

SIXTH DIVISION
September 30, 2013

No. 1-12-1354

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN RE MARRIAGE OF KIMBERLEY HOWARD,	)	Appeal from the
	)	Circuit Court
Petitioner-Appellee,	)	of Cook County
	)	
v.	)	No. 08 D 3873
	)	
ANDRE L. HOWARD,	)	Honorable
	)	Moira S. Johnson,
Respondent-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 Held: The trial court's finding that the marital residence was marital property was not against the manifest weight of the evidence. The trial court erred in determining the temporary support the wife received during the pendency of the proceedings was not taxable income to her, but the husband forfeited any claim regarding the provision of the judgment obligating the husband to pay the wife's tax obligations and penalties for the duration of the marriage.

The trial court committed harmless error in listing two properties as acquired during the marriage, but the husband otherwise failed to demonstrate the property valuations were against the manifest weight of the evidence or that the trial court abused its discretion in the property distribution. The trial court did not abuse its discretion in barring the husband's affirmative defenses regarding commingling or his income in 2010 or 2011.

The judgment of dissolution contains clerical errors and contradictory rulings regarding the payment of two different awards from the liquidation of

identical investment accounts, which cannot stand. The husband failed to show the trial court abused its discretion in awarding attorney fees as part of the judgment of dissolution.

¶ 2 The respondent, Andre Howard (Andre) appeals an order of the circuit court of Cook County entering a judgment of dissolution of his marriage to petitioner, Kimberley Howard (Kimberley). On appeal, Andre contends the trial court erred in: (1) finding the condominium at 4542 South Ellis Avenue was purchased in contemplation of the marriage; (2) entering a judgment in conflict with federal law; (3) failing to rationally distribute the property; (4) abusing its discretion in barring certain affirmative defenses as a discovery sanction; (5) making contradictory findings and rulings in the judgment for dissolution; and (6) granting Kimberley's petition for contribution of attorney fees and costs. For the following reasons, we affirm in part, vacate in part and remand the case for further proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. Andre and Kimberley were married on May 24, 2003. There were no children born to the marriage and the parties adopted no children. Kimberley filed her petition for dissolution of marriage on April 22, 2008.

¶ 5 On July 9, 2008, Kimberley filed a petition for temporary and permanent maintenance, alleging that during the marriage, Andre provided Kimberley with approximately \$4,000 monthly. Kimberley alleged she received \$2,500 monthly for her work in managing Andre's rental properties and regularly charged \$1,500 monthly on the parties' credit card, which she used to pay household and personal expenses. On August 27, 2008, Kimberley filed a petition for interim attorney fees and costs. On September 26, 2008, the trial court entered an order awarding

Kimberley's counsel \$10,000 in attorney fees and Kimberley \$7,500 for expert witness fees. The trial court further directed Andre to pay Kimberley \$4,200 in monthly maintenance, retroactive to the date of filing.

¶ 6 The parties entered into stipulations prior to trial. The parties agreed they had been living apart since April 18, 2008. Andre became employed as a Chicago police officer on July 8, 1996, and went on disability on August 14, 2007. The parties further agreed that any pension acquired by Andre from May 24, 2003, through the entry of a judgment for dissolution of the marriage would be subject to a Qualified Illinois Domestic Relations Order to equally divide the marital portion of the benefits, with Kimberley designated as the alternate payee. In addition, the parties' automobiles would be awarded to them, respectively, and they would hold each other harmless for any liability thereon.

¶ 7 The trial on Kimberley's petition commenced on October 19, 2010, and continued intermittently through October 13, 2011. The court heard testimony regarding a number of residential and commercial properties relevant to this appeal.

¶ 8 4542 South Ellis Avenue

¶ 9 The parties testified on the issue of whether Andre purchased a condominium at 4542 South Ellis Avenue in contemplation of the parties' marriage. Kimberley testified she met Andre in August 2000. At the outset of their relationship, Andre traveled to visit her in St. Louis, Missouri; she did not travel to Chicago until 2001. According to Kimberley, Andre proposed to her in late January 2001 in Springfield, Missouri. By this time, the parties had decided Kimberley would move to Chicago.

¶ 10 Kimberley also testified she came to Chicago in February or March of 2002 in order to locate a place where she could reside with Andre. Andre retained a realtor. Andre and Kimberley looked at properties in the Beverly, Hyde Park and Kenwood neighborhoods. Kimberley further testified that during this period, she and Andre ultimately agreed the condominium at 4542 South Ellis Avenue would be their home. Kimberley was living in St. Louis at the time, so Andre attended to the loan transaction, which closed in June 2002. Kimberley testified she moved her personal items from Missouri to Chicago on August 23, 2002, and began using the condominium as her mailing address. According to Kimberley, the couple did not break up between August 2002 and their wedding, although the wedding was delayed until May 2003.

¶ 11 Andre testified he and Kimberley were initially engaged in January or February of 2002. He, however, called off the engagement in the Spring of 2002. According to Andre, the engagement was reinstated in November 2002.

¶ 12 Andre also testified he moved into the condominium at 4542 South Ellis Avenue on June 27, 2002, and Kimberley relocated there in 2003. Andre further testified he did not buy the condominium because the parties were getting married. Andre explained he previously resided at a property he owned on 8623 South Ashland, but living with 11 of his tenants was a nuisance. Thus, Andre testified, he commenced searching for new living options while saving money to relocate. He saved enough money for the down payment on the condominium at 4542 South Ellis Avenue over the course of five years.

¶ 13 According to Andre, Kimberley was not present for the negotiations regarding the

purchase of the condominium. Kimberley did not deposit any money on the property and did not attend the closing. Kimberley's name was not on the deed or title to the condominium.

Kimberley never contributed funds to satisfy the mortgage. After moving into the condominium, Kimberley enrolled a number of the utilities in her name in order to improve her credit rating.

Andre testified, however, that he paid the utility bills. Andre did not testify regarding the source of funds for the utility payments.

¶ 14 Property and Business Valuation

¶ 15 Michael Grimes (Grimes) of Grimes Real Estate Services testified regarding his appraisal of the condominium at 4542 South Ellis Avenue and various properties acquired during the parties' marriage. Grimes followed the Financial Institutions Reform, Recovery, and Enforcement Act guidelines and the Uniform Standards of Professional Appraisal Practice. Grimes generally employed the sales comparison approach to appraising these properties. The appraisal reports Grimes generated were also admitted into evidence.

¶ 16 Grimes appraised the condominium at 4542 South Ellis Avenue as having a market value of \$400,000. Grimes testified a laundromat with parking facilities at 6136 South Ashland Avenue in Chicago, Illinois had an appraised value of \$480,000. A 10-unit apartment building at 6100-04 South Artesian Avenue in Chicago was appraised at \$300,000. A 13-unit apartment building at 8301-11 South Paulina Avenue in Chicago was appraised at \$293,000. A multi-tenant commercial office building at 110 East 79th Street in Chicago was appraised at \$700,000. A 14-unit apartment building located at 1649-51 West 83rd Street in Chicago was appraised at \$350,000. A boarded-up, presumed 10-unit building located at 6201-05 South Rockwell Street

in Chicago was appraised at \$90,000.

¶ 17 Grimes further appraised a six-unit residential apartment building at 1669 Harbor Boulevard in Calumet City, Illinois, at \$145,000. A six-unit residential apartment building at 1633 Harbor Boulevard in Calumet City, Illinois, also was appraised at \$145,000. In addition, Grimes appraised a 11-unit apartment building at 634 Sibley Boulevard in Calumet City at \$235,000.

¶ 18 Dr. Michael Sandretto, who teaches accounting at the University of Illinois, testified he had experience in business valuation, and had testified as an expert witness by deposition, but not in court.¹ Dr. Sandretto was initially retained by Kimberley to determine whether Andre had sufficient funds to pay maintenance and later to investigate any evidence of commingling of marital and nonmarital assets, primarily with regard to real estate. Dr. Sandretto also testified his work in this matter was regarding these issues and did not pertain to property valuation.

¶ 19 Dr. Sandretto testified that when he prepared his opinion of whether Andre could afford to pay maintenance, he was unsure whether Andre could pay maintenance from the income stream on the properties under his control. Dr. Sandretto also testified that after he received additional information regarding Andre's finances, he concluded Andre probably did not have the funds to satisfy the maintenance payment from the income streams of his businesses. Dr. Sandretto nevertheless opined at that time Andre could pay maintenance from his investment

¹ Dr. Sandretto did not specify whether he previously sat for discovery or evidentiary depositions.

accounts. Dr. Sandretto further testified he examined some appraisals and it appeared as though the properties were "about even," "Certainly not worth a lot, but maybe not a huge liability."

¶ 20 Brian Richman (Richman) testified he was engaged by Andre to provide a financial analysis including a valuation of businesses and properties. This analysis included an examination of rent rolls, leases, mortgage statements, escrow accounts and real estate tax bills.

¶ 21 Richman submitted a report valuing the properties acquired before and during the marriage. The reports states the condominium at 4542 South Ellis Avenue, per Andre, had an estimated value of \$200,000, less a \$170,000 mortgage, for a net value of \$30,000. Based on the Grimes market analysis, Richman estimated the value of the laundromat property at 6136 South Ashland Avenue in Chicago was \$550,000, less a \$1,024,247 mortgage, for a net value (including other assets and liabilities) of negative \$490,591. Richman also valued the laundromat business on a revenue basis as approximately \$310,000. Richman further valued the 10-unit apartment building at 6100-04 South Artesian Avenue in Chicago at \$280,000, less mortgages of \$400,431 and \$50,543 for a net value (including other assets and liabilities) of negative \$207,015. The 13-unit apartment building at 8301-11 South Paulina Avenue in Chicago, acquired before the date of marriage, was valued at \$520,000, less a \$551,713 mortgage for a net value (including other assets and liabilities) of negative \$39,139. The multi-tenant commercial office building at 110 East 79th Street in Chicago was valued at \$600,000 less a mortgage balance of \$818,592, for a net value (including other assets and liabilities) of negative \$249,759. The 14-unit apartment building located at 1649-51 West 83rd Street in Chicago, acquired before the date of marriage, was valued at \$560,000, less a mortgage of \$554,164, for a

net value (including other assets and liabilities) of negative \$429. The boarded-up, presumed 10-unit building located at 6201-05 and 6154-58 South Rockwell Street in Chicago was valued at \$150,000, less a \$342,715 outstanding mortgage balance, for a net value (including other assets and liabilities) of negative \$196,775, half of which is negative \$98,388.

¶ 22 Richman valued the six-unit residential apartment building at 1669 Harbor Boulevard in Calumet City, Illinois, at \$200,000, less a mortgage of \$233,380, for a net value (including other credits and liabilities) of negative \$39,731. The six-unit residential apartment building at 1633 Harbor Boulevard in Calumet City, Illinois, was valued at \$210,000, less a mortgage of \$393,230, for a net value (including other credits and liabilities) of negative \$193,054. Richman further valued the 11-unit apartment building at 634 Sibley Boulevard in Calumet City at \$300,000, less a mortgage of \$393,230, for a net value (including other credits and liabilities) of negative \$207,015.²

¶ 23 Richman additionally testified he faulted Dr. Sandretto's report in part as demonstrating a lack of understanding of real estate financing. Richman observed Andre did not own these properties due to the debt incurred in the underlying transactions. Richman opined the estate of Andre's assets and liabilities was negative. Richman testified the liabilities exceeded the assets by \$1,034,000. Richman's report indicates the real estate investment funds after the date of marriage had a value of negative \$533,562.

² The report indicates a single mortgage was taken out on 1633 Harbor Boulevard and 634 Sibley Boulevard; the report assigned 50% of the mortgage to each property.

¶ 24 Richman's report also assesses other aspects of the marital estate. For example, Richman's report indicates investment accounts valued at \$1,422,354, of which \$416,604 were funds relating to the period after the date of marriage. Richman's report further values an insurance business incorporated prior to the marriage as having an average market equity of \$627,000, based on 2008 revenue of \$104,142 and 2009 revenue of \$110,633.

¶ 25 Gregory Pearl, a business appraiser and consultant, testified the laundromat had an estimated annual revenue of \$288,000. Pearl tended to ignore the expense items in the laundromat's financial statement, based on his understanding that some of the expenses listed were probably used for other business interests. By examining other sales of laundromats and averaging the results of several methods of valuation, Pearl concluded the laundromat was valued at \$350,000.

¶ 26 **Commingling of Marital and Nonmarital Property**

¶ 27 Dr. Sandretto testified regarding evidence Andre commingled his marital and nonmarital accounts. For example, some of Andre's salary as a Chicago police officer went into his premarital personal account, as did disability payments.

¶ 28 Dr. Sandretto also regarded the parties' unpaid efforts on behalf of Andre's premarital businesses and properties to be evidence of commingling. According to Dr. Sandretto, Kimberley would count the revenue Andre brought home from the laundromat on a nightly basis. Kimberley also prepared leases and maintained records for some of Andre's businesses. Dr. Sandretto further testified Kimberley received \$2,500 monthly from Andre, but there was no evidence this was a salary, as opposed to a draw for household expenses. Dr. Sandretto added

Andre did not have financial statements for the period prior to 2008 and the tax returns did not indicate Andre or Kimberley were paid salaries from the various businesses.

¶ 29 Dr. Sandretto, referring to his report, observed Andre refinanced several properties for an amount exceeding \$600,000. Andre used this sum to fund his other businesses.

¶ 30 Moreover, based on Richman's report, Dr. Sandretto observed Richman was unable to determine the source of some of the funds utilized to acquire properties. Additionally, Dr. Sandretto noted that the payments into Andre's investment accounts were possibly sourced to Andre's salary or the businesses. Dr. Sandretto opined that some of the commingling was probably due to the severe recession which occurred during the time period at issue. Dr. Sandretto did not consider Andre's actions unusual, but concluded Andre did not maintain a separation of marital and nonmarital assets during the marriage.

¶ 31 Richman testified Andre satisfied both personal and business expenses out of his personal checking account. According to Richman, Andre did not have a checking account for his insurance business until 2009. In addition, certain expenditures related to the properties were withdrawn from Andre's personal checking account. Andre's paycheck was also deposited into his personal account. Richman's report stated Andre set up a separate checking account for each building or group of buildings in the same location, but it was often necessary to advance funds from one building account to another, or from Andre's personal checking account, in order to satisfy invoices as they came due. Richman, however, would not testify this constituted a commingling of funds.

¶ 32 On October 11, 2011, Kimberley filed an emergency motion for sanctions against Andre

pursuant to Illinois Supreme Court Rule 219 (eff. July 1, 1992). In the motion, Kimberley alleged Andre was not forthcoming regarding discovery either prior to or during the trial in this matter. Kimberley attached a group exhibit of trial court orders granting Andre extensions or ordering him to comply with discovery obligations. Kimberley also attached an October 6, 2011, order directing Andre to update discovery, particularly the 2011 rent rolls and invoices for legal and professional fees, by October 7, 2011. Kimberley alleged the rent roll tendered for one of the properties did not contain all of the information contained in rent rolls Andre previously submitted. Kimberley alleged she was prejudiced by the changing nature of Andre's testimony and his failure to provide supporting documentation. On October 11, 2011, the trial court entered an order granting Kimberley's motion and finding Andre in default over his counsel's objection. The trial court set the matter for a proveup on October 12, 2011.

¶ 33 On October 11, 2011, subsequent to the entry of the court's order, Andre filed an emergency motion to vacate or, in the alternative, for reconsideration. On October 12, 2011, the trial court entered an order granting Andre's motion in part and denying the motion in part. The trial court vacated the entry of default against Andre, but barred him from asserting any affirmative defense regarding commingling or his income in 2010 and 2011. The trial court also granted Kimberley leave to file a petition for attorney fees.

¶ 34 The Judgment of Dissolution

¶ 35 On October 13, 2011, following closing arguments and the submission of draft judgments by the parties, the trial court entered a judgment for dissolution of marriage. In the judgment, the trial court held Andre had a premarital estate including his retirement benefits, real estate

properties, investment accounts and the insurance business. Kimberley had a premarital estate including a property in Missouri and a deferred compensation plan which has been exhausted.

¶ 36 The trial court also determined the property at 4542 South Ellis Avenue was purchased prior to, but in contemplation of, the marriage. The trial court's finding was that the property had an appraised value of \$400,000, but was encumbered by a mortgage.

¶ 37 The trial court further determined the following properties were acquired during the marriage and were encumbered by mortgages: (1) 6201-05 South Rockwell Street in Chicago, appraised at \$90,000; (2) 1669 Harbor Boulevard in Calumet City, appraised at \$145,000; (3) 1633 Harbor Boulevard appraised at \$145,000; (4) 6100-04 South Artesian Avenue in Chicago, appraised at \$300,000; (5) 110 East 79th Street in Chicago, appraised at \$700,000; (6) 634 Sibley Boulevard in Calumet City, appraised at \$235,000; (7) 6136 South Ashland Avenue in Chicago, Illinois, appraised at \$480,000; (8) 1649-51 West 83rd Street in Chicago, appraised at \$350,000; (9) 8301-11 South Paulina Avenue in Chicago, appraised at \$293,000; and (10) a commercial strip mall located at 808 W. 87th Street in Chicago, appraised at \$2 million.

¶ 38 In addition, the trial court found the parties acquired business interests during the marriage, including the laundromat business, which was valued at \$350,000, and limited liability companies related to the real estate properties, which were not specifically valued in the judgment.

¶ 39 Moreover, the trial court determined Kimberley had two bank accounts in her name with a total value of approximately \$170. Andre had three premarital investment accounts in his name: (1) an American Century account valued at \$105,332.35 as of August 2011; (2) a Wells

Fargo Advantage Fund account, valued at \$55,951.05 in August 2011; and (3) a Janus Investments account valued at \$10,674.90 as of June 2011. Andre also had a Vanguard investment account valued at \$102,699.59 and a Vanguard annuity valued at \$137,527.57.

¶ 40 The judgment further recited Kimberley was awarded funds during the pendency of the proceedings, pursuant to a petition for temporary relief. The judgment additionally stated Kimberley filed a petition for contribution pertaining to attorney fees and incurred a balance of approximately \$130,000 in attorney fees.

¶ 41 The judgment determined the parties were capable of supporting themselves and were barred from seeking maintenance or alimony from each other. The trial court ruled the \$2,500 Kimberley received monthly from Andre to maintain the parties' household was not taxable income to her. In addition, the temporary support petitioner received during the pendency of the proceedings was not taxable income to her. The judgment further set forth Andre "shall hold solely responsible for any and all tax liabilities and penalties for any and all income earned by both parties from the date of marriage through the date of entry" of the judgment.

¶ 42 The trial court additionally determined the marital estate and Andre's premarital estate were commingled and it was impossible to distinguish between the two, based on the manner in which Andre handled assets and conducted business for various enterprises. The trial court found the commingling of the assets was "replete."

¶ 43 The judgment awarded Kimberley \$115,000 from the equity of the marital residence at 4542 South Ellis Avenue, to be paid by Andre within 90 days. In the event Andre failed to render payment to Kimberley within 90 days, Andre would be ordered to vacate the property and

quitclaim it to Kimberley within 30 days, with Kimberley to receive \$115,000 from the net proceeds from the sale of the property.

¶ 44 The judgment awarded Andre the properties listed in the judgment as acquired during the marriage, along with the property at 6154-58 South Rockwell Street in Chicago. The judgment also awarded Andre the business enterprises and interests acquired during the marriage. The trial court found Andre was in a better position than Kimberley to generate income from the properties and businesses, based on the parties' history.

¶ 45 The judgment awarded Kimberley \$650,000 for her interest in the real properties other than the marital residence. The amount typed in the judgment was \$800,000, which was struck and replaced with the handwritten figure of \$650,000. The order provides \$200,000 of this amount was immediately payable to Kimberley. Andre was ordered to liquidate his accounts with American Century, Wells Fargo and Janus, and tender payment of \$200,000 within 21 days of the entry of the judgment. The remaining \$450,000 was ordered to be paid in 84 installments over a seven-year period. The amount typed in this provision of the judgment was \$600,000, which was struck and replaced with the handwritten figure of \$450,000. Andre was also ordered to immediately execute an assignment of rents received by Chase Bank for the property located at 808 W. 87th Street in Chicago to effectuate the court's order. Moreover, in the event Andre was unable to assign these rents, Andre would be required to assign the rents from the Subway and currency exchange in the commercial strip mall.

¶ 46 The judgment further provided "[t]he award to [Kimberley] in the amount of \$800,000 shall be an automatic lien" on one of Andre's limited liability companies and the laundromat

business. The trial court struck from the typed judgment provisions requiring Andre to personally guarantee payment of the \$800,000 by securing a life insurance policy.

¶ 47 In addition, the judgment ordered Andre to immediately liquidate his accounts with American Century, Wells Fargo and Janus to pay \$130,000 to Kimberley's counsel within seven days of the entry of judgment.

¶ 48 On October 20, 2011, Andre filed a motion to vacate or reconsider the judgment for dissolution. On November 14, 2011, the trial court entered an order transferring the case to the presiding judge of the domestic relations division because Andre filed a bankruptcy petition in federal court. On March 6, 2012, the trial court entered an agreed order stating the federal court's automatic stay resulting from Andre's bankruptcy filing had been modified to allow the divorce proceedings to continue and transferring the matter to be heard by the original trial judge to schedule a hearing on Andre's motion to vacate or reconsider. On April 9, 2012, the trial court denied Andre's motion to vacate or reconsider. On May 9, 2012, Andre filed his notice of appeal to this court. On June 28, 2012, Andre filed a motion to set bond and stay enforcement of the judgment, which this court denied on July 11, 2012.

¶ 49 DISCUSSION

¶ 50 Prior to addressing the merits of this appeal, we first observe that Andre's brief fails to comply with the requirements of Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008), which requires the appellant's brief "shall contain [a statement of] the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Supreme court rules " "are not

aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." ' ' " *Rodriguez v. Sheriff's Merit Commission of Kane County*, 218 Ill. 2d 342, 353 (2006) (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494 (2002) (quoting *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995))). Where an appellant's brief violates the requirements of our supreme court rules, this court has the discretion to strike the brief and dismiss the appeal or disregard appellant's arguments. *Alderson v. Southern Co.*, 321 Ill. App. 3d 832, 845 (2001). We recognize, however, " '[w]here violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted.' " *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1101 (2008) (quoting *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 527 (1997)).

¶ 51 Andre's brief undoubtedly fails to strictly comply with Rule 341(h)(6). Andre's statement of facts comprises two and one-half pages to summarize 34 days of trial proceedings in a record comprised of 46 volumes, including expert reports on the appraisal and valuation of numerous properties and businesses. Andre's most specific references to testimony and documents are set forth in the argument section of his brief and are not always stated "accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008).

¶ 52 Nevertheless, given the nature of the issues Andre raises on appeal, these violations of Rule 341(h)(6) do not preclude review of the appeal. This court, in the exercise of its discretion, will consider this appeal on its merits. We observe, however, it is generally the appellant's burden to affirmatively demonstrate error from the record. *In re Alexander R.*, 377 Ill. App. 3d 553, 557 (2007). "Reviewing courts will not search the record for purposes of finding error ***

when an appellant has made no good-faith effort to comply with the supreme court rules governing the contents of briefs." *Id.* "[I]t is neither the function nor the obligation of the Appellate Court to act as an advocate or search the record for error ." *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50. Therefore, with these admonitions in mind, we turn to consider the merits of defendants' appeal.

¶ 53 Andre on appeal argues the trial court: (1) erred in finding the condominium at 4542 South Ellis Avenue was purchased in contemplation of the marriage; (2) entered a judgment in conflict with federal law; (3) failed to rationally distribute the property; (4) abused its discretion in barring certain affirmative defenses as a discovery sanction; (5) made contradictory findings and rulings in the judgment for dissolution; and (6) erred in granting Kimberley's petition for contribution of attorney fees. We address these arguments in turn.

¶ 54 I. The Status of 4542 South Ellis Avenue

¶ 55 Andre challenges the trial court's classification of 4542 South Ellis Avenue as marital property. "A circuit court's classification of property as marital or nonmarital will only be disturbed if the classification is against the manifest weight of the evidence." *In re Marriage of McBride*, 2013 IL App (1st) 112255, ¶ 24. "A decision is considered against the manifest weight of the evidence only where the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary or not based on the evidence presented." *Id.*

¶ 56 The condominium at issue was purchased prior to the parties' marriage. "Assets acquired prior to marriage, but in contemplation of marriage are to be considered marital property." *Id.* at ¶ 25.

"In these cases, the courts [have] looked to the totality of the circumstances finding relevant the following factors: the proximity in time between acquisition of the property and the marriage, whether equity in the property was acquired with marital funds, evidence that the parties intended the property to serve as the marital home, whether the parties' names appear on the offer sheet, and the manner in which title is held (although this last factor is not determinative and may be of no consequence in a given case.)" *In re Marriage of Olbrecht*, 232 Ill. App. 3d 358, 363 (1992) (and cases cited therein).

In a nonjury trial, where there is conflicting testimony, the determination of the witnesses' credibility is the province of the trier of fact. *In re Marriage of Jacks*, 200 Ill. App. 3d 112, 119 (1990).

¶ 57 In this case, Andre and Kimberley gave varying testimony on the events surrounding the acquisition of the property. The trial judge may have chosen to believe Kimberley's testimony that the parties began looking for a home two or three months after their engagement, looked at properties together and decided the condominium at 4542 South Ellis Avenue would be their home. Kimberley testified she moved her personal items from Missouri to Chicago on August 23, 2002, approximately two months after the closing on the condominium, though she did not move to Chicago for several months thereafter. According to Kimberley, the couple did not break up between August 2002 and their wedding, although the wedding was delayed to May 2003. Andre's brief concedes mortgage payments were made with marital funds during the course of the marriage. Although the record reflects Andre handled the real estate transaction and accompanying paperwork, considering the totality of the circumstances, the trial court's

finding is not unreasonable, arbitrary or not based on the evidence presented. See *Olbrecht*, 232 Ill. App. 3d at 363. Accordingly, we conclude the trial court's finding that 4542 South Ellis Avenue is marital property is not against the manifest weight of the evidence.

¶ 58

II. Federal Taxation

¶ 59 Andre next contends the judgment of dissolution directly conflicts with federal tax law by forgiving Kimberley's tax debts and shifting her tax liability to Howard. "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed." *Morgan v. Comm'r*, 309 U.S. 78, 80 (1940); see *In re Marriage of McCune*, 86 Ill. App. 3d 311, 316 (1980) ("No state is empowered to designate a transaction as a taxable or a non-taxable event under the Internal Revenue Code, as this power lies exclusively with the Federal government."). This approach balances the legitimate and traditional interest of the states in creating and defining property interests, and the necessity for uniform administration of the Internal Revenue Code. *Aquilino v. United States*, 363 U.S. 509, 513 (1960).

¶ 60 Section 71 of the Internal Revenue Code provides in relevant part:

"(a) General rule.--Gross income includes amounts received as alimony or separate maintenance payments.

(b) Alimony or separate maintenance payments defined.— For purposes of this section --

(1) In general. – The term “alimony or separate maintenance payment” means any payment in cash if --

(A) such payment is received by (or on behalf of) a spouse under a

divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

(2) Divorce or separation instrument.--The term "divorce or separation instrument" means--

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(B) a written separation agreement, or

(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse." 26

U.S.C.A. § 71 (2006).

The federal regulation implementing section 71 "requires the inclusion in the gross income of the

wife of periodic payments *** from her husband under any type of court order or decree (including an interlocutory decree of divorce or a decree of alimony pendente lite) *** requiring the husband to make the payments for her support or maintenance. It is not necessary for the wife to be legally separated or divorced from her husband under a court order or decree; nor is it necessary for the order or decree for support to be for the purpose of enforcing a written separation agreement." 26 C.F.R. §1.71-1(b)(3)(i) (2006).

¶ 61 In this case, the trial court entered an order directing Andre to pay \$4,200 monthly in maintenance. The order does not designate the funds as a payment which is not includible in gross income under section 71 of the Internal Revenue Code and not allowable as a deduction under section 215. The parties' trial stipulation states the parties lived apart since April 18, 2008. The order provides for temporary maintenance and bears no indication such payments would survive either party's death.

¶ 62 Kimberley's argument that there was no violation of the Internal Revenue Code is based entirely on *In re Marriage of Mass*, 102 Ill. App. 3d 984, 988 (1981). However, *Mass* is inapposite because it interprets a prior, significantly different version of the relevant statutes. See *id.* Accordingly, we conclude the trial court erred in determining the temporary support Kimberley received during the pendency of the proceedings was not taxable income to her.

¶ 63 Andre also argues the trial court erred in making him responsible for "any and all tax liabilities and tax penalties for any and all income earned by both parties from the date of marriage through the date of the judgment of dissolution. Andre observes that during the marriage, Kimberley filed her own tax returns as a single individual. Therefore, Andre argues he

cannot be held liable for tax liabilities or penalties where he did not prepare, review or sign Kimberley's tax returns.

¶ 64 Andre's sole citation to authority in support of this argument, however, is to "26 U.S.C. § 7201 *et seq.*" This general citation provides no guidance to a court in considering the issue raised in this appeal. Moreover, Andre cites no authority addressing the issue of whether one party to divorce proceedings may be required to reimburse the other party for tax liabilities or penalties incurred during the marriage. A failure to cite relevant authority violates Rule 341(h)(7) and can cause a party to forfeit consideration of the issue. *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38. Such is the case here.

¶ 65 III. Property Valuation and Distribution

¶ 66 Andre further argues the trial court had no rational basis for the property distribution, largely because the trial court's property valuations were against the manifest weight of the evidence. Section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503 (West 2006)), which governs the distribution of property in a dissolution proceeding provides that the trial court "shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including: (1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, ***; (2) the dissipation by each party of the marital or non-marital property ***; (3) the value of the property assigned to each spouse; (4) the duration of the marriage; (5) the relevant economic circumstances of each spouse when the division of property is to become effective ***; ***; (7) any antenuptial agreement of the parties; (8) the age, health, station,

occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; ***; (10) whether the apportionment is in lieu of or in addition to maintenance; [and] (11) the reasonable opportunity of each spouse for future acquisition of capital assets and income." 750 ILCS 5/503(d) (West 2006). "The touchstone of apportionment of marital property is whether the distribution is equitable [Citations], and each case rests on its own facts." " *In re Marriage of Demar*, 385 Ill. App. 3d 837, 852 (2008) (quoting *In re Marriage of Jones*, 187 Ill. App. 3d 206, 222 (1989)). The Act does not require an equal division of marital property; rather, as noted, it requires an equitable division. *Demar*, 385 Ill. App. 3d at 852. Specific findings are not required. *In re Marriage of Blunda*, 299 Ill. App. 3d 855, 868-69 (1998). "We will not disturb a trial court's division of marital property unless an abuse of discretion is shown." *Demar*, 385 Ill. App. 3d at 852. "A trial court does not abuse its discretion unless, in view of all of the circumstances, its decision so exceeded the bounds of reason that no reasonable person would take the view adopted by the trial court." *Id.*

¶ 67 Under section 503 of the Act, property acquired during the marriage is presumed marital, regardless of how the property is titled. 750 ILCS 5/503(b)(1) (West 2006). The presumption is overcome with a showing the property is nonmarital. 750 ILCS 5/503(b)(1) (West 2006).

Nonmarital property includes property acquired by gift, legacy or descent; or in exchange for such property; property acquired before the marriage; or income from nonmarital property if it is not attributed to a spouse's personal efforts. 750 ILCS 503(a)(1), (2), (6), (8) (West 2006).

When marital and nonmarital assets are commingled into newly acquired property, resulting in a loss of identities of the separate estates, the commingled property is transmuted to marital

property. 750 ILCS 5/503(c)(1) (West 2006). On the review of a trial court's findings on the existence of marital and nonmarital property, a manifest-weight-of-the-evidence standard is applied. *In re Marriage of Berger*, 357 Ill. App. 3d 651, 659-60 (2005).

¶ 68 Andre asserts that the judgment of dissolution lists the properties at 1649-51 West 83rd Street and 8301-11 South Paulina Avenue in Chicago as acquired during the marriage, when they were in fact acquired approximately a month prior to the date of marriage on April 23, 2003. Andre overlooks the fact that the judgment also determined Andre commingled his premarital estate with the marital estate. Moreover, the judgment awarded Andre the business enterprises and interests acquired during the marriage on the basis that Andre was in a better position than Kimberley to generate income from the properties and businesses, based on the parties' history. Accordingly, we conclude the inclusion of the two properties on the list of those acquired during marriage did not materially affect the trial court's intended property distribution and is harmless error. See, e.g., *In re Marriage of Bradley*, 2013 IL App (5th) 100217, ¶ 27.

¶ 69 Andre additionally argues the trial court "misstated the market value of the properties in that it listed the appraised value of certain properties without accounting for mortgages and other expenses." A review of the judgment however, establishes the judgment did not purport to state the market value of the properties. Rather, the judgment notes the appraised value of the properties, while also expressly noting these properties were encumbered by mortgages. Accordingly, the judgment does not establish that the trial court failed to consider the properties' liabilities.

¶ 70 Lastly on this point, Andre contends the trial court erred in valuing the laundromat

business at \$350,000. The Richman report, however, adopted the \$350,000 valuation.

Accordingly, the finding appears to be based on the evidence.

¶ 71 In short, although the trial court erred in listing two properties as acquired during the marriage, the error was harmless in this case. Andre has otherwise failed to demonstrate the property valuations were against the manifest weight of the evidence or that the trial court abused its discretion in the property distribution.

¶ 72 IV. The Discovery Sanction

¶ 73 Andre next contends the trial court abused its discretion in barring affirmative defenses regarding commingling or his income in 2010 or 2011. Andre's brief refers to a hearing on the motion for sanctions, but contains no citations to any transcript of proceedings for the hearing. Moreover, Andre's characterizations of the issues vary significantly. For example, Andre's opening brief refers (without citation to the record) to his "failure to update a rent roll to add the *de minimus* amount of \$2,000," while his reply brief acknowledges (again without citation to the record) he failed to include a new tenant "paying \$2,000 per month" – an amount considerably more than \$2,000. As the appellant, it is Andre's burden to affirmatively demonstrate error from the record. *Alexander R.*, 377 Ill. App. 3d at 557. It is not this court's duty to search the record for error. *Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50. The record Andre presents here does not establish the trial court abused its discretion.

¶ 74 Supreme Court Rule 219 (eff. July 1, 2002) authorizes the circuit court to impose sanctions, including barring defenses at trial, when a party fails to make timely disclosures or otherwise fails to comply with the court's orders regarding discovery. See *In re Marriage of*

Daebel, 404 Ill. App. 3d 473, 487-88 (2010) (where petitioner refused to sit for her deposition and then surprised respondent at trial with unexpected argument, trial court abused its discretion by not barring her testimony and barring her from presenting undisclosed defenses; trial court's final order, which was based largely upon petitioner's testimony, was vacated). In determining whether to impose Rule 219 sanctions, courts consider the following factors: "(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 124 (1998). The decision to impose sanctions for a party's violation of a pretrial discovery order is committed to the trial court's sound discretion, and it will not be disturbed on appeal absent an abuse of discretion. *Id.* at 123.

¶ 75 Andre relies primarily on *Smith v. P.A.C.E., a Suburban Bus Division of Regional Transportation Authority*, 323 Ill. App. 3d 1067, 1076 (2001). In *Smith*, however, this court affirmed an order barring the plaintiff from introducing any evidence in support of a claim for "lost time, income, profits and business resulting from the complained of accident," finding no abuse of discretion regarding that portion of the court's order, where the plaintiff failed to answer interrogatories addressed to such a claim for damages, refused to produce documents in support thereof, and failed to execute forms that would have enabled the defendants to obtain copies of his Federal tax returns. *Id.* at 1076. The *Smith* court reversed a separate portion of the order barring the plaintiff from calling any witnesses at trial. *Id.* at 1078.

¶ 76 In this case, Andre's brief acknowledges commingling and his income for 2010 and 2011 were significant issues at trial. Thus, the trial court could reasonably conclude Kimberley would suffer surprise and prejudice by Andre's refusal to fully comply with the court's prior discovery orders regarding these issues. Unlike the trial court in *Smith*, the trial court here did not bar Andre from presenting witnesses at trial. Indeed, the trial court heard Andre's expert testify regarding Andre's usage of personal and business funds, which did not significantly differ on this point from the testimony of Kimberley's expert, other than their ultimate conclusion regarding whether such usage should be deemed commingling. Based on this record, we conclude the trial court's order falls within the discretion of the trial court and the type of sanction affirmed in *Swift*.

¶ 77 V. Contradictions in the Judgment of Dissolution

¶ 78 Andre further contends findings and rulings in the Judgment of Dissolution conflict with each other and are impossible to enforce. A trial court's contradictory findings and rulings cannot stand and will be deemed against the manifest weight of the evidence. See *In re Marriage of Eltrevoog*, 92 Ill. 2d 66, 71 (1982); *In re Marriage of Escatel*, 226 Ill. App. 3d 629, 631 (1992). Kimberley maintains any inconsistencies in the judgment are merely clerical errors. A court may modify its judgment at any time *nunc pro tunc* to correct a clerical error or matter of form so that the record conforms to the judgment actually rendered by the court. *In re Marriage of Takata*, 304 Ill. App. 3d 85, 92 (1999). This court may correct clerical errors pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994). See *In re Marriage of Nesbitt*, 377 Ill. App. 3d 649, 661 (2007). "Clerical errors or matters of form are those errors, mistakes, or omissions

that are not the result of the judicial function." *Takata*, 304 Ill. App. 3d at 92. Kimberly also contends any error in the judgment is harmless. See *Bradley*, 2013 IL App (5th) 100217, ¶ 27.

¶ 79 Although Andre contends the judgment of dissolution is "replete with self-contradictory errors," his brief raises only three such instances, which we address in turn. First, Andre maintains it was contradictory for the judgment to find Kimberly "was awarded funds resulting from her Petition For Temporary Relief," when the trial court in fact ordered the payment of maintenance. As previously discussed, the trial court erred in determining the temporary support Kimberley received during the pendency of the proceedings was not taxable income to her. The judgment's reference to the temporary maintenance as "funds," however, is neither contradictory nor a mischaracterization. Rather, it is merely a broader, more general term.

¶ 80 Second, Andre correctly observes the judgment awarded Kimberley \$650,000 for her interest in the real properties other than the marital residence, striking the typed amount of \$800,000, yet retained the typed \$800,000 amount in imposing an automatic lien on one of Andre's limited liability companies and the laundromat business. As the latter provision of the judgment referred to "[t]he award to [Kimberley] in the amount of \$800,000," we agree with Kimberley that the trial court made a clerical mistake in failing to reduce the proposed judgment's lien to \$650,000 in the actual judgment.

¶ 81 Third, Andre observes that the judgment ordered him to liquidate his accounts with American Century, Wells Fargo and Janus, and tender payment of \$200,000 to Kimberley within 21 days of the entry of judgment, but also ordered Andre to immediately liquidate his accounts with American Century, Wells Fargo and Janus to pay \$130,000 to Kimberley's counsel within

seven days of the entry of judgment. The judgment also found American Century account was valued at \$105,332.35, the Wells Fargo account was valued at \$55,951.05, and the Janus Investments account was valued at \$10,674.90 – a total amount of \$171,958.30.

¶ 82 Kimberley asserts these provisions of the judgment are not contradictory because Andre's obligation to pay does not depend solely on the amounts listed in the stated accounts. The language of the judgment, however, directly links the liquidation of these specific accounts to the payment of two different awards of amounts totaling almost twice the value of the specified accounts. Moreover, unlike other provisions of the judgment, these awards do not refer to alternative methods for satisfying these awards. Accordingly, we conclude these provisions of the judgment are contradictory and cannot stand. *Eltrevoog*, 92 Ill. 2d at 71.

¶ 83 VI. Attorney Fees

¶ 84 Lastly, Andre asserts the trial court erred in awarding Kimberley's attorney fees pursuant to section 503(j) of the Act (750 ILCS 5/503(j) (West 2006)) because no attorney fee petition was filed and the trial court never conducted a hearing on the issue. The allowance of attorney fees and the amount awarded are matters within the sound discretion of the circuit court and will not be reversed on appeal absent an abuse of discretion. *In re Marriage of Suriano and LaFeber*, 324 Ill. App. 3d 839, 846 (2001). The interpretation of section 503(j), however, is a question of statutory construction. See *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 343-44 (1999).

¶ 85 We first observe that, contrary to the assertions in Andre's brief, Andre's motion to vacate asserts a fee petition was filed, in the context of contending the fee petition was submitted

minutes before the judgment was entered.³ It is Andre's burden as appellant to present a sufficiently complete record for review. *E.g., Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005). "Without an adequate record preserving the claimed error, the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law." *Id.* at 157. " 'Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.' " *Id.* (quoting *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)). Insofar as Andre's own motion to vacate asserts a petition was filed, Andre's failure to include a copy of the petition in the record on appeal precludes any review of its particulars.

¶ 86 In arguing he was denied a hearing, Andre primarily relies upon *Brackett*,⁴ in which this court ruled "the plain and ordinary meaning of the section 503(j) of the Act is that the trial court *must* hear and decide a party's petition for contribution to attorney fees and costs after the close of proofs on all other issues." *Brackett*, 309 Ill. App. 3d at 345. Andre's argument overlooks the *Brackett* court's further ruling that a separate hearing on the issue was not required. *Id.* In addition, the trial court is free to consider the petition "in the context of preexisting proceedings."

³ Andre retained new counsel for this appeal. We presume the oversight regarding the motion to vacate was unintentional.

⁴ Indeed, the other cases Andre cited in his brief predate the current version of section 503. See *In re Marriage of Snow*, 277 Ill. App. 3d 642, 653 (1996); *In re Marriage of Marthens*, 215 Ill. App. 3d 590 (1991); *Hogan v. Hogan*, 58 Ill. App. 3d 661, 668 (1978); *Moreau v. Moreau*, 9 Ill. App. 3d 1008 (1973).

Id. "Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 ***." 750 ILCS 5/503(j)(2) (West 2006).

Thus, "[i]n most cases, once the trial court has weighed marital property criteria ***, it will have enough of a record to determine the contribution amount." *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 596 (2001). Moreover, "under circumstances such as these, Illinois law does not require production or examination of the petitioner's attorney's billing records." *Id.* Section 503(j) does not even require the trial court to determine the attorney fees incurred were necessary. *Id.* This court construes section 503(j) as requiring the award be reasonable. *Id.* This court, however, has not required a specific finding of reasonableness. See *id.*

¶ 87 In this case, the trial court presided over a lengthy trial examining the relative financial position of the parties and the particulars of the marital estate. Although Andre believes the trial court erred in its consideration of the marital property criteria, he has failed to establish the trial court abused its discretion in this regard. Moreover, Andre has failed to demonstrate the record before the court was insufficient to determine the contribution amount. Thus, we conclude Andre has failed to show the trial court abused its discretion in its award of attorney fees in the judgment of dissolution.

¶ 88 CONCLUSION

¶ 89 In sum, we conclude the trial court's finding that 4542 South Ellis Avenue is marital property is not against the manifest weight of the evidence. The trial court erred in determining the temporary support Kimberley received during the pendency of the proceedings was not taxable income to her, but Andre forfeited any claim regarding the provision of the judgment

obligating Andre to pay Kimberley's tax obligations and penalties for the duration of the marriage. Although the trial court committed harmless error in listing two properties as acquired during the marriage, Andre otherwise failed to demonstrate the property valuations were against the manifest weight of the evidence or that the trial court abused its discretion in the property distribution. The trial court did not abuse its discretion in barring Andre's affirmative defenses regarding commingling or his income in 2010 or 2011. The judgment of dissolution contains not only clerical errors, but also contradictory rulings regarding the payment of two different awards from the liquidation of identical investment accounts, which cannot stand. Lastly, Andre has failed to show the trial court abused its discretion in awarding attorney fees as part of the judgment of dissolution.

¶ 90 Accordingly, we vacate the portion of the judgment determining the temporary support Kimberley received during the pendency of the proceedings was not taxable income to her. We also vacate the portion of the judgment listing the properties at 1649-51 West 83rd Street and 8301-11 South Paulina Avenue in Chicago as acquired during the marriage. We further vacate the portions of the judgment ordering Andre to liquidate his accounts with American Century, Wells Fargo and Janus, and tender payment of \$200,000 to Kimberley within 21 days of the entry of judgment, and ordering Andre to immediately liquidate the same accounts with American Century, Wells Fargo and Janus to pay \$130,000 to Kimberley's counsel within seven days of the entry of judgment. The case is remanded for the trial court to correct the clerical errors in the judgment and determine appropriate payments to Kimberly and her counsel. The judgment is affirmed as to the remaining issues.

1-12-1354

¶ 91 Affirmed in part, vacated in part and remanded.