

No. 2—10—0329
Order filed March 9, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
PATTI J. ROBERTS,)	of McHenry County.
)	
Petitioner-Appellant,)	
)	No. 04—DV—3
and)	
)	
DONALD R. ROBERTS,)	Honorable
)	Charles P. Weech,
Respondent-Appellee.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The trial court did not err in (1) determining that the parties' revocation of their ante-nuptial agreement was valid; (2) not ordering additional reimbursement from Donald's non-marital estate to the marital estate; (3) its classification of the parties' assets; and (4) not awarding or dividing a certain life insurance policy.

The petitioner, Patti Roberts, appeals from the March 4, 2010, order of the circuit court of McHenry County dissolving her marriage to the respondent, Donald Roberts. On appeal, Patti argues that the trial court erred in (1) finding that the parties' revocation of their ante-nuptial agreement was valid; (2) not ordering adequate reimbursement to the marital estate for its

contributions to the non-marital estate; (3) classifying certain property as non-marital; and (4) failing to value and assign a marital life insurance policy. We affirm.

The record in this case is substantial. A great deal of evidence and testimony was presented in the trial court. Therefore, only those facts necessary to an understanding of this court's decision will be set forth below, and the relevant facts will be discussed in the analysis of the issues in which they are pertinent.

I. General Background

The parties were married on May 23, 1981. It was a second marriage for Patti and a first marriage for Donald. Patti had three children from her first marriage. The parties also had one child together prior to becoming married. The parties had two more children during the marriage.

Sixteen days prior to the marriage, the parties entered into an ante-nuptial agreement. The agreement indicated that Patti had less than \$500 to her name and a few personal possessions. Donald had \$926,665 in assets. The agreement provided that upon the parties' 10th anniversary, Patti would be entitled to 50% of the "appreciated equity" of Donald's assets should the parties divorce. The agreement also provided that it could be revoked in its entirety. The trial court found that the parties had validly revoked the agreement on March 6, 1998.

Since 1966, Donald had been working for his family business, Reliable Sand and Gravel (Reliable). Reliable was in the business of gravel mining. For his work at Reliable, Donald was always paid at union scale, a little higher wage than an operator's wage as set by Local 150. Reliable has never owned any real estate. Reliable mined gravel from Roberts Mine, which was owned by Donald and his mother, Frances Roberts, prior to Donald's marriage. Reliable paid Donald and Frances royalties for the gravel mined on Roberts Mine. Those royalties were deposited into

Donald's DR Construction bank accounts. When the gravel deposits were depleted on Roberts mine, Reliable mined land adjacent to Roberts mine, that being the Kirchoff farm and the Reiland farm. Donald purchased an interest in the Kirchoff farm in 1985 and the Reiland farm in 1993 with his funds from the DR Construction accounts.

Reliable also did not own any equipment. It leased equipment from DR Construction (and later DRR Construction). DR Construction and DRR Construction were both owned by Donald. By the time of the dissolution, Reliable had ceased mining operations and was in the business of recycling concrete and asphalt, and had begun the reclamation of real estate.

During the marriage, Patti worked at various jobs, including selling Avon products, teaching swimming lessons, and managing residential and multi-family residential properties that the parties had purchased during the marriage.

On March 4, 2010, the trial court entered its judgment of dissolution. In its judgment, the trial court determined that Donald's non-marital assets were worth approximately \$4 million and assigned those all to him. The trial court determined that the marital estate was worth approximately \$1.6 million. The trial court awarded \$60,000 of that to Donald and the remainder to Patti. Patti thereafter filed a timely notice of appeal.

II. Revocation of the Ante-Nuptial Agreement

Donald testified at trial that it was Patti's idea to revoke the agreement, and that she had constantly badgered him throughout the marriage to revoke the agreement. According to Donald, Patti wrote the revocation without any input from him. He was not in the room when she prepared the revocation. At the time of the revocation, they did not discuss getting a divorce and he did not believe that Patti was going to file for divorce. The revocation was witnessed and signed by the

parties' son Dean, who was 16 years' old at the time. Donald acknowledged that he stood to gain by the revocation of the agreement.

Patti testified that it was Donald's idea to revoke the agreement. According to Patti, on the night that she signed the revocation, Donald was insistent that she do so. She complied with Donald's request because she was afraid that the situation would escalate. She explained that police had been called to their home for domestic situations on prior occasions in 1981, 1993, 1994, 1996, 1997, and 2000, and that she had in the past sustained blackened eyes, bruises, and lacerations from those situations.

One week prior to trial, Patti had testified in a deposition that she was not threatened and the parties were at "a very good point" in their lives when she prepared the revocation. She further acknowledged that the validity of the revocation was not an issue until she filed for divorce.

In its order of dissolution, the trial court found that the revocation was valid. The trial court found that Patti had failed to carry her burden of proving that the revocation was the product of duress or coercion. The trial court further found that Donald had not concealed the value of his non-marital assets. The trial court explained that Patti was aware that Donald owned Reliable, DR Construction, DRR Construction, Robert's Mine, Kirchoff Farm, and an interest in Reiland Farm. She was also aware of the parties' multiple rental properties. Although Patti was not involved in the day-to-day operation of all of those entities, she did have general knowledge of their operation and net worth. The trial court noted that Patti had previously been employed in some of those entities in a limited role, and had collected rents, managed properties, and did general bookkeeping on some entities. The trial court further found that, since 1981, Patti had signed the parties' joint tax returns which reflected the income incurred by the businesses and listed some assets and liabilities.

Patti contends on appeal that the trial court erred in determining that the parties validly revoked their ante-nuptial agreement. She insists that the revocation was not valid because it did not comply with the Illinois Uniform Premarital Agreement Act (the Premarital Agreement Act) (750 ILCS 10/1 *et seq.* (West 2008)). Specifically, she argues that the revocation was invalid because it was executed under duress, was unconscionable and lacked sufficient disclosure. Patti further contends that even if the Premarital Agreement Act is not applicable to this case, the revocation is still not valid because (1) she did not have knowledge of the value of Donald's assets; and (2) the revocation was neither fair nor reasonable.

The primary purpose of statutory construction is to determine and give effect to the legislature's intent, while presuming the legislature did not intend to create absurd, inconvenient, or unjust results. *In re B.L.S.*, 202 Ill. 2d 510, 514 (2002). The best indication of the legislature's intent is the language of the statute. *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 466 (2005). If the language of the statute is clear, there is no need to resort to other aids of statutory construction. *Id.*

Section 11 of the Premarital Agreement Act provides that it "applies to any premarital agreement executed on or after January 1, 1990." 750 ILCS 10/11 (West 2008). Based on the plain language of this statute, it does not apply to the parties' ante-nuptial agreement, which was entered into on May 7, 1981. See Lindman, 356 Ill. App. 3d at 462. Patti argues that the Premarital Agreement Act applies to this case because the alleged revocation occurred in 1998, eight years after the Premarital Agreement Act became effective. However, since the parties agreement was never governed by the Act, any subsequent revocation of the agreement also was not covered by the Act.

We next turn to Patti's argument that the trial court should have invalidated the revocation based on common law principles. Our supreme court has previously stated that "[t]here is no doubt" that "parties to an antenuptial agreement may, after marriage, by mutual consent alter or revoke the agreement." *Turner v. Black*, 19 Ill. 2d 296, 307 (1960). Further, ante-nuptial agreements are subject to ordinary principles of contract interpretation. *In re Marriage of Best*, 387 Ill. App. 3d 948, 969 (2009). A trial court's findings of fact in regard to a contract are reviewed under the manifest weight of the evidence standard. *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1024 (1996).

We do not believe that the trial court's determination that the parties validly revoked their ante-nuptial agreement was against the manifest weight of the evidence. Although Patti insists that she only signed the revocation because she was coerced into doing so, she failed to present clear and convincing evidence to establish that. See *In re Gibson-Terry and Terry*, 325 Ill. App. 3d 317, 327 (2001) (person asserting coercion in attempting to escape an agreement has burden of proving it by clear and convincing evidence). Patti's trial testimony that the revocation was due to coercion was inconsistent with her deposition testimony (provided only a week before trial) in which she indicated that the revocation was not the result of coercion. She also indicated in her deposition testimony that the marriage was "in a good place" when she signed the revocation. Further, Donald testified that he did not coerce Patti into signing the agreement. Thus, the evidence supported the trial court's ruling that coercion had not been established.

We also do not believe that the trial court's decision was against the manifest weight of the evidence on the basis that Donald concealed the true value of his non-marital assets. In arguing that the revocation should be set aside on the basis that she did not have knowledge of the value of Donald's non-marital estate, it was Patti's burden to prove that he had concealed the value of his

assets. See *Waggoner v. Waggoner*, 66 Ill. App. 3d 901, 905 (1978) (burden of proving fraud or concealment is on party asserting it). As the trial court pointed out, Patti was aware of all of Donald's business ventures. She had briefly worked for one of the businesses. She had signed off on all of the parties' tax returns which reflected the businesses' income and also reflected some of their assets and liabilities. We further note that the surrounding circumstances do not suggest fraud or concealment as, again, Patti indicated that the marriage was at "a very good point" when the revocation was entered. The fact that Patti had been married to Donald for 17 years at the time of the revocation also suggests that she was familiar with the parties' financial circumstances. Moreover, the revocation was not done in contemplation of divorce as Patti did not file for divorce until five years after the revocation was entered.

Finally, we reject Patti's argument that the revocation of the agreement should be set aside because it was neither fair nor reasonable. See *City of Chicago v. Fiber Optic Corp.*, 287 Ill. App. 3d 566, 575 (1997) (absent a defect in the negotiation process, a contract will be enforced as written, and a court will not set aside a contract merely because it later turns out to be a bad bargain for one of the parties).

III. Reimbursement to Marital Estate

A) Donald's compensation from Reliable

Donald worked for Reliable, a non-marital business that he had an 85% interest in. The parties' ante-nuptial agreement indicated that, as of May 7, 1981, the value of Don's interest in Reliable was \$494,449. The trial court's judgment of dissolution, entered on March 4, 2010, valued Donald's interest at \$774,577. Thus, in approximately 29 years, Donald's interest in Reliable had increased by \$280,128.

While working for Reliable, Donald paid himself consistent with what a Local 150 union heavy equipment operator would make. In the parties ante-nuptial agreement, Donald indicated that his wages from Reliable were \$62,000. However, between 1981 and 1990, Donald's salary ranged from \$16,112.79 to \$37,595.48. In 1995, Donald did not receive a salary from Reliable. There are no payroll records for Donald in 1987.

Donald's salary from Reliable also compensated him for his work for his other businesses, such as DR Construction and DRR Construction. As such, Donald did not receive a salary from those businesses.

Reliable's most profitable year was in 1999 when it had net profits of \$377,290. Reliable's least profitable year was in 2008 when it incurred losses of \$379,126. Donald did not disburse any of Reliable's profits and instead left them in the company. Donald testified that the retained money had to be used to comply with the reclamation plan for the properties mined by Reliable. The reclamation cost was estimated between \$400,000 and \$750,000. Mary Miller, Reliable's accountant, testified that the retained earnings would never be paid out. She explained that an accounting adjustment needed to be made on the books to offset the unpaid royalties. To make that adjustment, she would expense the unpaid royalties to Reliable, and Donald would take his 85% interest loss on the same expense with the net result being zero.

In its judgment of dissolution, the trial court noted that Patti argued that Donald had not received "just compensation" for his role with Reliable. The trial court found, however, that she had presented no evidence as to what reasonable compensation for his efforts should be, and, therefore, it would not guess what constituted reasonable compensation. The trial court further found that there was no evidence that Reliable's retained earnings could have been distributed. The trial court

therefore determined that Patti had not established that the marital estate was entitled to reimbursement.

On appeal, Patti argues that the trial court erred in not ordering that Donald reimburse the marital estate for his contributions to Reliable for which he was not adequately compensated. Patti contends that although Donald was president of Reliable, a million-dollar company, he only paid himself the salary of a supervising laborer. He also performed work for his other businesses, but he did not receive compensation from those businesses. She further points out that in some years Donald received little salary from Reliable or no salary at all.

Under the Illinois Marriage and Dissolution of Marriage Act (the Dissolution Act) (750 ILCS 5/101 *et seq.* (West 2008)), a business owned by a spouse prior to the marriage, such as Reliable, is non-marital property and retains that classification despite a significant increase in the value of the business during the marriage. *In re Marriage of Lundahl*, 396 Ill. App. 3d 495, 502 (2009). However, if personal efforts of a spouse resulting in a substantial appreciation of that business is contributed by the marital estate, that contribution may entitle the marital estate to reimbursement. *In re Marriage of Kamp*, 199 Ill. App. 3d 1080, 1085 (1990). It is the appreciation in value of the business, not inflation or external factors, that entitle the marital estate to reimbursement. *In re Marriage of Morse*, 143 Ill. App. 3d 849, 855 (1986). In valuing the right to reimbursement, if the contributing spouse received a salary and that salary is reasonable compensation for his efforts, the marital estate need not be compensated because the marital estate has already been compensated. *Lundahl*, 396 Ill. App. 3d at 502.

An order for reimbursement to the marital estate is appropriate only if there is clear and convincing evidence to establish the right to reimbursement. *In re Marriage of Werries*, 247 Ill.

App. 3d 639, 644 (1993). The burden of proof is on the party seeking reimbursement. *Id.* In determining whether reimbursement from a non-marital business is owed the marital estate based on the personal efforts of a spouse, the court may inquire as to whether the spouse was reasonably compensated for his efforts. *Id.* at 648. The findings of a trial court on the right to reimbursement cannot be reversed unless contrary to the manifest weight of the evidence. Additionally, the fact that a spouse could have received a higher salary does not mean that he was not adequately compensated. *In re Marriage of Perlmutter*, 225 Ill. App. 3d 362, 372 (1992).

Although Patti argues that Donald's business was a multi-million-dollar company, the trial court found that it was worth only \$740,000 at the time of the dissolution. This represented an increase of \$280,000 from when the parties were married 29 years earlier. In other terms, the value of the business increased by approximately \$10,000 a year during the course of the marriage. This was not an exorbitant amount that suggests Donald should have been taking more money, via a higher salary, from the company. Further, although Reliable reported approximately \$700,000 in retained earnings, Donald and Reliable's accountant explained that this was for bookkeeping purposes. Due to the expenses associated with the reclamation work that Reliable was obligated to perform on the land that it had finished mining, Reliable's shareholders would never actually receive a distribution of the retained earnings.

We also reject Patti's argument that since Donald was president of the company, he should have paid himself like a president instead of just a heavy equipment operator. This argument overlooks the fact that because Donald was the president of Reliable, he had to make sure that he did not pay out so much in salary that he would undermine the company's ability to remain financially

solvent. As Reliable had multiple years where its losses exceeded \$100,000, Donald's failure to pay himself more in salary cannot be considered unreasonable.

Moreover, we note that Donald's salary never increased from the amount he was receiving in 1981 when the parties married. This fact indicates that Donald's decision to pay himself a "low" salary was not done in anticipation of the dissolution of the marriage. Rather, the amount that Reliable paid Donald in salary was part of Donald's business plan to ensure that Reliable remained financially sound. Finally, we note that, despite Donald's low salary from Reliable, he was able to raise a family of 8 and help the parties accumulate \$1.6 million in marital assets. Based on all of these facts, the trial court did not err in not ordering Donald to reimburse the marital estate based on his "low" income from Reliable.

In so ruling, we find Patti's reliance on *In re Marriage of Steinberg*, 299 Ill. App. 3d 603 (1998) to be misplaced. In that case, the wife sought reimbursement for the husband's non-marital medical practice's account receivables which had increased about \$120,000 during the marriage. *Id.* at 612. The reviewing court found that although the marital estate was entitled to reimbursement, it had already been adequately reimbursed through the husband's salary during the years of marriage. *Id.* The trial court noted that the husband's salary ranged from \$157,500 to \$320,800 during the marriage. *Id.*

From *Steinberg*, Patti seeks to draw the inference that the reviewing court did not find reimbursement was warranted in that case because the husband was earning what one would expect a doctor to earn, a six-figure salary. As Donald was not earning anything close to that, even though he was the president of a "multi-million-dollar" company, Patti insists that *Steinberg* demonstrates that Donald was not paying himself adequate compensation.

We believe that whether a person was receiving adequate compensation depends on the particular facts of that case. Based on the evidence detailed above, we cannot say that the trial court's determination that the marital estate was not entitled to reimbursement based on Donald's "low" salary from Reliable was against the manifest weight of the evidence.

B. Marital contributions to the DR and DRR Construction accounts

Patti also argues that the marital estate should be reimbursed for contributions that the marital estate made to the DR Construction and DRR Construction accounts. Specifically, she contends that the marital estate should be reimbursed for proceeds from the parties' marital rental properties and joint tax returns that were wrongly deposited into those accounts. We will address this argument below in the context of whether certain deposits into the DR Construction and DRR Construction accounts transmuted those accounts into marital accounts.

IV. Classification of Assets

A. Classification of DRR Construction as Non-Marital

Donald owned a 100% interest in DR Construction and DRR Construction, Inc. DR Construction was started in approximately 1971 by Donald and his mother. It was listed as a non-marital asset on Donald and Patti's ante-nuptial agreement. The ante-nuptial agreement valued DR Construction at \$179,000. Donald legally owned DR Construction as a sole proprietorship; however, Donald testified that in fact it was a partnership with his mother. At the time of trial, DR Construction remained a sole proprietorship but consisted of only a small bank account and the equipment used on site at Reliable. In 1993, Donald incorporated DRR and transferred the rolling stock (*i.e.*, highway-worthy trucks) owned by DR Construction into DRR Construction. This was done to provide liability protection due to concerns about the trucks operating on the highways.

Donald testified that DR Construction had two separate bank accounts; one of them for passive income from equipment leased to Reliable, which was also used as a depository for the mineral rights paid by Reliable to Donald and his mother. The other bank account was for day-to-day hauling and demolition activity. The equipment-owning entity was converted into a corporation in 1993, transferring the vehicles and equipment that would operate on the highways. The Articles of Incorporation for DRR Construction state that the corporation is a continuation of an existing entity.

Donald and his mother deposited their gravel royalties into the DR Construction account at First National Bank of Barrington, along with Reliable's payments for leased equipment. The primary business activities of DR Construction, and later DRR Construction, was hauling material and demolition. The proceeds from that enterprise were deposited into the DR Construction bank account at First National Bank of McHenry, later Harris Bank.

According to Donald, the money deposited in the DR Construction accounts should be considered passive income. Donald testified that the DR Construction accounts contained the mineral rights lease payments and the equipment lease payments from Reliable. The DR Construction accounts were the source of funds used to purchase both additional non-marital and marital assets. DR Construction advanced the majority of funds used to purchase the parties' marital assets, including the rental homes managed by Patti. Rent received on those assets were deposited back into the DR Construction accounts to repay the advances. The down payments, mortgage payments if any, taxes, insurance, and major repairs on the neighborhood rental homes were all advanced by DR Construction, and the money was returned to DR Construction from rent receipts until 1999. At that time, Patti began keeping all the monies generated from rents. Donald further

testified that when he was not earning any money from Reliable when gravel deposits were depleted in the mid-1990s, he gave Patti the rent receipts in 1994 and 1995 to make-up for the shortfall.

Donald testified that he keeps DR Construction and DRR Construction open only to continue with the reclamation of the mined-out gravel pits, and a small amount of money in the bank that is needed for operations.

Patti testified that she has not worked for DR Construction since the parties married. She testified that throughout the marriage she and Donald kept the household finances separate from the business finances. As to the rental properties that the parties purchased during the marriage (valued at \$728,000 at the time of dissolution), Patti testified that she assumed that Donald financed the rental homes as she did not know how the mortgages were paid, except for the \$3,300 down payment on 723 W. Southside, which came from marital funds. She did not pay the mortgage payments or taxes on the rental properties from the marital accounts. Prior to 1999, she turned over all rental checks to Donald. Thereafter, all rental checks were deposited into a marital household account.

Patti retained Stout, Risius, Ross (Stout) to determine the value of DRR Construction. They indicated that DRR Construction was formed to hold and lease trucks and trailers to Reliable and, prior to its incorporation in 1993, it was held by Don individually. In its valuation report, Stout indicated that it looked at all the fixed asset listings, purchase invoices for recent acquisitions and all other pertinent information. At trial, one of Stout's appraisers, David Goesling testified that he and his co-workers did a site visit and examined all the equipment. He reviewed the applicable tax returns, a list of the individual assets which indicated when they were acquired, its cost, and its net tax value. Stout concluded that the value of DRR Construction was \$159,000.

The trial court found that the “evidence and testimony established that DRR Construction is a continuation of the predecessor entity DR Construction. [DRR] was established solely for liability purposes.” The trial court additionally noted that no credible evidence was provided that marital funds were used by DRR Construction. No evidence was presented that it was a new business venture, separate and distinct from the non-marital DR Construction business. Rather, the evidence established that DRR Construction was an ongoing business of mining and aggregate hauling. While equipment had been upgraded and exchanged, that equipment was needed to maintain the business. The trial court concluded that the value of DRR Construction was \$159,000. The trial court further found that Patti had failed to carry her burden that the marital estate was entitled to reimbursement for rental proceeds that had been deposited into the DR Construction and DRR Construction accounts.

On appeal, Patti contends that the trial court erred in classifying DRR Construction as a non-marital asset. She argues that DRR Construction should have been classified as a marital asset because it was created after the marriage and Donald failed to present clear and convincing evidence that it was a continuation of DR Construction. Alternatively, Patti argues that if DRR Construction is considered a continuation of DR Construction, DRR Construction should nonetheless be considered a marital asset because DR Construction had transmuted into a marital asset due to Donald’s commingling of marital and non-marital assets. Specifically, Patti contends that Donald commingled assets by depositing the following marital assets into the DR Construction accounts: joint tax refunds, income from the parties’ rental homes, mining royalties, and equipment and vehicle lease income. She additionally argues that the DR Construction account was transmuted into a marital account because it included funds that should have been distributed to Donald had he been

properly compensated for the work he did for DR Construction, and later DRR Construction, and Reliable.

Section 503 of the Dissolution Act governs the classification and distribution of assets in a divorce. Prior to dividing the property, the court must first classify each asset as marital or non-marital. *In re Marriage of Hegge*, 285 Ill. App. 3d 138, 140 (1996). Property which is acquired before the marriage and property acquired in exchange for property acquired before the marriage is non-marital property. 750 ILCS 5/503(a) (West 2008). The trial court's classification of marital property will not be disturbed unless it is contrary to the manifest weight of the evidence. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009).

We do not believe that the trial court's determination that DRR Construction was a non-marital asset was against the manifest weight of the evidence. In determining that DRR Construction was a non-marital asset, the trial court found that it was a continuation of DR Construction. That finding is supported by the record. Donald testified that DRR Construction was a spin-off of DR Construction, a non-marital business that he had operated since 1971. DR Construction transferred control of numerous vehicles to DRR Construction. Although DRR Construction in turn traded in those vehicles for newer vehicles, those post-marital acquisitions did not transmute DRR Construction into a marital entity. Cf. *In re Marriage of Siddens*, 225 Ill. App. 3d 496, 499 (1992) (husband's non-marital rental business did not become marital property simply because new properties were added and older ones were maintained when all of the funds came from the husband's separate accounts). DRR Construction also used the same bank accounts as DR Construction.

Relying on *In re Marriage of Henke*, 313 Ill. App. 3d 159, 168 (2000) and *In re Marriage of Patrick*, 233 Ill. App. 3d 561, 570 (1992), Patti argues that when a spouse trades in old non-marital property in exchange for new property, the new property will be considered marital property unless the spouse provides specific testimony as to how much he received by trading in the old equipment. Both of those cases are distinguishable. In *Henke*, the court found that a checking account, which was the husband's non-marital property before the marriage, became marital property when the parties deposited all earnings into it and paid household expenses from the account. The husband in *Henke* also bought new equipment, but did not testify which pieces were traded in or exchanged, and the cost difference was paid through the marital checking account. *Henke*, 313 Ill. App. 3d at 169. In *Patrick*, the reviewing court found that the husband traded in non-marital farm equipment for new equipment, but the marital estate contributed marital funds for the balance of the purchase. The reviewing court noted that the husband could have testified there was no donative intent, and the trial court could have found that testimony credible, but the husband failed to present any evidence on intent. *Patrick*, 233 Ill. App. 3d at 570.

Here, unlike in *Henke*, the parties kept separate marital and non-marital accounts. Unlike in *Henke*, there was evidence that the non-marital accounts were the source of the revenue needed to purchase the new equipment. Further, unlike the husband in *Patrick*, Donald testified how the marital and non-marital assets were kept separate. The trial court specifically found that Donald kept DR Construction (and later DRR Construction) separate from the marital accounts, and it was his clear intent to always keep the accounts separate. As such, neither *Henke* nor *Patrick* dictate a different result in this case.

We next consider Patti's argument that DRR Construction was not a continuation of DR Construction because DR Construction continued to exist after DRR Construction was formed. She further maintains that DRR Construction was not continuation of DR Construction because it engaged in activities that DR Construction had not, such as renting out dumpsters to other businesses. Patti's arguments do not undermine the trial court's determination that DRR Construction was a non-marital asset. The issue is not whether Donald transferred all of the non-marital assets of DR Construction to DRR Construction; the issue is whether DRR Construction was created with only non-marital assets. See 750 ILCS 5/503 (West 2008). As indicated above, Donald presented evidence that DRR Construction was started with solely non-marital assets. We note that Patti disputes this point by relying on DRR Construction's articles of incorporation which indicate that the company started with \$1,000. Because Donald never specifically testified that his non-marital estate contributed that initial \$1,000 to DRR Construction, she contends that he failed to present clear and convincing evidence that DRR Construction was in fact funded solely with non-marital assets. We disagree. Although Donald did not specifically testify that the \$1,000 that was used to start up DRR Construction came from DR Construction, that was a logical inference that the trial court could draw based on Donald's testimony that the DR Construction account was the account used to purchase non-marital assets. The fact that the trial court could draw such an inference was also supported by Patti's testimony that throughout the marriage she and Donald kept the household finances separate from the business finances.

Further, although DRR Construction engaged in activities that DR Construction did not, that also is not dispositive of whether DRR Construction should be treated as a non-marital asset. The issue again is whether DRR Construction was started with non-marital assets and whether the

proceeds from DRR Construction were thereafter segregated from the parties' marital estate. Again, the evidence adduced at trial indicates that DRR Construction was started with non-marital funds and segregated from the marital estate.

We next turn to Patti's argument that DRR Construction should not have been classified as non-marital because DR Construction and DRR Construction's bank accounts were commingled with marital assets. Patti contends that DR Construction and DRR Construction's bank accounts should be considered marital accounts because numerous marital assets were deposited into those accounts. Specifically, she argues that marital monies deposited into the bank accounts included: (1) \$70,668.69 in joint tax refunds; (2) income from the parties' rental properties; (3) mining royalties; and (4) equipment and vehicle lease income. She further asserts that the DRR Construction should be considered marital property because its bank accounts includes money that Donald should have received had he had not been undercompensated for his work.

As to the issue of the \$70,668.69 in joint tax refunds that were deposited into the bank accounts, Donald testified that he deposited \$37,304.69 of the parties' joint tax refunds into DR's accounts to reimburse DR Construction for overpayments that DR Construction had made to the parties' estimated taxes. As such, those joint tax refunds reflected monies that belonged solely to DR Construction; hence, those tax refunds constituted non-marital property. Of the remaining \$33,384, the trial court ordered that the marital estate be reimbursed that amount. Thus, as the marital estate was fully reimbursed as to the joint tax refunds that were improperly deposited into the DRR Construction account, commingling did not occur. See *Werries*, 247 Ill. App. 3d at 641 (commingling does not occur where marital and non-marital assets maintain their separate identity). The DRR Construction accounts did not transmute into a marital asset, therefore, on that basis.

Additionally, because the marital estate was fully reimbursed for the improperly deposited joint tax refunds, it is not entitled to any additional reimbursement.

We also find without merit Patti's argument that the DRR Construction account transmuted into a marital account because rent proceeds from the parties' rental properties were deposited into that account. Donald explained that the rental properties were purchased with funds that were advanced to it from the DRR Construction account. When the rental properties earned rent, that money was then returned to the DRR Construction account. Patti's testimony did not contradict Donald's on this point. Donald's testimony demonstrates that he did not intend to make a gift from his non-marital estate to the marriage. Further, as Donald specifically identified the funds that were advanced from the account and then returned to the account, commingling did not occur.

We also note that the trial court did not err in not ordering that the marital estate be reimbursed for the rental proceeds that were transferred to Donald's non-marital accounts. As explained earlier, it was Patti's burden to establish that the marital estate was entitled to reimbursement. *Werries*, 247 Ill. App. 3d at 644. Donald gave a plausible explanation of why the rental proceeds from the marital rental properties were deposited into his non-marital accounts. As Patti's testimony did not contradict Donald's explanation, the trial court's decision to deny reimbursement was not against the manifest weight of the evidence. *Perlmutter*, 225 Ill. App. 3d at 372.

We also reject Patti's argument that the mining royalties and equipment rentals that DRR Construction earned should have been classified as marital property. Patti points out that Donald acknowledged that the harder he worked, the more royalties that were paid to DR Construction. Further, Donald acknowledged that DR Construction could not continue without his personal efforts.

Thus, Patti insists that the monies earned from royalties and equipment rentals were the results of Donald's personal efforts. As they were results of his personal efforts, she argues those monies that were deposited into the DR Construction accounts transmuted the entire accounts into a marital account. Conversely, Donald contends that the trial court properly considered monies earned from royalties and equipment rentals as passive income and therefore non-marital property.

As noted earlier, income that one earns due to one's personal efforts during the marriage is considered marital income. *Kamp*, 199 Ill. App. 3d at 1085. The opposite of income earned from one's personal efforts is passive income. Passive income has been defined as:

“Income earned in an activity in which an individual does not materially participate. An example of ‘passive income’ includes: income from an interest in a limited partnership in contrast to ‘active income’ which is salaries and wages, or earnings from a trade or business. Rental income is always considered passive regardless of material participation.” Black's Law Dictionary (6th Ed. 1990) 1124.

Additionally, passive investment income is defined as “gross receipts from royalties, certain rents, dividends, interest, annuities, and gains from the sale or exchange of stock and securities.” Black's Law Dictionary (6th Ed. 1990) 1124.

We do not believe that the trial court erred in categorizing the monies that DRR Construction earned from mining royalties and equipment rental as being passive income and therefore non-marital. Indeed, both royalties and rentals are encompassed in the definition of passive income. Patti insists that the monies in royalties that DRR Construction earned were directly connected to Donald's personal efforts and therefore should have been classified as marital. However, any income generated from a passive source necessarily entails some personal efforts. Monies earned

from investments require one to exert efforts to invest that money. Monies earned from renting property require some effort to advertise the property and to maintain the property. We decline Patti's implicit invitation to ignore any distinction between passive and active income.

We also reject Patti's argument that the DR Construction account should have been classified as marital because the account contained monies that should have been distributed to Donald had he been properly compensating himself. Reliable compensated Donald for the work that he did for DR Construction. As explained above, the trial court's determination as to the reasonableness of the compensation that Donald received from Reliable was not against the manifest weight of the evidence.

B. Kirchoff Farm

Donald testified that when the Roberts Mine's gravel stores were near depletion, he and his mother looked for an additional piece of property to acquire so gravel mining operations could continue. When Roberts Mine gravel was depleted, Frances and Donald negotiated the purchase of Kirchoff Farm to acquire the underlying gravel. Kirchoff Farm is 158.88 acres, all of which is included in the annexation and reclamation plans with the Village of Holiday Hills. The property was purchased in 1985 for \$120,000. Frances paid a \$40,000 down payment with Donald financing the remaining \$80,000 through a purchase money mortgage with the sellers. Frances therefore had a one third interest in the Kirchoff farm. The purchase money note and mortgage on the property included Donald's personal guarantee. Donald testified that he made all of the payments for the Kirchoff farm through the DR Construction accounts. Frances subsequently gave her interest in the Kirchoff farm to Donald.

At trial, Patti testified that she gave Donald a check, dated November 9, 1985, for \$5,000 toward the purchase of the Kirchoff farm. The check was introduced into evidence. The check was signed by both Donald and Patti. It did not include a notation that it was for a down payment on the Kirchoff farm. Patti also produced a check register. The register had been in her sole possession throughout the marriage. The register included a handwritten notation stating that the \$5,000 was for a down payment on the Kirchoff farm. The notation was in a different color ink than the ink in which the check had been written. One week prior to trial, Patti had testified in a deposition that she did not know what the \$5,000 check was for.

Donald testified that the \$5,000 check was repayment to DR Construction for funds advanced in the expansion of the marital residence. The marital residence was expanded from 900 square feet to 1,500 square feet in 1984 and 1985. Donald never asked for money from the marital accounts to purchase the Kirchoff farm. He testified that the \$5,000 check and the notation in the check register are in his handwriting. Donald stated that since he did not include any reference to the Kirchoff farm, Patti must have added that reference at a later time.

At the close of the trial, the trial court found that Patti had failed to prove any marital funds were used to purchase the Kirchoff farm. The trial court therefore found that the Kirchoff farm was Donald's non-marital property and awarded it exclusively to him. The trial court valued Donald's interest in the Kirchoff farm as \$1,428,178.

On appeal, Patti contends that the Kirchoff farm should have been classified as a marital asset. Specifically, she claims that, because Donald personally guaranteed to pay \$80,000 to purchase the Kirchoff farm, he used the marital estate to gain financing. She further argues that the

Kirchoff farm was transmuted into a marital asset because Donald used funds from the DR Construction account as well as \$5,000 from a marital account to purchase the Kirchoff farm.

Patti's argument is without merit. We first observe that Patti cites no authority for the proposition that Donald's personal guarantee somehow transformed his purchase of the Kirchoff farm into a marital asset. That argument is therefore forfeited. See *In re Marriage of Hindenburg*, 227 Ill. App. 3d 228, 232 (1992) (arguments not supported by relevant legal authority are forfeited). Second, we have already rejected Patti's argument that the DR Construction account was transmuted into a marital account. Thus, as that account was non-marital, purchases from that account remained non-marital. Third, although Patti testified that \$5,000 from a marital account was used for the purchase of the Kirchoff farm, that testimony was contradicted by Donald's. In ruling that the Kirchoff farm was Donald's non-marital asset, the trial court found that Patti had failed to prove the Kirchoff farm had been purchased with any marital assets. The trial court therefore necessarily determined that Patti's testimony to the contrary was not credible. We will not disturb that determination on review. See *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004) (trial court's determination is afforded great deference when witness credibility is at issue because it is a superior vantage point to judge the credibility of the witnesses).

C. Reiland Farm

Reiland Farm was originally owned by Peter Reiland and mined by Reliable from 1977-1988. Peter Reiland was paid a per ton royalty for the gravel for the gravel mined by Reliable. Peter Reiland fell into financial difficulty during a protracted divorce and borrowed funds from DR Construction. After he could not repay the debt, Peter Reiland sold a half interest in the land to Donald in 1993 for the debt plus an additional sum paid from DRR Construction's account. In its

judgment of dissolution, the trial court awarded Reiland Farm to Donald as his non-marital property. The trial court valued Donald's 50% interest in the farm as \$1.05 million.

On appeal, Patti argues that the trial court erred in classifying Donald's interest in Reiland Farm as non-marital. She argues that his interest in Reiland Farm should have been considered marital because Donald used funds from the DR Construction account, a marital account, to purchase that farm. However, as we have already explained, Donald's use of the DR Construction account did not transmute that account into a marital account. As Patti presents no other reasons why the trial court should have classified Reiland Farm as a marital asset, we decline to disturb the trial court's judgment on that issue.

D. Classification of E*Trade Account as Non-Marital Property

On July 30, 1999, Donald purchased 3904 Elm, a rental property, for \$150,000. To finance that purchase, he obtained a loan of \$120,000 from Harris Bank. After obtaining that loan, he learned that the loan officer he had worked with at Harris Bank was moving to American Community Bank. On August 11, 1999, Donald obtained a loan of \$120,000 from his mother. He deposited that into the DRR Construction account. On August 24, 1999, he used that \$120,000 to pay off the loan to Harris Bank. Donald subsequently obtained a loan from American Community Bank for \$120,000 that was secured by a mortgage in 3904 Elm. With the \$120,000 in loan proceeds, Donald offered to repay his mother the entire loan. She told him to keep it. Donald testified that, in May 2001, he used the \$120,000 from his mother to open an E*Trade account. No other funds were ever deposited into that account. The account had a value of \$106,220.05 on March 31, 2009. Donald subsequently withdrew \$60,000 to pay his attorneys. In the judgment of dissolution, the trial court found that the account had a value of \$46,220.15 and classified it as

Donald's non-marital property. The trial court explained that Donald had shown clear and convincing evidence that the funds in the account had derived from a gift from his mother.

On appeal, Patti argues that the trial court erred in classifying Donald's interest in the E*Trade account as non-marital. She argues that since the funds used to start that account went through the DRR Construction account, a marital asset, the E*Trade account itself became a marital asset.

Patti's argument is without merit. We agree with the trial court's determination that Donald presented clear and convincing evidence that the funds he used to start the E*Trade account originated from a gift from his mother. Thus, that account was properly classified as non-marital. See *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 707 (2006) (gift to husband from husband's parents constituted non-marital property). Further, the fact that the \$120,000 Donald received from his mother went through the DRR Construction account is immaterial as we have already determined that account was non-marital.

V. Failure to Award Marital Life Insurance Policy

Patti introduced into evidence a life insurance policy from New York Life and Annuity Corporation that insured Donald. The policy indicated that it had a policy date of November 25, 1986 and a base plan amount of \$150,000. As of November 24, 2003, the policy had a cash surrender value of \$12,327.23. Donald testified that Reliable had taken the policy out on him and that Reliable was the beneficiary. Donald also testified that the policy was paid up.

In its January 14, 2010, memorandum of decision, the trial court found that no evidence was offered as to the date of the purchase or where the funds for the policy came from. The trial court therefore classified the policy as marital property as it found Donald had not presented clear and

convincing evidence to rebut the presumption that the policy was marital. However, the trial court did not assign a value to the policy or award it to either party.

In its March 4, 2010, judgment of dissolution, the trial court noted that one of the parties had added “a handwritten change which does list under paragraph K, New York Life Insurance policy as of 2003, with a value of \$12,237.23.” Nonetheless, neither party requested that the policy be awarded to them. As such, the trial court did not award the insurance policy to either party.

On appeal, Patti argues that the trial court should have awarded or divided the insurance policy pursuant to section 503(d)(1) of the Dissolution Act (750 ILCS 5/503(d)(1) (West 2008)). She also contends that the trial court should have valued the policy as close to the trial date as practicable. She further contends that because the insurance policy was always in David’s possession, she should not be penalized for his failure to disclose the current value of that policy. She therefore requests that the cause be remanded for the trial court to make those determinations. In response, Donald argues that Patti has forfeited this issue because she made no request at the March 4, 2010, hearing that the policy be awarded to her or divided among the parties.

Issues not raised in the trial court are forfeited on review. *In re Marriage of Benkendorf*, 252 Ill. App. 3d 429, 44 (1993). Parties to litigation cannot deliberately build an error by the trial court and then rely on that alleged error on appeal. *In re Marriage of Leff*, 148 Ill. App. 3d 792, 803 (1986). Further, parties cannot wait until proofs are closed and decisions rendered to seek out facts which would be the basis for a new trial. *In re Marriage of Rosen*, 126 Ill. App. 3d 766, 775 (1984).

We believe that Patti has forfeited this issue. The issue was raised before the trial court when it entered its judgment of dissolution. However, Patti never requested that the policy be awarded to her or be divided among the parties. Her failure to request that relief now precludes us from

remanding this case to allow her to seek that exact relief in a subsequent proceeding. See *Benkendorf*, 252 Ill. App. 3d at 444. To hold otherwise would allow Patti to deliberately build an error in the trial court and then benefit from that error on appeal. See *Leff*, 148 Ill. App. 3d at 803.

VI. Donald's Motion to Dismiss

On August 4, 2010, Donald filed a motion to dismiss Patti's appeal on the basis of the doctrine of the release of errors. Donald noted that Patti had been awarded almost the entire marital estate, valued at \$1.6 million. Donald asserts that Patti has mismanaged the former marital estate. He therefore contends that it would be inequitable to reverse the trial court's decision to reclassify and redistribute the parties' assets because of Patti's lessening of the value of the former marital estate. Since we are not reversing the trial court's decision, we need not address Donald's motion. We therefore deny Donald's motion as moot.

VII. Conclusion

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

Affirmed.