eileen, to whom he pays a yearly $800,000 sinecure, and his childhood friend and lawyer, Steven Blumenthal, act as a *real check* on his power over CXG and DDG." (Emphasis in original.) Stacy likens the CXG Trust and DDG to Dru's "personal piggy bank" and asserts that adding Eileen and Steven as trustees actually expanded Dru's power by giving him a greater ability to distribute the property held by the CXG Trust. She contends that Dru has received more than $17 million in tax-free distributions from the CXG Trust since 2006, has borrowed and repaid millions of dollars from DDG, and, as of the time of the trial, owed DDG $6 million. Again, Stacy's position ignores key provisions of the CXG Trust document. The testimony presented at trial established that during the time Dru was the sole trustee of the CXG Trust, his ability to receive disbursements

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of the trust; and to designate or appoint a trustee to act in any other jurisdiction as the sole trustee or co-trustee of any part or all of the trust estate located in such other jurisdiction; to confer upon the appointed trustee any or all of the powers, duties or rights of the appointing Trustee; and to remove any trustee appointed pursuant hereto and appoint another, including the appointing Trustee." For two principal reasons, this provision does not provide Dru the power to remove Eileen and Steven. First, Eileen and Steven were appointed as co-trustees pursuant to article 13.1 of the CXG Trust. Stacy does not direct us to a corresponding provision in Article XIII of the CXG Trust providing for removal of a trustee. Second, the scope of paragraph six of Article XII is narrow. It allows the trustee the power to appoint, and the discretion to remove, an individual to oversee trust property located in a foreign jurisdiction. Stacy does not explain how this provision applies here in light of the fact that Eileen and Steven were appointed pursuant to article 13.1 of the CXG Trust.

was limited to funds necessary for his support. After Dru appointed additional trustees, however, he was allowed discretionary distributions from time to time by the trustees if in Dru's best interests and Dru abstained from voting. There was no evidence, however, that the addition of the trustees and the looser restrictions turned the CXG Trust into Dru's "personal piggy bank" as Stacy contends. Steven testified that in his capacity as trustee, he has fiduciary duties "to be responsible for knowing what's going on with DDG and its various operating companies." Steven also testified that Dru has made requests for distributions from the CXG Trust, including money for a car, which he and Eileen have denied. Moreover, although Stacy points out that Dru received more than $17 million tax-free distributions from the CXG Trust since 2006, the document Stacy cites shows that the distributions after 2010, when Dru appointed the additional trustees, were substantially *lower* than any of the distributions made between 2006 and 2009. Finally, while Stacy asserts that $6 million in funds Dru borrowed from DDG remained unpaid at the time of trial, she does not allege any wrongdoing on Dru's part. To the contrary, she acknowledges that Dru has repaid millions in funds from DDG that he previously borrowed. See *Larocque*, 2018 IL App (2d) 160973, ¶ 55 (noting that although the husband borrowed money from various trusts, the loans were documented and repaid with interest).

¶ 113 Accordingly, the trial court could reasonably find that Dru did not have unfettered access to the funds as Stacy would have us believe. As such, we cannot say that a conclusion opposite that of the trial court is clearly apparent or that the trial court's findings are unreasonable, arbitrary, or not based on the evidence presented. Hence, the trial court's finding that the first factor weighs against a finding that the retained earnings were Dru's income was not against the manifest weight of the evidence.

¶ 114 The second *Joynt*/*Lundahl* factor concerns the extent to which the retained earnings are

considered in the value of the corporation and used to fund the corporation's business. *Lundahl*, 396 Ill. App. 3d at 504; *Joynt*, 375 Ill. App. 3d at 821. The trial court also found that this factor weighed against holding that the retained earnings were part of Dru's income. In support of this finding, the trial court determined that the corporate retained earnings were used to facilitate the expansion of Tubular and finance corporate operations and acquisitions. Again, the evidence supports the trial court's findings. The evidence presented at trial showed that a significant portion of DDG's retained earnings are derived from Tubular. Steven testified that Tubular's profits are "up-streamed" to its parent, DDG. DDG, in turn distributes some of the profits to shareholders while retaining some for operational needs or for future working capital or investment needs. Additionally, Sherrill testified to two loans from DDG to finance an expansion at Tubular. In this regard, Dru authorized DDG to loan Tubular $5 million in 2010 for an expansion and $6 million 2014 to acquire land. Dru confirmed these transactions occurred. Dru also noted that the CXG Trust had operating costs of "maybe 50 to $100,000 a year in legal bills."

¶ 115 Stacy acknowledges these costs and transactions, but suggests that because the combined retained earnings of DDG and Tubular grew "exponentially" from $59 million to over $152 million between 2010 and 2014, Dru did not prove that DDG's retained earnings were utilized or needed to fund the businesses. Stacy, however, cites no authority for the proposition that a business must use a certain amount of its retained earnings each year to satisfy the second *Joynt*/*Lundahl* factor. See *Lundahl*, 396 Ill. App. 3d at 504 (2009) (citing *Ramon*, 963 A.2d at 133). Indeed, Lee Gould, Stacy's valuation expert, recognized in his report that while Tubular holds a significant amount of cash, "its gross working capital as a percent of revenues is comparable to the industry's working capital in 2015." Moreover, Vogt explained that DDG's investment strategy is to retain cash because of the volatile nature of the oil industry and in case Tubular needs to borrow money from

DDG.

¶ 116 Based on the foregoing evidence, the trial court could reasonably conclude that the retained earnings were used to facilitate the expansion of Tubular and finance corporate operations and acquisitions. Compare *Joynt*, 375 Ill. App. 3d at 821 (holding that retained earnings were part of the corporate assets, based in part on evidence showed that the retained earnings were held by the corporation to pay expenses) with *Lundahl*, 396 Ill. App. 3d at 504 (holding that retained earnings constituted shareholder-spouse's income based in part on evidence that the retained earnings were not held by the corporation to pay expenses, dividends, or another proper corporate purpose). As such, we cannot say that a conclusion opposite that of the trial court is clearly apparent or that the trial court's findings are unreasonable, arbitrary, or not based on the evidence presented. Hence, the trial court's finding that the second *Joynt*/*Lundahl* factor weighs against a finding that the retained earnings were Dru's income was not against the manifest weight of the evidence.

¶ 117 Although not discussed in depth by Stacy, the trial court also found that the third and fourth *Joynt*/*Lundahl* factors weigh against holding that the retained earnings were Dru's income. The trial court's findings are not against the manifest weight of the evidence. The third factor examines the extent of the shareholder spouse's responsibility for paying income taxes on retained corporate earnings. With respect to this factor, the trial court found that the evidence at trial established that the CXG Trust "was and continues to be responsible for paying taxes on DDG and Tubular earnings, which flow into CXG and not Dru." Since Dru was not responsible for paying taxes on any retained earnings, the court found that this factor weighed against holding that the retained earnings at issue were income to Dru. The evidence supports this finding. As noted previously, Steven testified that Tubular's profits are "up-streamed" to its parent, DDG. Steven explained that once DDG receives the profits, some of it is distributed to DDG's shareholders and some is

retained within DDG for operational needs and reserves. Steven testified that the funds are taxed at the trust level. Thus, when distributions are made from the CXG Trust, the tax has been paid before Dru receives his share. Other than to simply assert that the trial court "ignored the reality that the trust is essentially Dru's alter ego," Stacy does not dispute the trial court's finding that Dru did not pay the taxes on the retained earnings. Given Stacy's failure to develop any cogent argument or cite any evidence contrary to the trial court's finding, we agree with the trial court that that the third factor weighs against a finding that the retained earnings are part of Dru's income. Compare *Joynt*, 375 Ill. App. 3d at 821 (noting that although earnings were taxed to parties, corporation reimbursed the husband for the tax through year-end designated payments) and *Steel*, 2011 IL App (2d) 080974, ¶68 (noting that third factor favored a finding that retained earnings were not income to the husband because the corporation reimbursed the husband for the taxes he paid on the retained earnings) with *Lundahl*, 396 Ill. App. 3d at 504 (noting that this factor favored a finding that retained earnings were income to the husband rather than a corporate asset where the taxes on the retained earnings were paid by the husband).

¶ 118 The fourth factor examines the extent to which shareholder spouse's salary from the corporation was reasonable and fair for the services provided. The trial court found that the evidence at trial established that Dru was adequately and reasonably compensated by DDG over the term of the marriage. Moreover, the trial court expressly rejected the inference that DDG was undercompensating Dru at his own direction. See *Dann*, 2012 IL App (2d) 100343, ¶ 79 (noting in the context of the fourth factor, that if the shareholder-spouse is undercompensated by his own choosing and the corporation retains more earnings than are necessary to maintain the business, further income in the form of a portion of the retained earnings may be imputed to the spouse and considered marital property). As such, the court concluded that this factor weighed against a

finding that the retained earnings were income to Dru.

¶ 119 In support of its finding as to the fourth factor, the trial court referenced paragraph 10 of its judgment. Paragraph 10 is captioned "[r]easonableness of the compensation Dru Goodman received from DDG." In paragraph 10, the trial court addressed whether, pursuant to section 503(c)(2)(B) of the Act (750 ILCS 5/503(c)(2)(B) (West 2016)), the marital estate was reasonably compensated for Dru's personal efforts to DDG and its operating entities. The court noted that the parties presented various witnesses regarding Dru's work at DDG, his compensation therefor, and his involvement with Tubular. Among these witnesses were Dru, Stacy, Steven, Sherrill, DDG employees (Franzen and Vogt), a compensation expert (Cross), and business evaluation experts (Gould and Stout). Initially, the court considered Dru's involvement with DDG and Tubular. The court found that Dru, Steven, and the DDG employees "all mildly minimized Dru's work at DDG and his involvement at Tubular." Conversely, the court found that Stacy "slightly exaggerated Dru's work with DDG and Tubular and much of her testimony on this subject was speculative." The court found Sherrill's testimony credible relating to Dru's involvement with Tubular. Ultimately, the court determined that Dru's involvement with Tubular "was not day to day and was minimal as to the function and performance of its business." The court also concluded that there was no testimony that the profitability of Tubular was the result of Dru's personal efforts. In this regard, the court observed that Gould, Stout, Sherrill, and Dru all agreed that the price of oil and the energy market were the driving force to the profitability of Tubular and thus DDG.

¶ 120 Regarding Dru's compensation, the court noted that Steven and Dru testified that Dru's salary from DDG was set by Bud and essentially remained the same ($675,000) since Bud's death. The court also cited the testimony of and report authored by Cross. The court noted that Cross had 28 years of experience as a compensation expert. The court found that Cross tendered "a

comprehensive report *** of his assessment, analysis, methodology and opinion" and that Cross "followed the typical steps that compensation professionals use to assess the market value of jobs." The court further found that Cross's testimony was "thorough and comprehensive." The court noted that Cross's opinion "was not contradicted and was conservative in its final analysis." The court concluded that Cross's expert opinion was that Dru was reasonably compensated for his work at DDG and Tubular. Given the evidence presented on this factor, and in light of the trial court's analysis, we cannot say that the trial court's finding that the fourth factor weighed against a finding that the retained earnings were income to Dru was against the manifest weight of the evidence.

¶ 121 Stacy argues that, although required to do so, it is unclear to what degree, if any, the trial court considered whether Dru met his burden to prove by clear and convincing evidence that the retained earnings of DDG, Tubular, and the CXG Trust were not attributable to his "personal efforts." In support of her argument, Stacy directs us to *Dann*, 2012 IL App (2d) 100343, ¶ 83, and *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1018 (2009). The pinpoint citations provided by Stacy reference section 503(a)(8) of the Act (750 ILCS 5/503(a)(8) (West 2016)). Pursuant to section 503(a)(8), "income" from non-marital property of a spouse constitutes marital property unless the spouse claiming that it is non-marital proves by clear and convincing evidence that the "income" is "not attributable to the personal efforts of [the] spouse." *Dann*, 2012 IL App (2d) 100343, ¶ 83; *Schmitt*, 391 Ill. App. 3d at 1018.

¶ 122 The *Joynt* court did not reference section 503(a)(8) in its analysis. See *Dann*, 2012 IL App (2d) 100343, ¶ 80 (observing that although the *Joynt* court's analysis "has much in common" with the considerations relevant to determining whether income is attributable to the personal efforts of a spouse, the *Joynt* court did not identify under which subsection of section 503 it believed the

retained earnings fell). Perhaps the *Joynt* court did not expressly mention section 503(a)(8) because it concluded that the retained earnings in that case constituted a corporate asset rather than income to the shareholder spouse. *Joynt*, 375 Ill. App. 3d at 819-21. And while the *Lundahl* court found that section 503(a)(8) did apply, that court concluded that the retained earnings at issue did constitute income to the shareholder spouse. *Lundahl*, 396 Ill. App. 3d at 504. Here, the trial court, like the *Joynt* court, found that the retained earnings were not part of Dru's income. Thus, it would seem that pursuant to *Joynt*, there is no need to apply section 503(a)(8) of the Act. Indeed, although Stacy cites to the sections of *Dann* and *Schmitt* discussing section 503(a)(8) of the Act, she herself does not expressly reference this statutory provision in her analysis. In any event, to the extent the trial court was required to determine whether the retained earnings were attributable to Dru's personal efforts, we find that the court adequately did so when it concluded that the evidence presented at trial did not support the inference that DDG was undercompensating Dru at his own direction.

¶ 123 In fact, despite claiming that it is unclear whether the trial court considered whether the retained earnings were attributable to Dru's personal efforts, Stacy later acknowledges that the trial court "touched upon Dru's personal efforts contributions" in paragraph 10 of its judgment. However, Stacy complains that the court failed to acknowledge Dru's ownership of DDG and its operating entities and his positions as DDG's president and board chairman. Stacy also complains that the court failed to recognize that Dru was "solely responsible for all major decisions," he "exerted total control over the corporation," and he "was responsible for the phenomenal success of the business *** and the millions of dollars of retained earnings that have been amassed." We disagree. As noted above, the trial court was presented with conflicting evidence regarding the scope of Dru's work at DDG and Tubular. The trial court thoroughly reviewed the evidence

regarding the scope of Dru's duties and weighed it accordingly, as was its province as the trier of fact. *In re Marriage of Sturm*, 2012 IL App (4th) 110559, ¶ 6. We will not substitute our judgment for that of the trial court with respect to the weight to be given the evidence.

¶ 124 Stacy also complains that the trial court, in its judgment, failed to mention Eileen's March 10, 2009, affidavit or her testimony, in which she attributed DDG's success following Bud's death to Dru. Stacy, however, points to nothing affirmative in the record to show that the trial court did not consider Eileen's affidavit or her testimony. Indeed, this evidence was before the trial court, and, absent clear evidence to the contrary, we must presume that the trial court considered and properly weighed it. See *Young v. Herman*, 2018 IL App (4th) 170001, ¶ 68 (noting that a court need not explicitly mention every piece of evidence that it considers in reaching its decision). Stacy also contends that the trial court's finding that Dru's involvement with Tubular was minimal was contradicted by various pieces of evidence in the record. Again, however, Stacy's position ignores the fact that the parties presented conflicting evidence regarding the extent of Dru's involvement in DDG and Tubular. The trial court weighed and resolved the conflict in this evidence, as was its province to do. *Sturm*, 2012 IL App (4th) 110559, ¶ 6. Accordingly, we find that the trial court's finding as to the fourth factor was not against the manifest weight of the evidence.

¶ 125 Stacy alternatively argues that if this court affirms the trial court's finding that the retained earnings are Dru's non-marital property, the marital estate is entitled to reimbursement from Dru's non-marital estate pursuant to section 503(c)(2)(B) of the Act (750 ILCS 5/503(c)(2)(B) (West 2016)) because Dru's significant efforts to his business resulted in substantial appreciation.

¶ 126 Section 503(c)(2)(B) of the Act provides in relevant part that "[w]hen a spouse contributes personal effort to non-marital property, it shall be deemed a contribution from the marital estate,

which shall receive reimbursement for the efforts if the efforts are significant and result in substantial appreciation to the non-marital property except that if the marital estate reasonably has been compensated for his or her efforts, it shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate." 750 ILCS 5/503(c)(2)(B) (West 2016). The burden of proof is on the party requesting reimbursement by clear and convincing evidence. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 644 (1993). Whether reimbursement is appropriate is a question of fact. *Dhillon*, 2014 IL App (3d) 130653, ¶ 29. A trial court's finding as to reimbursement will not be reversed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Stuhr*, 2016 IL App (1st) 152370, ¶ 61; *Dhillon*, 2014 IL App (3d) 130653, ¶ 29; *Dann*, 2012 IL App (2d) 100343, ¶ 159; *In re Marriage of Ford*, 377 Ill. App. 3d 181, 185-86 (2007).[7] Under the manifest weight of the evidence standard, we give deference to the trial court as the finder of fact because it is in a superior position to observe the demeanor of the witnesses, determine and weigh their credibility, and resolve any conflicts in the evidence.

[7] In her brief, Stacy, citing *In re Marriage of Crook*, 211 Ill. 2d 437, 453-55 (2004), asserts that the standard of review for the issue of reimbursement to the marital estate is an abuse of discretion. We recognize that in *Crook* our supreme court reviewed a trial court's decision awarding reimbursement for an abuse of discretion. However, in discussing the standard of review, the *Crook* court cited to *In re Marriage of DeRossett*, 173 Ill. 2d 416, 422 (1996), which invoked the abuse-of-discretion standard of review in relation to the *distribution* of marital assets. Ultimately, we find the specific decision of whether to award reimbursement is a factual finding better subject to review under the manifest-weight standard. See *Dhillon*, 2014 IL App (3d) 130653, ¶ 29; *Ford*, 377 Ill. App. 3d at 185-86.

Romano, 2012 IL App (2d) 091339, ¶ 95. As noted, a finding is against the manifest weight of the evidence only if it is clearly apparent from the record that the trial court should have reached the opposite conclusion or if the finding itself is arbitrary, unreasonable, or not based upon the evidence presented. *Kavchak*, 2018 IL App (2d) 170853, ¶ 65.

¶ 127 As discussed earlier, in paragraph 10 of its judgment, the trial court addressed whether, pursuant to section 503(c)(2)(B) of the Act (750 ILCS 5/503(c)(2)(B) (West 2016)), the marital estate was reasonably compensated for Dru's personal efforts to DDG and its operating entities. Ultimately, the court found that Dru was "adequately and reasonably compensated by DDG over the term of the marriage" and that the marital estate "was reasonably compensated for Dru's efforts to his non-marital property." As such, the court concluded that "Dru's efforts at DDG, Tubular, and/or CXG shall not be deemed a contribution to the marital estate and there shall be no reimbursement to the marital estate."

¶ 128 Stacy argues that Dru failed to present any evidence that he was adequately compensated for his "personal efforts contributions to his business as its president and board chair." To the contrary, Stacy insists that Dru was undercompensated for his personal efforts during the marriage. In support of her argument, Stacy asserts that Dru's salary was increased from $675,000 to over $1 million after the divorce began ostensibly to show that he was not undercompensated. Stacy also cites the fact that Eileen was paid more than Dru "for essentially doing no more than occasionally visiting the office and talking with people for a few hours when she was not in Florida from November to May." Stacy essentially invites us to reweigh the evidence and find that the evidence she cites was entitled to more weight than the evidence presented by Dru. However, as noted above, we give deference to the trial court as the finder of fact because it is in a superior position to observe the demeanor of the witnesses, assess their credibility, weigh the evidence, and

resolve any conflicts in the evidence. *Romano*, 2012 IL App (2d) 091339, ¶ 95. In this case, we cannot say that the evidence Stacy cites is so compelling that the trial court was required to give more weight to it than the other evidence, such as Cross's opinion.

¶ 129 Stacy also faults the trial court for crediting Cross's testimony regarding the adequacy of Dru's compensation. Stacy complains that Cross included the dividends and distributions from the CXG trust in assessing the reasonableness of Dru's compensation. According to Stacy, this was "inapposite of both legal and common-sense understandings of what 'compensation,' 'dividends,' and 'trust distributions' are." Stacy reasons that once the inappropriate inclusion of Dru's dividends and distributions is removed from Cross's work, the rest of his analysis is helpful. Stacy explains as follows:

> "Mr. Cross testified that if Dru held the position of non-executive chairman, CEO and CFO of DDG, he would assign a 15-20% premium to highest compensation of the three roles, which in this case was the CEO of the market comparable. Since Dru held the title, and/or fulfilled the responsibilities, of DDG's chairman of the board, president, CEO and CFO, the adequacy of his compensation could be reasonably compared to a CEO market comparable, with a 20% premium added, to determine whether he was reasonably compensated."

Applying a CEO market comparable with a 20% premium, Stacy asserts that the marital estate was undercompensated by more than $17 million.

¶ 130 We find Stacy's position unpersuasive. Stacy's argument is based on the unsupported premise that Dru held the title or fulfilled the responsibilities of DDG's chairman of the board, president, CEO and CFO. While the evidence established that Dru served as DDG's president and board chair, Stacy cites no evidence of record that Dru held the titles of CEO or CFO, much less

that he fulfilled the responsibilities of these positions. To the contrary, it was the opinion of Cross, the only compensation expert to testify at the dissolution proceeding, that Dru's role at DDG was akin to that of non-executive chairman because Dru's position was principally one of oversight. Stacy presented no expert compensation witness of her own to counter Cross's testimony. Indeed, as the trial court found, Cross's testimony was not contradicted. In short, given that Stacy's argument is based on a flawed premise and in light of her failure to call her own expert regarding Dru's compensation, we find ill-taken her claim that the trial court erred in finding that the marital estate was not entitled to reimbursement for Dru's personal efforts at DDG.

¶ 131 For the foregoing reasons, we find that the trial court's classification of the retained earnings of DDG, Tubular, and the CXG Trust as Dru's non-marital property was not against the manifest weight of the evidence.

¶ 132 3. Maintenance

¶ 133 Next, Stacy challenges the trial court's award of maintenance. A trial court's award of maintenance is presumed to be correct. *In re Marriage of Nord*, 402 Ill. App. 3d 288, 292 (2010). As such, a maintenance award will be reversed on appeal only if the trial court abuses its discretion. *In re Marriage of Cole*, 2016 IL App (5th) 150224, ¶ 10. An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the court. *In re Marriage of Johnson*, 2016 IL App (5th) 140479, ¶ 93. The party claiming the trial court's maintenance award was improper bears the burden of showing the trial court abused its discretion. See *Nord*, 402 Ill. App. at 292.

¶ 134 Section 504(a) of the Act (750 ILCS 5/504(a) (West 2016)) provides that in a dissolution proceeding, the trial court may grant maintenance for either spouse "in amounts and for periods of time as the court deems just." Section 504(a) sets forth a list of factors for the trial court to consider

in determining whether a maintenance award is appropriate. 750 ILCS 5/504(a) (West 2016). If the court determines that an award of maintenance is appropriate, it must then set the amount and duration of maintenance. 750 ILCS 5/504(b-1) (West 2016). Where the parties' combined gross annual income is less than $250,000 and the payor spouse has no obligation to pay child support or maintenance from a prior relationship, the amount and duration of maintenance is established according to statutory guidelines. 750 ILCS 5/504(b-1) (West 2016).[8] However, where the parties' combined gross annual income is greater than $250,000, the trial court may impose a non-guidelines award of maintenance after consideration of the relevant statutory factors in section 504(a) of the Act (750 ILCS 5/504(a) (West 2016)). 750 ILCS 5/504(b-1), (b-2) (West 2016). The Act requires the trial court to make specific findings of fact "stat[ing] its reasoning for awarding or not awarding maintenance and *** includ[ing] references to each relevant factor set forth in [section 504(a)]." 750 ILCS 5/504(b-2)(1) (West 2016).

¶ 135 In this case, the trial court considered the relevant statutory factors set forth in section 504(a) of the Act (750 ILCS 5/504(a) (West 2016)) and concluded that an award of maintenance was appropriate, but that the statutory guidelines as to the amount and duration of maintenance were not applicable. Ultimately, the court ordered Dru to pay Stacy maintenance of $65,000 per month indefinitely, commencing on July 1, 2017, and continuing thereafter until Dru's death, Stacy's death, Stacy's remarriage, or cohabitation by Stacy, on a resident, continuing conjugal basis.

[8] Section 504(b-1) has since been amended to provide that the statutory guidelines apply in situations when the combined gross annual income of the parties is less than $500,000. See P.A. 100-520, § 15, eff. Jan. 1, 2018 (amending 750 ILCS 5/504(b-1) (West 2016)).

¶ 136 On appeal, Stacy complains that the trial court erred in awarding her periodic maintenance payments of $65,000 per month in lieu of a lump-sum maintenance-in-gross award. We disagree.

¶ 137 In *In re Marriage of D'Attomo*, 2012 IL App (1st) 111670, ¶ 24, the court explained the difference between maintenance in gross and periodic maintenance:

> "Periodic maintenance, the common type of maintenance, typically takes the form of an order to pay a spouse a specified amount at regular intervals. *In re Marriage of Mass*, 102 Ill. App. 3d 984, 994 (1981). Under the *** Act ***, the defining characteristic of periodic maintenance is its indefiniteness, as it may be modified or terminated by a court upon a showing of a 'substantial change in circumstances.' 750 ILCS 5/510 (a-5) (West 2010); *Mass*, 102 Ill. App. 3d at 994. In contrast, maintenance in gross involves an order to pay a spouse 'a definite total sum upon the entry of the decree or a definite total sum in installments over a definite period of time.' *Mass*, 102 Ill. App. 3d at 994. The distinguishing characteristics of maintenance in gross are its definite sum and its vesting date. *In re Marriage of Hildebrand*, 166 Ill. App. 3d 795, 799 (1988). Amounts that are awarded as maintenance in gross are not subject to modification based on a change in circumstances. *In re Marriage of Freeman*, 106 Ill. 2d 290, 298 (1985). Maintenance in gross, like 'alimony in gross' awarded prior to the Act, is in the nature of a property settlement and creates a vested interest in the recipient. *Id*. At 296."

Absent exceptional circumstances, periodic maintenance is the preferred form of maintenance. *In re Marriage of Bohnsack*, 2012 IL App (2d) 110250, ¶ 10 (citing *Lamp v. Lamp*, 81 Ill. 2d 364, 374 (1980)). Nevertheless, the supreme court has recognized that section 504(a) of the Act authorizes the trial court to award maintenance in gross if the court "finds it to be appropriate in a particular case." *Freeman*, 106 Ill. 2d at 298.

¶ 138 Stacy argues that the trial court should have awarded maintenance in gross as opposed to periodic payments because "the parties engaged in highly contested and protracted divorce proceedings" for nearly four years. See *In re Marriage of Patel*, 2013 IL App (1st) 112571, ¶¶ 93-94 (awarding maintenance in gross in part to eliminate the "endless and destructive arguments between the parties over financial matters"). During that time, the parties fought over virtually everything, including discovery, temporary support, and the trial issues incident to the divorce, including property classification, valuation and division, dissipation, maintenance, child support, and contribution to attorney fees. According to Stacy, the severe bitterness of the parties is best illustrated by the fact that she obtained a plenary order of protection after Dru "caused [her] to be under daily surveillance by various private investigators that he surreptitiously hired to watch her and report her every move for over three and one-half years, at the unfathomable cost of $1.5 million." Stacy asserts that based on these "exceptional circumstances," an award of maintenance in gross would have been the best way to limit future opportunities for litigation between the parties.

¶ 139 According to Dru, the trial court lost the statutory authority to award maintenance in gross before it entered its judgment of dissolution because the legislature amended section 504 of the Act effective January 1, 2016, to eliminate maintenance in gross from the statute. Dru further contends that even if maintenance in gross had survived repeal, the trial court appropriately exercised its discretion to award Stacy periodic maintenance. We note initially that Dru does not specifically identify the change the legislature made to section 504 of the Act to eliminate maintenance in gross from the statute. Accordingly, we find this argument forfeited. Ill. S. Ct. R. 341(h)(7), (i) (eff. Nov. 1, 2017) (noting that points not argued are waived). Even if Dru had properly raised this argument, we would not have to address whether the 2016 amendment to

section 504 of the Act eliminated maintenance in gross as we find that the trial court did not abuse its discretion in awarding Stacy periodic maintenance.

¶ 140 As noted, Stacy directs us to *Patel*, 2013 IL App (1st) 112571, in support of her argument to reverse the trial court's award of periodic maintenance and substitute an award of maintenance in gross. However, Stacy cites no facts from that case that support her request for maintenance in gross. Indeed, *Patel* presented a scenario opposite to the one here in that the wife in *Patel* argued that the trial court abused its discretion in awarding her maintenance in gross in lieu of periodic maintenance. And while the *Patel* court stated that it was appropriate to consider the "elimination of endless and destructive arguments between the parties over personal or financial matters" in awarding maintenance in gross, the court acknowledged that this was but one factor to consider. *Patel*, 2013 IL App (1st) 112571, ¶ 94. Significantly, the *Patel* court cited other factors in upholding the trial court's award of maintenance in gross. For instance, the *Patel* court cited the short duration of the parties' marriage (eight years) and the fact that the wife had received a law degree just five years prior to the parties' separation. *Patel*, 2013 IL App (1st) 112571, ¶ 90. The court also relied on the wife's failure to use her advanced degree to obtain full-time employment despite the fact that she no longer had custody of the children, the wife's receipt of $6000 per month in support during the parties' separation, and the wife's decision to pursue an advanced degree in theology that was not necessary for her current employment. *Patel*, 2013 IL App (1st) 112571, ¶ 92. The *Patel* court emphasized that under the abuse of discretion standard, the relevant inquiry is "whether any reasonable person could have taken the position adopted by the trial court." *Patel*, 2013 IL App (1st) 112571, ¶ 95 (quoting *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 708 (2006)). Ultimately, the reviewing court determined that the trial court's award of maintenance in gross was supported by the evidence and was fair and reasonable under the

circumstances of the case. *Patel*, 2013 IL App (1st) 112571, ¶ 96.

¶ 141 Aside from the contentious nature of the divorce, Stacy cites no other reason for an award of maintenance in gross. More importantly, in determining whether a maintenance award was appropriate, the trial court thoroughly and thoughtfully made findings of fact as to each statutory factor. For instance, the court noted that Stacy was not employed outside the home and her non-marital estate, valued at $244,450, consists of personal property. 750 ILCS 5/504(a)(1) (West 2016). Based on the testimony of Lee Gould, Stacy's lifestyle and business evaluation expert, the court determined that Stacy's monthly "lifestyle expenditure" amounted to $56,885. 750 ILCS 5/504(a)(2) (West 2016). The court noted that Stacy has been a stay-at-home parent since the beginning of the marriage, has no sources of income or likelihood of employability or acquisition of capital assets or income. 750 ILCS 5/504(a)(3), (a)(4) (West 2016). The court further noted that the parties had been married for more than 17 years when Stacy filed her petition for dissolution of marriage and that the parties enjoyed a "substantial" standard of living during the marriage. 750 ILCS 5/504(a)(7), (a)(8) (West 2016). Quite simply, other than the argument that their marriage was contentious, this case is readily distinguishable from *Patel*.

¶ 142 For the foregoing reasons, we find that the trial court's award of periodic maintenance was supported by the evidence and was fair and reasonable under the circumstances. Accordingly, we cannot say that no reasonable person would take the position adopted by the trial court. Thus, the trial court did not abuse its discretion in awarding Stacy periodic maintenance in lieu of maintenance in gross.

¶ 143 B. Dru's Cross-Appeal

¶ 144 Dru also raises three issues in his cross-appeal. First, Dru challenges the propriety of the plenary order of protection entered in this case. Second, Dru challenges the trial court's decision

to grant Stacy's motion for contribution to her attorney fees. Finally, Dru asserts that the trial court erred in classifying as marital property his 0.1% interest in DDG.

¶ 145 1. Order of Protection

¶ 146 Dru first argues that the plenary order of protection entered by the trial court is against the manifest weight of the evidence and should be reversed because it was necessary to accomplish a purpose which is reasonable under the circumstances, *i.e.*, gathering evidence of cohabitation in a divorce case.

¶ 147 a. Background

¶ 148 As noted above, the divorce proceedings in this case commenced in November 2013. On December 11, 2013, Stacy served upon Dru's counsel an emergency petition for order of protection. On December 20, 2013, the trial court entered an agreed order which required Dru to cooperate and transfer funds for Stacy's purchase of a new residence. The December 20, 2013, agreed order also provides that Stacy's emergency petition for order of protection had been withdrawn and "shall be purged from the court file." A separate order also entered on December 20, 2013, restrained each party from harassing, intimidating, or interfering with the other's liberty.

¶ 149 On March 12, 2017, Stacy filed a verified petition for an order of protection under the Domestic Violence Act (750 ILCS 60/101 *et seq*. (West 2016)), naming Dru as the respondent. Attached to the petition was an affidavit from Stacy. In the affidavit, Stacy stated that she suspected that Dru had hired a private investigator to follow her soon after she filed for divorce. Stacy stated that her suspicion was confirmed on December 31, 2015, when her boyfriend, Matthew Kornick, looked out the window of Stacy's home and observed a camera flash from a car parked nearby. Stacy exited her residence to obtain the car's license-plate number, but the vehicle began to drive away. Stacy entered the middle of the street in an attempt to stop the driver. The

driver turned on his high beams and drove towards Stacy. Stacy moved away so that the driver would not run her over. Stacy obtained the license-plate number and filed a police report. She later learned that the owner of the car was Bing R. Apitz, a private investigator.

¶ 150 In response to the incident with Apitz, Stacy's attorneys issued a discovery request on Dru. Stacy learned that between September 2013 and April 2016, Dru hired someone to follow, videotape, and photograph her for approximately 12 hours per day at her home, while she was on vacation, and in public places. Stacy later discovered that Dru had spent more than $1.295 million to surveil her. Stacy stated that Dru's constant surveillance caused her emotional distress and anxiety. Stacy stated that she continues to fear that Dru has someone following and recording her at all hours of the day at her home and in public places because, on February 27, 2017, Dru disclosed another private investigator, Robert Scigalski, to testify at trial to private investigative services that he provided to Dru.

¶ 151 In his response, Dru recounted that Stacy filed an emergency petition for order of protection in December 2013 to enjoin Dru from "continuing to employ any private detective to follow/investigate [her]." Shortly thereafter, Stacy withdrew the emergency petition after Dru agreed to make available the funds necessary for Stacy to purchase her current residence. Dru therefore alleged that Stacy's claim of distress was pretextual because she withdrew the emergency petition in exchange for "a financial payoff" in which Dru agreed to advance her money to purchase a home. Dru further explained that Stacy was seeking maintenance, but he believed that Stacy and Kornick were cohabiting. Thus, Dru asserted, the surveillance was "in pursuit of relevant information or information that may lead to relevant information" regarding cohabitation and that the discovery methods employed "do not fall within the definition of 'harassment' as defined by the [Domestic Violence Act]."

¶ 152 On April 12, 2017, the trial court entered an agreed interim order of protection that, among other things, prohibited Dru or an investigator or agent on his behalf from harassing or stalking Stacy. The agreed interim order, which was set to expire in May 2017, was extended multiple times. A hearing on Stacy's verified petition for an order of protection was held over three dates in August and September 2017. Five witnesses testified at the hearing: Scigalski, Vogt, Dru, John Purdy, Jr., and Stacy.

¶ 153 Scigalski testified that he is a retired Federal Bureau of Investigation (FBI) agent who works as a private investigator. Scigalski was hired by Dru's attorney to investigate whether Stacy and Kornick were cohabiting. Scigalski's investigation lasted from February 15, 2017, through March 25, 2017. Surveillance would often start at Stacy's home and the agents would follow Stacy and the children to see if Kornick was there. All surveillance was within the law after advising the local police. Scigalski described how the surveillance revealed individuals associated with Kornick, Stacy shopping and eating at restaurants with the children and Kornick, and Stacy and Kornick together at Evanston High School for an event for Stacy's son. At times, the surveillance was for 18 hours a day.

¶ 154 Scigalski also testified as to his understanding of "cohabitation." Scigalski defined the term as "when two people live together and conduct their life together *** [a]s if they were married." Scigalski acknowledged that Stacy and Kornick do not live together and reside in separate abodes. At the close of Scigalski's testimony, Stacy moved into evidence five binders of exhibits comprising invoices, reports, and photographs related to Scigalski's investigation. Dru did not object to the admission of this evidence, and the court granted Stacy's motion. Scigalski charged over $100,000 for his work.

¶ 155 Vogt, a DDG employee, testified that in 2013 Dru confided that he was having family

problems, was receiving threatening phone calls, and expressed concern for the well-being of his children. In August 2013, Vogt hired private investigator Bob Arden without Dru's knowledge and instructed Arden to look into Stacy's whereabouts and activities and to look out for the safety of Dru and Dru's children. When Arden discovered Stacy was consistently with another man, the directive changed to investigating possible cohabitation. Vogt engaged Purdy to oversee Arden. Dru knew about the investigator two or three months after Vogt hired him. According to Vogt, surveillance ceased "[b]efore the trial."

¶ 156 Dru testified that he did not learn that Vogt hired an investigator until December 2013 or January 2014. He understood Vogt did so initially for the safety of Dru and his children because Stacy was bringing the children around Kornick. The investigation continued so as "to prove adultery" and subsequently conjugal cohabitation. Dru testified that the investigation lasted until August 2016, but his divorce counsel hired another investigator and that investigation lasted until March 2017.

¶ 157 Purdy testified that he has been a licensed attorney since 1966. Vogt engaged him on behalf of DDG to review investigator Arden's reports "to make sure that there were no problems for [DDG] and its officers." Once Purdy reviewed the reports, he would send them to Vogt. Purdy charged $375 per hour for his services. Purdy did not find anything improper about the way the reports were prepared. Arden's reports were not admitted into evidence due to lack of foundation.

¶ 158 Stacy testified that she first believed she was under surveillance late in 2013, when she was visiting Kornick at a friend's house in Wheeling. At that time, her friend's neighbor saw someone take pictures and look into the windows of Stacy's car. Stacy testified that when she learned that someone was taking photographs of her car, it made her feel "[a]ngry, anxious, violated." Stacy testified that she has addressed her feelings with a therapist, although she acknowledged that she

had been seeing a therapist long before the divorce proceedings commenced.

¶ 159 Stacy further testified that she "would periodically see people" and was suspicious of being watched but became certain on December 31, 2015, when Kornick saw from the window of her home flashes from someone taking pictures of her and Kornick's cars in her driveway. Stacy ran outside in an attempt to get the license plate number of the vehicle. As the car approached Stacy, she placed her hands up to stop the vehicle. However, the driver kept going so Stacy jumped out of the way. Stacy later contacted the police. Stacy acknowledged that the private investigator did not come onto her property, but testified that once she was able to confirm that she was being followed she felt "worse" because she wondered who was watching her. Stacy explained that she has become paranoid and that sometimes she cannot sleep at night.

¶ 160 At the conclusion of the evidence on September 6, 2017, the trial court granted Stacy's petition. The court made the following remarks in support of its ruling:

> "Counsel, the forthcoming [*sic*] about her relationship with Matt Kornick, what business is it of any of ours other than as it relates to the issue of cohabitation? We are not the moral police. We are not the judgment police. We are—the only—I had already ruled on the issue of cohabitation. That wasn't even close.
>
> And what I have here is I have an obsessive pattern of surveillance of his wife that was precipitated, not by the trying [*sic*] to draw a legal conclusion as to whether she was cohabitating, but initially to show that she was having an affair, which is not something that is something that is of concern to me certainly now. And that was his—and I get it, but that was his personal concern.
>
> If he were the one surveilling, if he were the one outside the house, if he were the one following her to her boyfriend's apartment, if he were the one taking 2,000 pictures,

this wouldn't even be a question. But because he has the means, the means to hire a high-end private investigator, all of a sudden it is, oh, it is okay. He has the ability to—in which actually makes it worse because she knows he has the ability. *** He—I mean, this is a—this became obsessive.

Anybody who would spend $1.5 million over a period of little over three years in private investigators is somebody with too much money and who is obsessed. And that in and of itself causes—would cause any reasonable person anxiousness, all the terms she used, to be afraid, angry, upset. I would be—any of us would be furious if somebody surveilled us like that. We would all feel violated, that's the perfect word, violated. This is beyond any means, and I will take it beyond necessary to accomplish a purpose.

This is—this is—you know, you did great research on your cases. But I don't know what those other—the rules of the definitions given by the statute in those other states. But for me to just like totally disregard what the definition of harassment is as defined by the statute, harassment means knowing conduct which is not necessary to accomplish a purpose. This was not necessary to accomplish a purpose. This was not necessary to accomplish any purpose. The initial purpose was to find out if she was having an affair. It ultimately transformed into whether or not she is cohabitating. But that would mean that only people of means of Dru Goodman could prove cohabitation, which is not the case.

Would cause a reasonable person emotional distress and does not cause—and does cause [*sic*]. Unless the presumption is rebutted, this hits two things, repeatedly follow Petitioner about in a public place or places. Now, trust me, when they wrote this, they had no idea that somebody would be surveilled like she was surveilled. I mean,

some of these time sheets that I saw that are in evidence are 18 hours a day. She is sleeping, and they are outside her house.

How would you like a van outside your home with your children surveilling you? How would you like it? We would feel violated.

The other thing is repeatedly keeping Petitioner under surveillance by remaining present outside his or her home or in other places. I mean, this fits it perfectly. And I could go like this and say, oh, it is some wealthy guy who has the means to hire a fancy former FBI agent, and he won't violate the law because he knows what the law is or he is clever enough to not be seen all the time. But this is it. We would all be violated. This is a perfect—this is—this I don't care what the Appellate Court does with this if you appeal because I am following the law. How they manipulate it, I don't care because this is—these facts fit the statute perfectly.

I am going to enter the order. It is going to be a two-year order. The order is just going to prevent him or agents of him from surveilling her outside her home. She is not working, right? So her home, her social, like a health club or whatever known social locations we can name within the petition for two years.

I think from the way I am expressing myself, I think I am making my point that this was completely and utterly inappropriate and warrants a plenary order of protection."

That day, the trial court entered a two-year plenary order of protection against Dru. The trial court prohibited Dru from "further acts/threats of abuse on protected persons." The court did not check any of the boxes on the plenary order of protection with respect to police-enforced remedies or firearms. Instead, the court imposed a "miscellaneous" remedy which specifically enjoined Dru "from engaging in surveillance of the petitioner, either personally or through his agents, assigns,

or any other person or company on his behalf."

¶ 161 b. The Domestic Violence Act

¶ 162 The Domestic Violence Act is to be liberally construed and applied to advance its underlying purposes, which include "to promote safe and healthy families" by "prevent[ing] abuse and harassment between family or household members." 750 ILCS 60/102 (West 2016); *People v. Leezer*, 387 Ill. App. 3d 446, 449-50 (2008); *Glater v. Fabianich*, 252 Ill. App. 3d 372, 375 (1993). The Domestic Violence Act provides for three types of orders of protection—emergency (750 ILCS 60/217 (West 2016)), interim (750 ILCS 60/218 (West 2016)), and plenary (750 ILCS 60/219 (West 2016))—as well as various types of remedies (750 ILCS 60/214 (West 2016)). In this case, the order of protection at issue is a two-year plenary order of protection against Dru which prohibited him "from further acts/threats of abuse" on Stacy and enjoined Dru "from engaging in surveillance of [Stacy], either personally or through his agents, assigns, or any other person or company on his behalf."

¶ 163 Section 219 of the Domestic Violence Act provides that a plenary order of protection "shall issue" if the petitioner has, among other things, satisfied the requirements of section 214 of the Domestic Violence Act. 750 ILCS 60/219 (West 2016). Section 214 of the Domestic Violence Act provides that "[i]f the court finds that petitioner has been abused by a family or household member *** an order of protection prohibiting the abuse *** shall issue." 750 ILCS 60/214(a) (West 2016). The Domestic Violence Act defines "abuse" as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation but does not include reasonable direction of a minor child by a parent or person in loco parentis." 750 ILCS 60/103(1) (West 2016). The Domestic Violence Act defines "harassment" as follows:

" 'Harassment' means knowing conduct which is not necessary to accomplish a

> purpose that is reasonable under the circumstance; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner. Unless the presumption is rebutted by a preponderance of the evidence, the following types of conduct shall be presumed to cause emotional distress:
>
> * * *
>
> (iii) repeatedly following petitioner about in a public place or places;
>
> (iv) repeatedly keeping petitioner under surveillance by remaining present outside his or her home, school, place of employment, vehicle or other place occupied by petitioner or by peering in petitioner's windows." 750 ILCS 60/103(7) (West 2016).

Thus, to support a conclusion that an act of domestic violence has occurred due to "harassment," there must be evidence that the respondent committed conduct that (1) was knowing; (2) was not necessary to accomplish a purpose that is reasonable under the circumstance; (3) would cause a reasonable person emotional distress; and (4) did cause emotional distress to the petitioner. 750 ILCS 60/103(7) (West 2016). Moreover, certain types of conduct are presumed to cause emotional distress unless rebutted by a preponderance of the evidence. 750 ILCS 60/103(7) (West 2016); *People v. Wett*, 308 Ill. App. 3d 729, 732-33 (1999).

¶ 164 The standard of proof in a proceeding to obtain an order of protection is proof by a preponderance of the evidence. 750 ILCS 60/205(a) (West 2016); *Best v. Best*, 223 Ill. 2d 342, 348 (2006); *In re Marriage of Holtorf*, 397 Ill. App. 3d 805, 808 (2010); *Frank v. Hawkins*, 383 Ill. App. 3d 799, 812 (2008). "A preponderance of the evidence is evidence that renders a fact more likely than not." *People v. Uridales*, 225 Ill. 2d 354, 430 (2007); *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 17. When the trial court makes a finding by a preponderance of the evidence, a reviewing court will overturn the trial court's finding only if it is against the

manifest weight of the evidence. *Best*, 223 Ill. 2d at 348-49. A finding is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *Romano*, 2012 IL App (2d) 091339, ¶ 44.

¶ 165 c. Argument

¶ 166 Dru argues that the plenary order of protection entered by the trial court is against the manifest weight of the evidence and should be reversed. Dru acknowledges that there is a presumption under subsection (iv) of the definition of "harassment" in section 103(7) of the Domestic Violence Act (750 ILCS 60/103(7)(iv) (West 2016)) that repeatedly keeping someone under surveillance causes emotional distress. He asserts, however, that the trial court erred in entering the plenary order of protection because: (1) the surveillance conduct in this case was necessary to accomplish a purpose that is reasonable under the circumstance, *i.e.*, to gather evidence of cohabitation in a divorce case; and (2) evidence of Stacy's "emotional concerns" is suspect because virtually all of her knowledge of the surveillance "came after the fact through discovery responses, not contemporaneous observations" and "all observation was in public using legal methods."

¶ 167 As noted above, in order to constitute harassment as defined by the Domestic Violence Act, the trial court must find, *inter alia*, that the respondent engaged in "knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances." 750 ILCS 60/103(7) (West 2016). Here, Dru asserts that the private investigators were hired to gather evidence of cohabitation, and, therefore, their surveillance was necessary to accomplish a reasonable purpose under the circumstances. The trial court rejected Dru's argument, finding that Dru engaged in "an obsessive pattern of surveillance of his wife that was precipitated, *not by the*

[*sic*] *trying to draw a legal conclusion as to whether she was cohabiting*, but initially to show that she was having an affair." The court also remarked that the surveillance went "beyond [what was] necessary to accomplish a purpose" and that the evidence of cohabitation "wasn't even close." Based on our review of the record, we cannot say that a finding opposite that of the trial court is clearly apparent. Stacy was under almost constant surveillance for more than three years. The investigators would follow her, Kornick, and the parties' children for up to 18 hours a day to friend's homes, stores, restaurants, and school events. Yet, as Scigalski acknowledged, he was unable to establish that Stacy and Kornick resided together. Thus, even if the surveillance was partially directed at gathering evidence of cohabitation, the trial court could have concluded that the duration and scope of the surveillance exceeded what was reasonably necessary to gather evidence of cohabitation, especially given the lack of any evidence supporting Dru's claim that Stacy and Kornick were living together. Accordingly, we conclude that the trial court's finding that the surveillance was not necessary to accomplish a purpose that is reasonable under the circumstances was not against the manifest weight of the evidence.

¶ 168 In so holding, we reject Dru's reliance on three cases from foreign jurisdictions which he asserts support his claim that the surveillance in this case served a legitimate purpose. The scope and duration of the surveillance that occurred in the principal case cited by Dru, *Kennedy v. Morgan*, 726 S.E.2d 193 (N.C. App. 2012), does not remotely approach the surveillance that occurred in this case. In *Kennedy*, the appellate court reversed an order of protection entered against an ex-husband who hired a private investigator to monitor whether his ex-wife was cohabitating so that he might be able to terminate maintenance payments. *Kennedy*, 726 S.E.2d at 197. In the course of its decision, the *Kennedy* court observed that while "a person may not appreciate being subjected to surveillance by a [private investigative] service, surveillance in and

of itself, if properly conducted *** does not support a finding of 'harassment' with no 'legitimate purpose.' " *Kennedy*, 726 S.E.2d at 197 (quoting N.C. Gen. Stat. § 14-277.3A(b)(2)). In *Kennedy*, however, the evidence showed that the surveillance was conducted over "a few nights in June of 2011" by a private investigator who "parked on the public street in front of [the ex-wife's] home." Under these circumstances, the *Kennedy* court found that the evidence did not support a finding that the surveillance served no legitimate purpose, explaining:

> "The [trial court's] finding of fact notes that the surveillance was conducted 'at late hours' which also indicates that the trial court found [the ex-husband's] testimony, in this regard credible, as [the ex-husband] claimed he had hired the [private investigative] service to see if [the ex-wife] was co-habiting with another individual for alimony purposes, which would normally require overnight surveillance." *Kennedy*, 726 S.E.2d at 197.

Here, in contrast, Stacy was surveilled for up to 18 hours per day over a course of more than three years. Moreover, the investigators did not remain parked on a public street in front of Stacy's home overnight. Rather, they followed Stacy to various places, including a friend's house, a store, a restaurant, and a school event. For these reasons, *Kennedy* is clearly distinguishable from the present case.

¶ 169 Likewise, Dru's reliance on two other two foreign cases—*Anonymous v. Anonymous*, 893 N.Y.S.2d 859 (2010) and *In re Millie S. v. Thomas S.*, 77 N.Y.S.3d 829 (2018)—is misplaced. Dru cites these cases for the proposition that he had the right to gather evidence of cohabitation "up to the date of trial in defense of the matrimonial action and in support of his own counterclaim." See *Anonymous*, 893 N.Y.S.2d at 862 (finding that hiring a private investigator in a divorce action to gather evidence is for "a proper and legitimate purpose" and that the husband "had the right to

gather evidence up to the date of trial in defense of the matrimonial action and in support of his own counterclaims"); *In re Millie S.*, 77 N.Y.S.3d at 831-34 (agreeing with the husband that he was within his rights to retain a private investigator to gather evidence of his wife's alleged misconduct in pursuance of his divorce action and holding that the husband did not violate order of protection when he and the private investigator contacted the wife's attorney by email on three occasions threatening criminal prosecution against the wife). However, our conclusion does not bar a party to a divorce action from engaging a private investigator to gather evidence relevant to the divorce proceedings. Rather, we simply hold that the trial court's determination that the surveillance at issue did not serve a purpose that is reasonable under the circumstances in light of its duration and scope was not against the manifest weight of the evidence.

¶ 170 Moreover, both *Anonymous* and *Millie S.* are factually distinguishable. In *Anonymous*, the husband hired a private detective to follow and record his wife, who the husband suspected was having an affair with a priest from the church where she worked. Dru cites to no evidence in *Anonymous* that the duration and scope of the surveillance in that case approached what occurred here. In *Millie S.*, the complained of contact consisted of three emails authored by the husband and his private investigator. Again, this does not approach the duration or scope of the surveillance used by Dru in this case. *Cf.*, *In re Julie G. v. Yu-Jen G.*, 917 N.Y.S.2d 355, 360 (2011) (holding that the petitioner's testimony and the 294 emails that the respondent sent to the petitioner over an eight-month period established by a preponderance of the evidence that the respondent committed harassment).

¶ 171 Dru also suggests that the trial court erred in finding that Stacy suffered emotional distress as a result of the surveillance. In this regard, Dru asserts that Stacy admitted that she only saw an investigator on one or two occasions, virtually all of her knowledge of the surveillance came after

the fact through discovery responses not contemporaneous observations, and all observation was in public using legal methods. Dru does not cite any authority that a victim of harassment has to observe each and every act of surveillance to experience emotional distress and he cites no authority for the proposition that harassment cannot occur if the surveillance occurs in public using legal methods. Indeed, the Domestic Violence Act expressly states that there is a presumption that certain types of conduct shall be presumed to cause emotional distress, including "repeatedly following petitioner about in a public place or places" and "repeatedly keeping petitioner under surveillance by remaining present outside his or her home, school, place of employment, vehicle or other place occupied by petitioner or by peering in petitioner's windows," unless the presumption is rebutted by a preponderance of the evidence. 750 ILCS 60/103(7) (West 2016); *Wett*, 308 Ill. App. 3d at 732-33. Dru does not explain how the arguments he advances rebutted these presumptions by a preponderance of the evidence. Indeed, Stacy testified to the emotional distress she experienced as a result of the surveillance. Specifically, Stacy testified that when she learned in 2013 that someone was taking pictures of her car, she felt "[a]ngry, anxious, [and] violated" and addressed her feelings with a therapist. Stacy further testified that she was suspicious of being watched because she "periodically would see people," but following the event in 2015, she felt "worse," became paranoid, and experienced occasional sleeplessness. In short, the trial court's finding that the conduct at issue caused Stacy emotional distress is not against the manifest weight of the evidence. We therefore affirm the trial court's decision to enter a plenary order of protection against Dru.

¶ 172 2. Attorney Fees

¶ 173 Dru next argues that the trial court committed reversible error in requiring him to contribute more than $2 million to Stacy's attorney fees.

¶ 174 a. Background

¶ 175 On June 7, 2017, Stacy filed a petition seeking an order requiring Dru to contribute to her attorney fees and costs pursuant to sections 503(j) and 508(a) of the Act (750 ILCS 5/503(j), 508(a) (West 2016)). In her petition, Stacy asserted that she incurred a total of $3,163,234 in attorney fees and costs. After accounting for $1.1 million in fees she had been previously awarded, Stacy still owed her law firm (Grund & Leavitt) $2,063,234 for outstanding fees and costs in connection with the divorce proceeding. Stacy specifically referenced the following fees and costs in her petition: (1) $511,455 to prepare and fashion a defense to Dru's summary judgment motion; (2) $363,592 in relation to her effort to vacate the trial court order granting Dru's summary judgment motion; (3) $57,706 to defend against Dru's efforts to block Stacy from taking Eileen's deposition; and (4) $103,680 in relation to the cross-motions resulting in the trial court reinstating Dru's motion for summary judgment. Stacy's petition also included a chart of 30 depositions taken to prepare for trial and asserted that her attorneys incurred substantial fees in the preparation of exhibit lists, exhibits, trial stipulations, responses and arguments against Dru's motions *in limine*, and preparing for 12 witnesses disclosed to testify at trial. Stacy claimed that Dru's total legal fees are comparable to her own after considering the attorney fees and costs paid for by DDG and other entities in relation to this case. Stacy requested that the trial court require Dru to pay for "all of the attorney fees, costs, and interest in accordance with her fee agreement." Neither the fee agreement, billing records, or any affidavit was attached to Stacy's petition.

¶ 176 On June 16, 2017, Dru filed a response to Stacy's petition for contribution to attorney fees and costs. Among other things, Dru denied the reasonableness or necessity of the fees and costs alleged in Stacy's petition. He also claimed that he had incurred a total of only $1,164,353 in attorney fees through the date of his response.

¶ 177 On July 12, 2017, the trial court called the attorneys to court to discuss contribution because it was concerned with making a determination as to the reasonableness of the fees. The court stated that it was "not inclined to conduct some kind of evidentiary hearing where we put the lawyers that worked on the file on the stand" and "thought about the prospect of supplementing the petition[] through affidavit."

¶ 178 Counsel for Stacy remarked that Stacy's petition for contribution "pretty much" recited the work that was done in the case and observed that the trial court was familiar with the case having presided over the matter. Stacy's counsel further asserted that he prepared a supplement breaking down every cost incurred and to whom the funds were paid as well as "a breakdown of the total fees that [the firm] charged in the case, the total costs by lawyer, the time incurred by the [attorneys and non-attorneys], the hourly charge, the blended rate *** and the interest that was attached to the retainer agreement because [the firm] funded the fees for [Stacy]." Stacy's counsel added that if the court wanted to see the firm's "billing, the actual work done," he would take the time to "block out, eradicate all of the privileged information." But, if Stacy's firm supplied the billing to Dru's counsel, it wanted Dru's billing and that of Steven "so that we can argue *** that our billing is consistent with the work that they did and the charges that they made." Dru's counsel objected to paying the interest charged on Stacy's fees. He also stated that "the bigger issue" was that the attorney fees requested by Stacy are "literally double" that of Dru's fees. Moreover, he argued, he could not "make a coherent argument in defense of [Stacy's] claim without knowing what [her attorneys] did."

¶ 179 The court responded that it was not inclined to order the parties to produce redacted billing statements because "it would not only be a lot more work and some more fees" and the court was not sure "how much help it would be." Dru's counsel stated that he was not advocating a trial on

fees and that he did not disagree with the court's conclusion that requiring production of redacted billing statements "would be opening up Pandora's Box that will take weeks and months to play out," but argued that he did not know how the court could quantify the attorney fees and costs without additional information. Ultimately, the court decided not to require billing statements but instead allowed Stacy to supplement her contribution petition with an exhibit disclosing the total amount of fees by billing attorney name, the rate the attorney charged, the amount of billable time, and the total billed per attorney. The court said it was "inclined to just take this, supplement it with the petition, take [Dru's] response, if there is a response to this which it just seems like it is just a computation of everything."

¶ 180 Stacy's supplement consisted of 15 pages. Page one of the supplement was titled "Outstanding Balance" and provided as follows:

"Total Fees	$ 2,824,410.91
Total Expenses	$ 494,584.30
Less Payments	$ (1,100,000.00)
Interest	$ 89,424.14
Outstanding Balance	**$ 2,308,420.35**"

Page two of the supplement listed 12 attorneys from Grund & Leavitt, the period of time each attorney worked on the case, each attorney's hours (divided into "billable," "no charge," and "total" hours), each attorney's total fees billed, and each attorney's average hourly rate billed.[9]

[9] For instance, the document reflects that David Adams, the first attorney listed, worked on the case from December 5, 2013, through June 16, 2017, with 604.70 "billable" hours, zero "no charge" hours, and 604.70 "total" hours. The total fees billed by Adams were $299,600, resulting

The 12 attorneys listed a total of 5,219.43 hours worked (5,188.93 billable and 30.50 no-charge), $2,539,920.83 in fees billed, and an average hourly rate of $489.49. The document also listed 14 staff members who worked 2,101.02 hours (2,072.52 billable and 28.50 no charge) with $284,490.08 in fees billed at an average hourly rate of $137.27. Page three of the supplement detailed the payments received on Stacy's behalf. The last 12 pages of the supplement detailed the total expenses allegedly incurred with the date, description, and amount of each expense.

¶ 181 On July 18, 2017, Dru filed a response to Stacy's supplement to her petition for contribution to attorney fees and costs. Dru asserted that because the trial court determined that Stacy "was not required to tender detailed billing records beyond what is set forth in the Supplement, *** it is not possible for [him] to otherwise address the reasonableness and necessity of the time billed by Stacy's counsel and/or the staff of Grund & Leavitt as set forth on page two of her Supplement." In addition, Dru called the court's attention to various items in the supplement, including that Grund & Leavitt had billed Stacy for interest on her outstanding fees and that Stacy's lead counsel charged an average hourly rate of $746.53 per hour whereas Dru's lead trial counsel charged an hourly rate of $425 for office time and $450 for court time.

¶ 182 The trial court's ruling on Stacy's petition for contribution to attorney fees and costs was incorporated into the judgment of dissolution entered on July 26, 2017. In the judgment, the trial court found that Dru "has the ability to contribute to Stacy's attorney's fees without undermining his financial stability" and that "Stacy is not capable of paying her total attorney's fees and costs without undermining her financial stability." With respect to the reasonableness of the attorney fees and costs charged by Stacy's counsel, the judgment provides in relevant part:

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in an average hourly rate of $495.45.

> "[T]he court notes that the billing records produced by Stacy are in the form of a summary that adds up all of the billable work performed by individual attorneys and staff. These types of bundled records do not allow the court to precisely ascertain whether all of the work performed by her attorneys was reasonable. However, the Illinois Appellate Court has ruled that such a degree of precision is not required in a request for contribution. *IRMO Nesbitt*, 377 Ill. App. 3d 649, 659 (2007). If a trial court has enough information about the work performed by counsel and the reasons for that work, then the court can grant an order for contribution without examining detailed attorney billing records. See, *e.g.*, *IRMO Hasabnis*, 322 Ill. App. 3d 582, 596-97 (2001) (holding that trial judge did not abuse discretion by declining to order production of attorney billing records before awarding reasonable legal fees pursuant to request for contribution)."

Ultimately, the court found that "the legal fees and costs summarized in Stacy's petition and referenced in her supplemental exhibit are reasonable." In support of its decision the court cited: (1) Stacy's and Dru's written submissions; (2) the voluminous record in this case; (3) the court's "thorough understanding of the legal work performed by Stacy's legal counsel in preparation for trial;" and (4) the fact that Dru's own legal fees were roughly equivalent to Stacy's fees after considering the legal fees that were separately incurred by DDG in relation to the case. The court recognized that unnecessarily increasing the cost of litigation is a relevant factor in the allocation of attorney fees (see *Patel*, 2013 IL App (1st) 112571, ¶ 117), but found that this factor cannot serve as a basis for denying Stacy's request for contribution because "the highly contentious nature of litigation in this case and the resulting increase in legal fees can be attributed equally to both spouses." Accordingly, pursuant to section 503(j) of the Act (750 ILCS 5/503(j) (West 2016)), the court ordered Dru to contribute $2.4 million toward Stacy's attorney fees of $3,163,134, after

allocating the $1.1 million advance as a pre-distribution of the marital estate to Stacy.

¶ 183 b. Argument

¶ 184 In general, a party's costs and attorney fees are the responsibility of the party who incurred them. *In re Marriage of Faber*, 2016 IL App (2d) 131083, ¶ 40. However, section 508(a) of the Act allows the trial court to order a party to contribute to the other party's costs and attorney fees after considering the parties' respective financial resources. 750 ILCS 5/508(a) (West 2016); *Faber*, 2016 IL App (2d) 131083, ¶ 40. Section 508(a) provides in relevant part:

> "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 or the other party's costs and attorney's fees. *** At the conclusion of any pre-judgment dissolution proceeding under this subsection, contribution to attorney's fees and costs may be awarded from the opposing party in accordance with subsection (j) of Section 503." 750 ILCS 5/508(a) (West 2016).

In turn, section 503(j) provides in relevant part that any award of contribution "shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under section 504." 750 ILCS 5/503(j) (West 2016). Though not explicitly required by section 503(j), the statue has long been interpreted as incorporating a reasonability requirement. *In re Marriage of Kane*, 2016 IL App (2d) 150774, ¶ 22; *Nesbitt*, 377 Ill. App. 3d at 657; *Hasabnis*, 322 Ill. App. 3d at 596; *In re Marriage of DeLarco*, 313 Ill. App. 3d 107, 114 (2000).

¶ 185 We review a trial court's ruling regarding contribution to attorney fees for an abuse of discretion. *In re Marriage of Tworek*, 2017 IL App (1st) 160188, ¶ 18; *Faber*, 2016 IL App (2d) 131083, ¶ 39; *Nesbitt*, 377 Ill. App. 3d 649, 656 (2007); *Hasabnis*, 322 Ill. App. 3d 582, 597-98

(2001). An abuse of discretion occurs when the court's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *LaRocque*, 2018 IL App (2d) 160973, ¶ 94.

¶ 186 Dru argues that the portion of the trial court order requiring him to contribute more than $2 million toward Stacy's attorney fees pursuant to section 503(j) of the Act (750 ILCS 5/503(j) (West 2016)) constituted reversible error. Dru does not contest the parties' respective ability and inability to pay fees and costs. Instead, Dru challenges the trial court's reasonableness determination as to the amount of attorney fees. In this regard, Dru points out that the trial court admitted that it lacked the records (Stacy's attorneys' billing statements) necessary to ascertain if the fees were reasonable, yet it expressly rejected considering and requiring production of this information. Dru also argues that the trial court's contribution award includes interest pursuant to Stacy's fee agreement with her attorneys and that inclusion of interest in the award is improper.

¶ 187 Stacy responds that the trial court's contribution award was correct. Stacy initially contends that Dru did not request an evidentiary hearing on contribution or production of the itemized billing records of Stacy's counsel, thereby waiving his right to an evidentiary hearing on contribution as well as his right to examine the billing records. Stacy further contends that the trial court did not abuse its discretion in ordering Dru to contribute more than $2 million to Stacy's attorney fees. According to Stacy, her initial verified petition for contribution to attorney fees and costs provided the trial court with extremely detailed information regarding the issues in controversy, their complexity, the work done on each issue, and the total amount of fees and costs incurred in pursuing several major issues. Stacy further contends that any concerns regarding the sufficiency of the evidence on contribution were alleviated when she filed the supplement to her contribution petition, which detailed the total fees and costs incurred, listed each attorney and staff

member who worked on the case, and summarized the total combined billable hours and no-charge hours, the total fees billed, and average hourly rate billed. Stacy also points out that the trial court had direct knowledge of the complexity of the case given the time the court spent presiding over it. With respect to the issue of interest, Stacy disputes that the contribution award includes interest.

¶ 188 We initially reject Stacy's claim that Dru did not request an evidentiary hearing on contribution or the production of the itemized billing records of her attorney, thereby waiving his right to an evidentiary hearing on contribution and his right to examine the billing records. Dru's attorney did state at the July 12, 2017, proceeding that he was not necessarily "advocating" a trial on fees. However, at a later point in the hearing, he expressly declined Stacy's attorney's suggestion that he waive a hearing on the attorney fee issue. In addition, Dru's attorney requested that the court order Stacy's attorneys to produce their billing records so he could "make a coherent argument in defense of their claim." Under these circumstances, Stacy's waiver argument finds no basis in the record. Turning to the merits, we conclude that the trial court's decision to grant Stacy's petition for contribution to her attorney fees constituted an abuse of discretion because Stacy failed to present evidence sufficient to assess the reasonableness of the fees she requested.

¶ 189 It is the burden of the attorney seeking contribution to establish the value of his or her services and that the fees consist of reasonable charges for reasonable services. *Kane*, 2016 IL App (2d) 150774, ¶ 25. To justify fees, the attorney must present "more than a mere compilation of hours multiplied by a fixed hourly rate." *Kane*, 2016 IL App (2d) 150774, ¶ 25. Rather, the attorney must provide sufficiently detailed time records that were maintained throughout the proceeding, and those records must specify the services performed, by whom they were performed, the time expended thereon, and the hourly rate charged. *Kane*, 2016 IL App (2d) 150774, ¶ 25. Once presented with the foregoing information, the trial court should consider a variety of

additional factors in assessing the reasonableness of the fees, such as the skill and standing of the attorney, the nature of the case, the novelty and/or difficulty of the issues involved, the importance of the matter, the degree of responsibility required, the usual and customary charges for similar work, the benefit to the client, and whether there is a reasonable connection between the fees requested and the amount involved in the litigation. *Kane*, 2016 IL App (2d) 150774, ¶ 25; *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978, 984 (1987). In ruling on the reasonableness of the fees, the trial court may also rely on its own experience. *Kane*, 2016 IL App (2d) 150774, ¶ 25.

¶ 190 In this case, the contribution petition and supplement submitted by Stacy are insufficient to determine whether the attorney fees she requests are reasonable. First, although Stacy's supplement lists $2,824,410 in attorney fees and $494,585 in costs, her petition accounts for only $1,036,614 in fees and costs. Second, the petition justifies fees relating to Dru's summary judgment motion by listing various tasks and setting forth a total fee without identifying who performed each task, the time spent on each task, or the hourly rate charged for each task. Stacy's supplement did not serve to cure these deficiencies as it only compiles hours billed by Grund & Leavitt attorneys and staff multiplied by a fixed "average" hourly rate. Under these circumstances, the trial court had insufficient information to make a determination as to the reasonableness of the attorney fees for which Stacy sought contribution from Dru. Consequently, we reverse that portion of the trial court judgment requiring Dru to contribute to Stacy's attorney fees.

¶ 191 In so concluding, we find the trial court's reliance on *Nesbitt*, 377 Ill. App. 3d 649 (2007) and *Hasabnis*, 322 Ill. App. 3d 582 (2001) misplaced. Borrowing from *Nesbitt*, the court described the records submitted by Stacy as "bundled" because they "are in the form of a summary that adds up all of the billable work performed by individual attorneys and staff." The trial court

acknowledged that "bundled" records do not allow it to "precisely ascertain whether all of the work performed by [Stacy's] attorneys was reasonable," but asserted that such a degree of precision is not required in a request for contribution under *Nesbitt*, 377 Ill. App. 3d at 659. However, the "bundled" records in *Nesbitt* were actual billing statements produced in conjunction with the contribution hearing. Although the time for all work performed by an attorney was aggregated into one daily total, the records in *Nesbitt*, unlike those in this case, contained specific dates, descriptions of the work performed on those dates, the initials of the person who performed the work, the hourly rate, and the total number of hours of work performed. *Nesbitt*, 377 Ill. App. 3d at 651-52, 659. Moreover, unlike here, the trial court in *Nesbitt* held an evidentiary hearing during which several attorneys testified and the billing records were detailed. *Nesbitt*, 377 Ill. App. 3d at 651-659. Accordingly, the trial court's reliance on *Nesbitt* is misplaced.

¶ 192 The trial court cited *Hasabnis* for the proposition that if a court has sufficient information about the work performed by counsel and the reasons for that work, then it can grant an order of contribution without examining detailed billing records. However, *Hasabnis* did not address the type of hearing to be held on a contribution petition or what evidence must be considered to determine reasonableness. *Hasabnis*, 322 Ill. App. 3d at 595-96.

¶ 193 Regarding the matter of whether interest was included in the contribution award, the record shows that the trial court awarded fees and costs in the full amount Stacy requested in her petition for contribution. In paragraph 29 of the petition, Stacy requested that the court require Dru "to pay for all of the attorney fees, costs *and interest* in accordance with her fee agreement." Likewise, the supplement to Stacy's petition includes interest in the total outstanding balance. Thus, we find that the contribution award entered by the trial court included an award of interest. Stacy did not explicitly cite any authority in her contribution petition allowing for an award of interest. Indeed,

interest may only be recovered on the basis of a contract or statute. *Thompson v. Buncik*, 2011 IL App (2d) 100589, ¶ 18. Dru was not a party to the fee agreement between Stacy and her law firm. As such, an award of interest could not be assessed against him based on the fee agreement. Moreover, section 503(j) of the Act (750 ILCS 5/503(j) (West 2016)) provides only for an award of "fees and costs," not interest. Thus, the interest award was not authorized by statute.

¶ 194 One further point bears comment. We note that Stacy's June 7, 2017, petition also requested costs. The trial court found that the costs summarized in Stacy's petition and in her supplemental exhibit were reasonable. Dru does not expressly challenge the trial court's award of costs and therefore has forfeited any such claim. See Ill. S. Ct. R. 341(h)(7) (providing that points not argued in the appellant's brief are forfeited); *Kroot v. Chan*, 2019 IL App (1st) 181392, ¶ 29; *Tzakis v. Berger Excavating Contractors, Inc.*, 2019 IL App (1st) 170859, ¶ 24. Moreover, following our review of the record, we cannot say that the trial court abused its discretion in awarding the costs detailed in Stacy's filings. The last 12 pages of Stacy's supplemental exhibit listed $494,585.30 in expenses she incurred in relation to the dissolution proceeding. Significantly, Stacy detailed the date each expense was incurred, provided a description of the expense, and set forth the amount of the expense. Accordingly, while we find that the trial court abused its discretion in awarding Stacy attorney fees and interest, we affirm that portion of the trial court order awarding costs in the amount of $494,585.30.

¶ 195 Following entry of our order in this case, Stacy filed a petition for rehearing and certificate of importance. See Ill. S. Ct. Rs. 316 (eff. July 1, 2017) (certificate of importance) and 367 (eff. Nov. 1, 2017) (petition for rehearing). On our own motion, we ordered Dru to file an answer to Stacy's petition and allowed Stacy to file a reply to Dru's answer. See Ill. S. Ct. R. 367(d) (eff. Nov. 1, 2017). In her petition, Stacy argues that, for various reasons, this court incorrectly

reversed the trial court's contribution award. Alternatively, Stacy requests either a remand to the trial court to conduct a hearing on the reasonableness of her attorney fees or the grant of a certificate of importance pursuant to Illinois Supreme Court Rule 316 (eff. July 1, 2017). We decline Stacy's request for a certificate of importance pursuant to Illinois Supreme Court Rule 316 (eff. July 1, 2017). In addition, while we find Stacy's arguments for rehearing unpersuasive, her request for a remand to the trial court to conduct a hearing on the reasonableness of her attorney fees warrants discussion.[10]

¶ 196 In our original decision, we reversed the trial court's contribution award outright. Stacy submits, however, that the proper course of action would have been to remand the matter to the trial court with instructions to conduct further proceeding on the reasonableness of her attorney fees because it was "*not* [her] choice to not submit her billing records, it was the trial court's decision for which she should not be punished." (Emphasis in original.) Stacy posits that a remand would "allow[] the trial court to correct the error that *it caused* during the contribution proceedings, preserve[] [her] right to seek contribution from her multi-millionaire husband, and

[10] In her petition for rehearing, Stacy also argues that this court incorrectly affirmed the trial court's decision granting Dru's motion for summary judgment (which found that the CXG Trust and its component holdings constitute Dru's non-marital property) and classifying the retained earnings held in DDG, Tubular, and the CXG Trust as Dru's non-marital property. The arguments presented in the petition, however, merely rehash arguments that we have already addressed and rejected. See Ill. S. Ct. R. 367(b) (eff. Nov. 1, 2017) ("Reargument of the case shall not be made in the petition [for rehearing]."); *Sobina v. Busby*, 62 Ill. App. 2d 1, 25 (1965). Accordingly, they do not provide a proper basis for rehearing.

allow[] her to avoid financial ruin." (Emphasis in original.) Dru responds that a party may not escape the consequences of its own dereliction by blaming the trial court for supposedly offering erroneous advice. See *Tielke v. Auto Owners Insurance Co.*, 2019 IL App (1st) 181756, ¶ 43. According to Dru, it was Stacy's attorneys, not the trial court, who caused the error below because they "blatantly chose to withhold required evidence" pertaining to the reasonableness of their fees. Thus, Dru maintains, any attempt by Stacy's attorneys to shift responsibility to the trial court should not be countenanced.

¶ 197 The parties' arguments center on the discourse at the July 12, 2017, hearing called by the trial court to discuss the issue of the reasonableness of the attorney fees requested by Stacy in her contribution petition. The record establishes that the court (and the parties) struggled with how to proceed. At the hearing, the trial court voiced a preference for supplementing Stacy's petition over conducting an evidentiary hearing. The court then sought the parties' input on the matter. Stacy's counsel told the court that he had prepared a supplement to her contribution petition. He also offered to produce redacted billing statements (albeit with the condition that Dru's attorney did the same). The court indicated that it was not inclined to order the parties to produce redacted billing statements given the time and cost involved as well as the court's doubts about how helpful it would be. Dru's attorney agreed that requiring the production of redacted billing statements would be time consuming but asserted that that he did not know how the court could quantify the attorney fees and costs without additional information. Ultimately, the trial court considered only the contribution petition and supplement submitted by Stacy in finding that the attorney fees she requested were reasonable. As noted above, this was improper. However, given that the court and the parties struggled with how to determine the reasonableness of the attorney fees in a fair, timely, and cost-efficient manner, the hesitance of the trial court to order redacted billing statements or

conduct an evidentiary hearing as to the reasonableness of Stacy's attorney fees, and the parties' acquiescence in the court's preference how to proceed (which provided a basis for Dru's claim of error on this issue), we find that a remand, as requested by Stacy in her petition for rehearing, is appropriate. Our decision in this regard should in no way be interpreted as an opinion as to the merits, if any, of Stacy's contribution petition. That is a question for the trial court to decide.

¶ 198 In reaching this conclusion, we note that Dru's reliance on *Tielke* is misplaced. In that case, the plaintiff filed a complaint alleging that she slipped, fell, and injured herself at a bowling alley under the defendants' control. During the personal injury trial, the plaintiff rejected a $700,000 settlement offer, but later tried to accept the offer after the defendants withdrew it. The plaintiff brought the matter before the trial judge, who told the plaintiff that if the jury verdict was less than the settlement offer, her remedy would be to file a breach of contract suit to enforce the $700,000 settlement. The jury returned a verdict of $332,425 and the plaintiff accepted a check in that amount while still claiming defendants owed her the difference between the $700,000 settlement offer and the amount tendered to her in payment of the jury verdict. The plaintiff's posttrial motion did not raise the settlement offer shortfall and no appeal was filed from the final judgment entered in the personal injury action. Thereafter, the plaintiff filed a breach of contract action, arguing that the settlement agreement should have been enforced. The trial judge dismissed the breach of contract action, finding that it was an impermissible collateral attack on the order entered in the underlying personal injury case.

¶ 199 In affirming the dismissal of the breach of contract complaint, the reviewing court noted that under the collateral attack doctrine, a final judgment may only be challenged through a direct appeal or other procedure allowed by statute and remains binding on the parties until it is reversed through such a proceeding. *Tielke*, 2019 IL App (1st) 181756, ¶ 31. Thus, the plaintiff's breach

of contract action constituted an improper collateral attack on the order in the personal injury action. *Tielke*, 2019 IL App (1st) 181756, ¶ 37. The court also remarked that reliance on the trial judge's erroneous advice did not obviate the collateral attack doctrine. Citing the decision of the Illinois Supreme Court in *Bonhomme v. St. James*, 2012 IL 112393, ¶ 26, the court held the plaintiff was not excused "from following rules intended to preserve issues for review" by relying on the court's "erroneous suggestion" that she could collaterally attack the jury verdict with a later breach of contract action. *Tielke*, 2019 IL App (1st) 181756, ¶ 43. The present case is clearly distinguishable from *Tielke* in that it does not involve an attempt to circumvent court rules by launching an improper collateral attack.

¶ 200 In short, we conclude that the trial court erred in ordering Dru to pay the attorney fees requested in Stacy's contribution petition without an appropriate hearing. As such, we vacate that portion of the judgment awarding Stacy attorney fees and remand the matter to the trial court with directions to hold an appropriate hearing on the issue of the reasonableness of the attorney fees requested in Stacy's contribution petition. In addition, we reverse the award of interest requested in the contribution petition. However, we affirm the award of costs in the amount of $494,585.30.

¶ 201 3. Dru's Interest in DDG

¶ 202 Dru's final argument on appeal is that the trial court erred in classifying as marital property his 0.1% interest in DDG.

¶ 203 Dru obtained his 0.1% interest in DDG in June 2002, when Eileen exercised her power of appointment pursuant to section 3.2 of the ECD Trust agreement to appoint "one-tenth of one percent of each and every asset" of the ECD Trust, *i.e.*, DDG, to Dru personally.[11] At trial, Dru

[11] In his brief, Dru asks that the judgment be amended to reflect that he owns "only 0.001%

testified that he believed the transfer was a gift, explaining, "they handed me a 10th or a 100th share of the—of this corporation. I didn't pay for it, so it must have been a gift." The trial court classified Dru's 0.1% interest in DDG as marital property. The court reasoned that the transfer occurred during the marriage and there was no evidence of an exception under section 503(a) of the Act (750 ILCS 5/503(a) (West 2016)).

¶ 204 Dru argues that the trial court erred in classifying as marital property his 0.1% interest in DDG. According to Dru, he acquired the interest at issue "under circumstances that were consistent with a distribution from a trust" because Eileen exercised her powers under the ECD Trust to convey an interest in DDG from Bud's estate to him. Hence, Dru concludes, he received his interest in DDG by gift, legacy, or descent and it constitutes non-marital property as a matter of law. Dru adds that this conclusion is compelled by *Asta*, 2016 IL App (2d) 150160, which held that stock acquired from a parent's trust during the marriage remains a non-marital inheritance. Should this court reclassify his interest in DDG as non-marital property, Dru does not ask for any reduction in Stacy's share of the marital estate "because there were other sufficient bases for the court to divide the marital property in a proportion favoring Stacy even if her percentage increases by reallocating the [0.1%] to Dru as non-marital rather than marital property."

¶ 205 Stacy responds that the issue of the classification of Dru's interest in DDG is an "abstract question" because no effectual relief can be granted by this court if it decides the question. In this

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rather than '.1%' of DDG." We decline Dru's request. As noted, the power of appointment executed by Eileen in June 2002 expressly appoints to Dru "*one-tenth of one percent* of each and every asset of the Trust." (Emphasis added.) "One-tenth of one percent" is properly expressed as a percentage by "0.1%," *i.e.*, 1.0% divided by 10.

regard, Stacy posits that although Dru appealed from the trial court's classification of his interest in DDG, that interest was already awarded to him in the judgment and he does not seek to have the trial court's property allocation otherwise changed due to the purported classification error. Thus, Stacy reasons, a decision by this court on the classification of Dru's interest in DDG would have no impact on the property allocation or any other aspect of the trial court's rulings in the judgment and would constitute an advisory opinion.

¶ 206 It is the duty of an appellate court to decide actual controversies which can be carried into effect and not to give opinions upon moot questions or abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the case before the court. *South Stickney Park District v. Village of Bedford Park*, 131 Ill. App. 3d 205, 209 (1985). " 'A moot question is one that existed but because of the happening or certain events has ceased to exist and no longer presents an actual controversy over the interest or rights of the party; an abstract question is one in existence but for which no effectual relief can be granted.' " *Johnson v. Quern*, 90 Ill. App. 3d 151, 155 (1980). Further, when a decision on the merits would not result in appropriate relief, it would essentially be an advisory opinion. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 9. "As a general rule, courts in Illinois do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Marriage of Donald B. and Roberta B.*, 2014 IL 115463, ¶ 32.

¶ 207 We conclude that the issue Dru presents has no practical significance and is therefore moot. In this regard, we observe that the 0.1% interest in DDG was awarded to Dru in the judgment and he does not seek to have the trial court's property allocation otherwise changed due to the purported classification error. To the contrary, he specifically indicates that he is *not* requesting a reduction in Stacy's share of the marital estate should his request for reclassification be granted. In other

words, Dru is not seeking any modification of the trial court's property allocation on appeal. Hence, a decision by this court regarding the classification of his 0.1% interest in DDG would have no impact on the property allocation or any other aspect of the trial court's rulings in the judgment of dissolution. Stated differently, any decision on the issue would change nothing with respect to his 0.1% interest in DDG which he was awarded pursuant to the judgment of dissolution. See *In re Marriage of Sturm*, 2012 IL App (4th) 110559, ¶ 9 (noting that "[t]he significance of a determination that property is marital or nonmarital is that marital property may by divided, but nonmarital property must be assigned to the owner;" thus, in dividing property "it makes little difference whether the property is classified as marital or nonmarital; the ultimate question is who receives it"); *In re Marriage of Mouschovias*, 359 Ill. App. 3d 348, 354 (2005) (holding that even if the trial court improperly classified two investment accounts opened by the husband prior to the marriage as marital property, no error occurred where both accounts were awarded to the husband). Dru argues that remand is always an available remedy when property is reclassified (*Schmitt*, 391 Ill. App. 3d at 1022), and the availability of a remand remedy defeats mootness even if Dru does not pray for redistribution in his favor. However, Dru cites no authority in support of the proposition that the mere availability of a remand, even if not requested, defeats Stacy's position that he can be afforded no effectual relief. Accordingly, this argument is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *In re Marriage of Malhorta*, 2019 180672, ¶ 12. Since Dru was awarded the property at issue and he does not request a reallocation, we decline to address the issue.

¶ 208 C. Department's Appeal

¶ 209 In its appeal, the Department argues that a condition placed by the trial court in the plenary order of protection, *i.e.*, that Dru's FOID card be reinstated and returned to him with no restrictions,

was improper as it directed the Department to violate the plain language of section 8.2 of the FOID Card Act (430 ILCS 65/8.2 (West 2016)).

¶ 210 1. Background

¶ 211 As noted above, on March 22, 2017, Stacy filed a verified petition for an order of protection under the Domestic Violence Act (750 ILCS 60/101 *et seq*. (West 2016)). On April 12, 2017, the trial court entered an agreed interim order of protection. The agreed interim order of protection: (1) prohibited Dru from harassing Stacy, interfering with her personal liberty, physically abusing her, or stalking her; (2) ordered respondent and any investigator, agent, or entity acting on Dru's behalf to stay at least 500 feet away from Stacy and her place of residence except when a child of the parties is present; and (3) enjoined Dru individually or through any entity from "employing or otherwise directing anyone to follow, keep under surveillance, stalk, harass, photograph, video-tape, or record Stacy." On April 14, 2017, the Department, pursuant to section 8.2 of the FOID Card Act (430 ILCS 65/8.2 (West 2016)), informed Dru by letter that his FOID card had been revoked.[12] See 430 ILCS 65/9 (West 2016) (requiring the Department to provide written notice

[12] A copy of the Department's April 14, 2017, letter was not made part of the record on appeal. However, the Department included a copy of the letter in the appendix to its reply brief. The Department asks us to take judicial notice of the revocation letter pursuant to Illinois Rule of Evidence 201 (eff. Jan. 1, 2011). That rule allows a court to take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned." Ill. R. Evid. 201(b) (eff. Jan. 1, 2011). The Department asserts that the letter's accuracy as to the revocation of Dru's FOID card cannot be

to every person whose FOID card is revoked). Thereafter, the agreed interim order, which was set to expire in May 2017, was extended multiple times.

¶ 212 A hearing on Stacy's petition for an order of protection was held over three dates in August and September 2017. On September 6, 2017, the trial court entered a two-year plenary order of protection prohibiting Dru from "engaging in surveillance of [Stacy], either personally or through his agents, assigns, or any other person or company on his behalf." After the trial court made its oral ruling, the following exchange occurred between Dru's attorney and the court:

> "MR. FISHER: Your Honor, one last thing. As a result of the order of protection, we would like in the order that [Dru] can reclaim his FOID card back. You haven't found him to be—
>
> THE COURT: Yeah. If that is an issue, that's not—that's not what the Court's going at at all. That's not an issue.
>
> * * *
>
> MR. FISHER: We can include in the order that the FOID card shall be returned to Dru and no impact on that?
>
> THE COURT: Yes."

In accordance with this exchange, the trial court entered a written order that same day providing

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reasonably questioned and will aid this court in efficiently resolving the case. See *Koshinski v. Trame*, 2017 IL App (5th) 150398, ¶ 10. Because it is undisputed that Dru's FOID card was revoked following entry of the agreed interim order of protection, we take judicial notice of the fact that the Department revoked Dru's FOID card by way of the April 14, 2017, letter following entry of the agreed interim order of protection.

that "Dru Goodman's FOID card shall be reinstated and returned to Dru Goodman with no restrictions." Both parties appealed from the entry of the plenary order of protection as well as from the denial of Stacy's petition for attorney fees and costs incurred in connection with the order of protection.

¶ 213 On January 12, 2018, the Department filed in the trial court a "Non-Party *** Petition to Intervene as a Matter of Right." The Department sought leave to intervene pursuant to section 2-408(a)(2) of the Code (735 ILCS 5/2-408(a)(2) (West 2016)) to file a motion to vacate that part of the trial court's September 6, 2017, order requiring the reinstatement and return of Dru's FOID card. The Department claimed that it had satisfied all of the requirements for intervention set forth in the statute. Specifically, the Department claimed that its petition was timely, its interests were not adequately represented by the existing parties, and it had a direct interest in the matter. Dru moved to dismiss the Department's petition. Dru argued that since the Department filed its petition to intervene more than 30 days after the disposition of the last pending postjudgment motion, the trial court lacked jurisdiction to grant the relief the Department sought. Alternatively, Dru argued that Stacy was the sole party with an interest in the order of protection and that the Department's "only legitimate interest" is to comply with the second amendment (U.S. Const., amend. II) by adhering to the injunction to restore Dru's FOID card to him. Stacy also filed a response to the Department's petition contending that the trial court lacked jurisdiction to grant the Department's petition to intervene. On February 20, 2018, following a hearing, the trial court granted Dru's motion to dismiss the Department's petition to intervene. The court ruled that it had lost jurisdiction to entertain the Department's petition but noted three times that it "killed" the court that it was unable to "do something about it." The Department subsequently filed a petition to intervene as an appellant in this court pursuant to section 2-408(a)(2) of the Code (735 ILCS 5/2-

408(a)(2) (West 2016)). We granted the Department's petition on March 12, 2018.

¶ 214 As noted above, the Department argues that a condition placed by the trial court in the plenary order of protection, *i.e.*, that Dru's FOID card be returned to him, was improper as it directed the Department to violate the plain language of section 8.2 of the FOID Card Act (430 ILCS 65/8.2 (West 2016)). However, in its petition to intervene filed in this court, the Department asserted that the trial court's "refusal to entertain" its petition to intervene in order to partially vacate the September 6, 2017, order was itself error. We agree with the Department's contention that the trial court erred in dismissing the Department's petition to intervene.

¶ 215 Section 2-408(a)(2) of the Code provides that "[u]pon timely application anyone shall be permitted as of right to intervene in an action *** when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." 735 ILCS 5/2-408(a)(2) (West 2016). Thus, in determining whether to grant a petition to intervene, a court must consider whether the petition is timely, whether the applicant's interest in the proceedings is sufficient, and whether the applicant's interest is adequately represented. *In re Bailey*, 2016 IL App (5th) 140586, ¶ 21; *Winders v. People*, 2015 IL App (3d) 140798, ¶ 13; *Citicorp Savings of Illinois v. First Chicago Trust Company of Illinois*, 269 Ill. App. 3d 293, 298 (1995). Because the intervention statute is remedial in nature, it should be construed liberally. *In re Bailey*, 2016 IL App (5th) 140586, ¶ 22. Generally, a trial court's decision regarding intervention is reviewed for an abuse of discretion. *In re Bailey*, 2016 IL App (5th) 140586, ¶ 22; *Winders*, 2015 IL App (3d) 140798, ¶ 13. However, an application of impermissible legal criteria justifies reversal. *In re Bailey*, 2016 IL App (5th) 140586, ¶ 22. Accordingly, if the threshold requirements are met, then, under the plain meaning of section 2-408(a)(2), the petition to intervene must be granted. *In re Bailey*, 2016 IL App (5th) 140586, ¶ 21.

¶ 216 In this case, the trial court concluded that it lacked jurisdiction to consider the Department's petition to intervene because more than 30 days had passed since the disposition of the last pending postjudgment motion. While it is true that a party may not normally seek to intervene after the rights of the original parties have been determined and a final decree has been entered, a petition to intervene may be timely filed even after a final judgment has been entered where the intervenor lacked knowledge of the action prior to the judgment being entered or where it is necessary to protect the rights of the intervenor. See *In re Bailey*, 2016 IL App (5th) 140586, ¶¶ 18-19 (holding that petition to intervene filed 31 days after entry of final judgment was timely where the Department lacked notice to seek intervention at an earlier date); *Winders*, 2015 IL App (3d) 140798, ¶¶ 14-15 (holding that petition to intervene filed three months after entry of final judgment was timely where Department sought to intervene soon after receiving court order); *Redmond v. Devine*, 152 Ill. App. 3d 68, 73-75 (1987) (holding that intervention was timely despite being filed 20 months after entry of final judgment because doing so was necessary to protect the intervenor's rights).

¶ 217 Here, in rejecting the Department's petition to intervene, the trial court failed to consider that the Department would not have been aware of Dru's request for the return of his FOID card prior to the entry of final judgment. In this regard, the Department was not a party to or present at any phase of the proceeding on Stacy's petition for the order of protection, Dru made his request for the reinstatement and return of his FOID card orally at the hearing entering the order of protection, and the trial court entered the order granting Dru's request immediately after Dru's request was made. Intervention was also necessary to protect the Department's interests. "Although a party need not have a direct interest in the pending suit, it must have an interest greater than that of the general public, so that the party may stand to gain or lose by the direct legal

operation and effect of a judgment in the suit." *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 57-58 (2002). The Department's interest is broader than that of the general public as it is the agency charged with administering the FOID card program and ensuring compliance with the law. See, *e.g.*, 430 ILCS 65/2(a) (West 2016) ("No person may acquire or possess any firearm *** within this State without having in his or her possession a [FOID card] previously issued in his or her name by the Department *** under the provisions of this [FOID Card Act]"); 430 ILCS 65/4 (West 2016) ("Each applicant for a [FOID card] must *** [m]ake application on blank forms prepared and furnished *** by the Department" and submit certain evidence to the Department); 430 ILCS 65/5 (West 2016) ("The Department **** shall either approve or deny all applications within 30 days from the date they are received"); 430 ILCS 65/8 (West 2016) (granting the Department "authority to deny an application for or to revoke and seize a [FOID card] previously issued" under the FOID Card Act); 430 ILCS 65/8.2 (West 2016) (requiring the Department to "deny an application or *** revoke and seize a [FOID card] previously issued *** if the Department finds that the applicant or person to whom such card was issued is or was at the time of issuance subject to an existing order of protection"); see also *Winders*, 2015 IL App (3d) 140798, ¶ 16. Yet, the trial court's order bound the Department in a manner that was inconsistent with the Department's interpretation of the legislature's directives, and no one was present at the hearing to represent the Department's position. Thus, the Department's petition to intervene was timely, the Department possessed a sufficient interest in the proceedings, and the Department's interest was not represented by the existing parties. Under these circumstances, the trial court erred in dismissing the Department's petition to intervene. 735 ILCS 5/2-408(a)(2) (West 2016); *Winders*, 2015 IL App (3d) 140798, ¶ 16. As such, we are compelled to reverse the trial court's decision. Moreover, pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff.

Feb. 1, 1994), we grant intervention in this case and we remand this matter to the trial court to allow the Department to file its motion to vacate that part of the trial court's September 6, 2017, order requiring the reinstatement and return of Dru's FOID card and to hold further proceedings thereon.

¶ 218 III. CONCLUSION

¶ 219 For the reasons set forth above, we hold that the circuit court of Lake County erred in ordering Dru to pay the attorney fees requested in Stacy's contribution petition without an appropriate hearing. Accordingly, we vacate that portion of the judgment awarding Stacy attorney fees and remand the matter to the trial court with directions to hold an appropriate hearing on the issue of the reasonableness of the attorney fees requested in Stacy's contribution petition. We also hold that the trial court erred in ordering Dru to pay the interest requested in Stacy's contribution petition and we reverse the interest award outright. In addition, we hold that the trial court erred in dismissing the Department's petition to intervene. We grant the Department's petition to intervene in this case and remand the case to the trial court to allow the Department to file its motion to vacate that part of the trial court's September 6, 2017, order requiring the reinstatement and return of Dru's FOID card and to hold further proceedings thereon. We otherwise affirm the judgment of the trial court.

¶ 220 Affirmed in part, reversed in part, and vacated in part; Cause remanded with directions.