2014 IL App (1st) 122586-U

SIXTH DIVISION
May 16, 2014

No. 1-12-2586

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re THE MARRIAGE OF	)	Appeal from the Circuit Court
	)	of Cook County
BARBARA SCHULTZ,	)	
	)	
Petitioner-Appellee and Cross-Appellant,	)	No. 10 D 7142
	)	
v.	)	Honorable Kathleen Kennedy,
	)	Judge Presiding.
RICHARD SCHULTZ,	)	
	)	
Respondent-Appellant and Cross-Appellee.	)	

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's calculation of net income was not an abuse of discretion. The trial court's award of Shuffle Tech International, LLC to the husband was not an abuse of discretion. The classification of the wife's investment retirement account as marital property was not against the manifest weight of the evidence. The trial court did not err in declining to allocate the husband's airline miles. The trial court abused its discretion in determining the wife must provide proof of reasonableness of her attorney fees in order to receive contribution from her

husband. Contrary to the wife's contentions on appeal, the trial court issued rulings regarding the award of pretrial support as well as retroactive support and maintenance.

¶ 2 Petitioner, Barbara Schultz (Barbara), appeals from the entry of the judgment of dissolution and supplemental judgment of dissolution of her marriage to respondent, Richard Schultz (Richard). On appeal, Barbara contends the trial court erred in: (1) failing to include funds from Richard's father in the calculation of Richard's net income; (2) awarding Richard 100% of his startup company Shuffle Tech International (Shuffle Tech); (3) classifying her individual retirement account (IRA) as martial property; (4) determining each party must bear their own attorneys fees and costs; (5) failing to issue a ruling on pretrial support and failing to award retroactive temporary child support and maintenance awards in the judgment; and (6) failing to allocate Richard's airline miles to either party. For the following reasons, we reverse the portion of the judgment of dissolution precluding an award of contribution towards Barbara's attorney fees and affirm the judgment of the trial court regarding the remainder of the issues on appeal.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses the following facts. Barbara and Richard Schultz were married on May 8, 1999. On September 8, 2003, one child, Richard (Ricky), was born to the parties. At the time the judgment of dissolution was issued, February 23, 2012, Richard was 42 years old and residing at 1012 N. Crosby (the Crosby property), a rental property titled in Barbara's name. Richard was working for his start-up company, Shuffle Tech. Barbara was 47

years old and resided at 1025 N. Riverwalk (the Riverwalk property), this residence was previously the marital home titled in her name. Barbara was unemployed and was the primary care-giver for the parties' son.

¶ 5 I. Pretrial Proceedings

¶ 6 On July 9, 2010, Barbara filed a petition for dissolution of marriage along with a request for temporary support pending the entry of a judgment of dissolution and attorney fees in the circuit court of Cook County.

¶ 7 A. Temporary Support Orders

¶ 8 1. The Temporary Support Order of September 8, 2010

¶ 9 On September 8, 2010, the trial court granted Barbara's petition for temporary support and fees. The order required in pertinent part that Richard "shall be responsible for maintaining the household expenses (mortgage and utilities) on the Riverwalk property and provide Barbara with proof of income and proof of payment." Richard was also ordered to "promptly pay the mechanics bill for the parties' Subaru automobile." The order further prescribed Richard "shall pay Barbara the sum of $500 per week in temporary support. Barbara shall be responsible for paying food costs and incidental child expenses."[1] The record discloses this order remained in effect until December 31, 2010.

¶ 10 On September 21, 2010, Barbara filed an emergency petition for rule to show cause

[1]The trial court did not consider food costs to be part of household expenses. The trial court also addressed the issue of interim attorneys fees in this order, which will be discussed separately herein.

regarding Richard's noncompliance with the September 8, 2010, order. Specifically, Richard failed to repair the Subaru, did not pay the mortgage or utilities for the Riverwalk property, had not provided Barbara with his proof of income, and had made no payments to Barbara for her temporary support.

¶ 11 On September 22, 2010, the trial court required Richard to pay the mechanic's bill for the Subaru and tender the vehicle to Barbara within seven days. Richard was also ordered to immediately provide Barbara with weekly support which was past due. The court entered and continued the petition to October 8, 2010, however, the record is devoid of an order from October 8, 2010.

¶ 12 On November 17, 2010, Richard filed a response to Barbara's petition for rule to show cause.[2] Richard asserted he paid the mechanic's bill for the Subaru and made the vehicle "available" to Barbara on September 29, 2010. Richard also stated his monthly net income was $5,078 per month and that during the month of September he was "financially unable to make all the payments required under the September 8, 2010 [order] at the same time." Specifically, those payments were: $4,100 for vehicle repairs; $5,000 in attorney's fees; $2,000 in temporary support; $750 for the guardian ad litem; $1259 to a monthly fixed debt service; $5,459 for the mortgage; $3,000 in household expenses for a total of $21,568. Richard contended a party cannot be held in indirect civil contempt of court where that party does not have the ability to comply with the court's order. The record on appeal does not contain an order disposing of

[2]The record does not disclose whether Richard was given leave to file this response.

Barbara's September 21, 2010, petition for rule to show cause.

¶ 13 On December 27, 2010, Barbara filed her second petition for rule to show cause alleging that Richard failed to comply with the September 8, 2010, order which required him to pay the remainder of attorney's fees due to Barbara's attorney by November 6, 2010. On December 28, 2010, Barbara filed an amended second petition for rule to show cause, which added allegations that Richard failed to pay the mortgage, utilities, assessments, property taxes, and insurance pursuant to the September 8, 2010, order. The record fails to indicate whether Barbara sought leave to file the amended second petition nor does it disclose whether the original second petition was stricken or withdrawn. The trial court granted Richard seven days to file a response and continued the matter for hearing to January 11, 2011.

¶ 14 Richard filed his response to Barbara's second petition for rule to show cause on January 6, 2011. Richard's response addressed his failure to pay Barbara's attorney, but did not address Barbara's contention that he failed to pay the mortgage and utilities on the Riverwalk property pursuant to the September 8, 2010, order.

¶ 15 On January 11, 2011, the trial court ordered Richard's counsel to release funds from its client trust account to pay the home owners' association assessment arrearage on the Riverwalk property. The order did not address Richard's failure to pay the mortgage or utilities on the Riverwalk property. Further, the order failed to indicate whether the matter was entered and continued.

¶ 16 The following day, January 12, 2011, the court entered a rule against Richard to show cause why he should not be held in contempt for his violation of the September 8, 2010, order.

The court, however, did not set forth Richard's violations. The court stated, however, that "[s]tatus on the return of the rule and Richard's proposed payment plan for the outstanding mortgage payments accrued during the September 8 temporary support order (September 8-December 31, 2010) is consolidated with the trial of this matter (June 20-23, 2011)."

¶ 17 2. The Temporary Support Order of January 12, 2011

¶ 18 The trial court also entered a new temporary support order on January 12, 2011. The trial court stated "Richard has represented and warranted *** that his gross monthly income is approximately $8,000. Barbara has represented that her only source of income is the Crosby rental property which is cash flow neutral after the payment of expenses." The court ordered Richard to pay Barbara 50% of his gross monthly income for each month subject to specific deductions. The court further ordered that "[p]rior to the 50/50 division of income Richard shall continue to pay, from his gross monthly income, the family's health insurance premium and past due Federal Taxes. Richard shall also be solely responsible for paying the 15.4% self-employment tax (FICA and Medicare) of $1,232 per month on his gross $8,000 monthly income, and holds Barbara harmless thereupon." Richard was also ordered to provide Barbara with proof of his income. The order was retroactive to January 1, 2011, due to the expiration of the previous temporary support order, and required Barbara and Richard to be individually responsible for all household and personal costs incurred by him or her from that day forward until further order of court.

¶ 19 Thereafter, Barbara filed a third petition for rule to show cause. Barbara's brief indicates the third petition for rule to show cause was filed on February 9, 2011, and asserted Richard was

not in compliance with the January 12, 2011, order. This petition, however, was not included in the record on appeal. On March 8, 2011, after a hearing on Barbara's third petition for rule to show cause, the trial court found Richard to be in indirect civil contempt of court for the underpayment of January 2011 support. Richard was ordered to tender $645.15 to Barbara within 14 days. The record does not disclose whether Richard complied with the order.

¶ 20 3. Emergency Motions Regarding the Payment of Household Expenses

¶ 21 On April 19, 2011, Barbara filed an emergency motion requesting that the court order Richard to pay the outstanding electricity bill so the power at the Riverwalk property could be reinstated. Barbara asserted Richard was responsible for this payment pursuant to the September 8, 2010, temporary support order. On April 20, 2011, the trial court ordered Richard to immediately pay the balance necessary to restore the electrical power at the Riverwalk property.

¶ 22 Thereafter, Barbara filed an emergency motion seeking payment of the gas bill on the Riverwalk property for January 2011 through May 2011.[3] On May 20, 2011, pursuant to the January 2011 temporary support order, the trial court ordered Richard to pay $752.28 towards the gas bill. This amount was Barbara's responsibility, therefore, the $752.28 was deducted from the May 2011 support payment provided to Richard as reimbursement.

¶ 23 On September 7, 2011, the trial court ordered Richard to pay Barbara $5,000 to be drawn from the $9,600 held by Richard's attorneys.[4] The payment was considered an advance on the

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[3]Barbara's emergency motion is file-stamped "May 31, 2011."

[4]The record is devoid of a motion or record of proceedings addressing the reason behind the entry of this order.

distribution to Barbara from her ultimate judgment entered on February 23, 2012. The trial court further ordered all temporary financial pleadings that were currently outstanding to be consolidated and ultimately considered at trial.[5] These pleadings included Barbara's petitions for rule to show cause regarding Richard's failure to pay the household expenses pursuant to the September 8, 2010, order as well as his failure to properly account for 50% of his income as required in the January 12, 2011, order.

¶ 24 B. Payment of Interim Attorney Fees

¶ 25 The September 8, 2010, order also required Richard to pay $10,000 to Barbara's attorney. Subsequently, Barbara filed multiple motions and petitions for rule to show cause seeking full payment of the $10,000 due to her attorney. As of November 6, 2010, the date the payment was due, Richard had only paid Barbara's counsel $6,500. In response, Richard asserted he was financially incapable of paying the remaining $3,500. The trial court consistently, and on multiple occasions, ordered Richard to submit the remainder due to Barbara's counsel. The last order entered requiring Richard to tender the remaining $3,500 in interim fees within seven days was entered on August 11, 2011. The record discloses Richard paid $3,500 to Barbara's attorney, but does not disclose when the payment was tendered.[6]

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[5]There is no motion for consolidation contained in the record. Additionally, the appellant did not provide a record of proceedings from this date, therefore, we do not know whether a motion was made by the parties or by the court.

[6]On October 19, 2011, testimony was elicited at trial which indicated Richard paid the $3,500 "a month and a half ago."

¶ 26 C. Possession of Real Property

¶ 27 When Barbara initiated the dissolution proceedings, the parties resided together at the Riverwalk property. As their discord escalated, it became apparent to both parties they could no longer reside together. On November 24, 2010, the trial court entered an order granting Barbara exclusive use and occupancy of the marital home. Richard was required to vacate the Riverwalk property on January 10, 2011, and occupy the Crosby rental property after the tenant vacated the property.

¶ 28 D. Distribution of Personal Property

¶ 29 The parties' dispute over the division of the personal property commenced with Richard's motion for return of personal property, which was filed on October 20, 2010. In the motion, Richard alleged that Barbara had removed a number of his personal items from their home. He requested an accounting of the couple's personal property and attached to his motion a list of their personal property along with the value of each item.

¶ 30 On November 24, 2010, the trial court entered an order requiring the parties to meet prior to January 1, 2011, to "create an agreed upon master inventory of their personal property. Marital items which may be divided in-kind shall be divided in-kind."[7] By July 5, 2011, the parties had still not resolved this dispute. Accordingly, the trial court ordered that Barbara had 14 days to add items to the personal property master list, otherwise Richard's list would "be deemed the master list."

[7]The November 24, 2010, order was subsequently modified to require the parties to meet and allocate all personal property on or before December 28, 2010.

¶ 31 On September 7, 2011, the trial court ordered the parties to meet to allocate their personal property on the afternoon of September 16, 2011. As previously stated, this order also required Richard's counsel tender a check to Barbara in the amount of $5,000 within seven days. On the first day of trial, September 21, 2011, the parties represented they had not allocated the personal property due to their conflicting interpretations of the September 7, 2011, order. The court clarified that the $5,000 payment was not contingent on the division of the personal property. Richard's counsel tendered the payment in court and the trial court ordered the personal property division be conducted that day after trial proceedings concluded.[8]

¶ 32 II. Discovery

¶ 33 Pursuant to an agreed order, discovery in the matter closed on July 8, 2011. On August 17, 2011, Barbara filed a motion to reopen discovery, as she had not yet deposed Richard. On August 22, 2011, the trial court reopened discovery for the limited purpose of deposing Richard and his business partner in Shuffle Tech, Hirohide Toyama (Toyama). Barbara's motion did not request to depose Toyama and the order does not disclose the reason Toyama was to be deposed. The trial date of September 21, 2011, however, was not delayed. Toyama failed to sit for his scheduled deposition and thereafter Barbara filed a motion for issuance of a body attachment. On December 6, 2011, the trial court entered a writ of body attachment against Toyama.

¶ 34 On January 5, 2012, the last day of trial, Barbara presented another motion for issuance of

[8]The trial court later clarified in its supplemental judgment of dissolution, that it did not enter a property allocation order on September 21, 2011, but that the "uncontradicted evidence at trial supports Richard Schultz's position that Exhibit 98 [the master list] includes all the items the parties agreed would be awarded to him * * *."

a body attachment, as the Toyama deposition had still not been conducted due to Toyama's failure to schedule the deposition. The record of proceedings from January 5, 2012, discloses that the trial court determined the proofs in the matter would remain open for Barbara's attorney to conduct Toyama's deposition, but did not indicate how long proofs would remain open.[9]

¶ 35 Thereafter, multiple orders were entered by the trial court ordering Toyama to sit for his deposition. The orders also indicated the proofs in the matter would remain open until Toyama's deposition was completed. Despite these orders, the trial court entered the judgment of dissolution on February 23, 2012, prior to Toyama's deposition taking place. It was not until March 6, 2012, that Barbara's attorney was able to conduct Toyama's deposition.

¶ 36 After being granted leave, on April 9, 2012, Barbara filed a petition for fees associated with the Toyama deposition. On July 20, 2012, after briefing and hearing on the petition, the trial court entered sanctions against Richard in the amounts of $3,000 to Barbara and $3,000 to her attorney. The trial court determined: "It is clear that Richard Schultz intentionally interfered with discovery and his conduct is sanctionable." The trial court, however, declined to reopen the proofs and conduct additional proceedings.

¶ 37 III. Pretrial Motions

¶ 38 On September 20, 2011, Richard filed a motion *in limine* in which he requested the trial court exclude evidence and testimony pertaining to the fair market values of the Riverwalk and Crosby properties and his dissipation of marital assets. Richard also requested the list of

[9]The record is devoid of a written order regarding the trial court's oral pronouncement.

personal property he submitted be considered to be the master list, as Barbara failed to add any items. Richard filed a subsequent motion *in limine* in which he requested the court exclude Barbara's testimony pertaining to custody of Ricky. The record is devoid of any order disposing of Richard's motions *in limine*. The master list, however, was admitted at trial and the judgment of dissolution contained a provision identifying the list Richard submitted as the "master list."

¶ 39 The record discloses Barbara also filed a motion *in limine*, but it is not included in the record on appeal. Accordingly, we are not able to deduce what relief she sought. In addition, the record is also devoid of the trial court's determination regarding Barbara's motion *in limine*.

¶ 40 IV. Trial

¶ 41 The trial was conducted over six days: September 21, October 19, November 1, December 6, December 12, 2011, and January 5, 2012. The record discloses the following facts.

¶ 42 A. Richard and Barbara's Income

¶ 43 Richard testified to the following facts regarding his employment history during the marriage. Richard worked throughout the course of the marriage and, in addition, obtained his Masters of Business Administration from the University of Chicago in 2007. When the parties were first married, Richard was employed with Pioneer Photo Albums as a regional sales manager for two years and three months making approximately $65,000 per year with a $10,000 bonus in 1999. In February of 2000, he commenced working for Carl Manufacturing as an executive vice president and chief operating officer. He was later promoted to president and chief executive officer in August of 2002. In October 2006, Richard was replaced and removed as chief executive officer of Carl Manufacturing and was unemployed until August of 2007,

which is when he started Shuffle Tech.

¶ 44 At the time of trial he owned 30.5% of Shuffle Tech. Richard's father loaned $380,000 to the business and he is one of the primary investors in Shuffle Tech. In 2008 through 2010, Richard earned $110,236, $150,852, and $92,814, respectively. As of August 31, 2011, Richard had earned $36,905.15. Richard testified his 2011 income was significantly less than in 2010 because Shuffle Tech lacked capital funds. Richard further testified Shuffle Tech was at the time of trial "substantially underwater" and the "capital was substantially negative" because the company had "consumed capital in excess of its equity, leaving only debt."

¶ 45 Richard further testified since the proceeds from Shuffle Tech was his sole source of revenue he received no income during the month of December 2011. He was, however, able to pay $100 to the State of Illinois for back taxes, purchase groceries, dine out, and make his car payment by borrowing money from family members and his credit cards. He also traveled to Florida for business at Shuffle Tech's expense. Richard did not purchase any Christmas presents for Ricky in 2010. During the divorce proceedings Richard testified he had two sources of cash flow, his earnings from Shuffle Tech and "in the short-term period" he borrowed funds from his father.

¶ 46 Barbara testified to the following facts regarding her education and employment history as well as Richard's employment during the marriage. In 1982, directly after obtaining her high school diploma, Barbara attended cosmetology school and received her cosmetology license. She could not recall when the license was last active and did not work as a cosmetologist while married to Richard. Barbara completed three years of college, but did not graduate.

¶ 47 At the time she married Richard in 1999, Barbara was unemployed and her cosmetology license was inactive. She obtained employment at Carl Manufacturing from 2000-2002 making $21,443, $31,075, and $3,280 each year, respectively. In 2002, Barbara and Richard agreed she would no longer work so she could become pregnant. Between 2004 and 2007 Barbara was not gainfully employed and did not contribute any income to the marriage. In June 2004, shortly after acquiring the Crosby property Barbara started a real estate management company, but did not earn any income from her company.

¶ 48 Barbara testified in 2002, 2004, and 2005 Richard's income each year was over $150,000. In 2003, Richard's income was over $250,000 and in 2006 Richard's income was over $350,000.

¶ 49 B. Funding From Richard's Father

¶ 50 From April 2008 until December 2009, Richard received a series of unsecured funds totaling $71,620.14 from his father. The allocation of these funds to Richard from his father commenced as an oral agreement with the understanding that the funds were loans. On January 20, 2010, Richard executed an unsecured promissory note for $71,620.14 made payable to his father.[10] Richard testified that in the beginning of 2010 he made one interest payment to his father, however the remaining interest payments were deferred pursuant to a verbal agreement between Richard and his father.

¶ 51 On July 20, 2010, Richard borrowed an additional $20,000 from his father to pay a

[10] This document was a stipulated exhibit, but was not included in the record on appeal. The testimony reflects the document was prepared by Richard and his father's attorney and was signed only by Richard. There is nothing in the record which corroborates the loan included interest.

retainer to Richard's attorney, which Richard testified was a loan. Richard's father also executed a guarantee of $40,000 to Richard's counsel to be used for the payment of Richard's attorneys fees. Richard's father additionally executed a promissory note on December 31, 2009, in the amount of $315,000 to Shuffle Tech.

¶ 52 C. Payment of Ricky's Education

¶ 53 Richard testified Ricky was currently in his fourth year at the British School, which cost $24,000 annually for Ricky to attend. Regarding the payment of Ricky's tuition, Richard testified, "Early on I paid it from my earnings, later I had - - there was a combination of money that my parents lent us to pay part of his tuition and then the remainder from my earnings, and this year payments have been made by my parents." Richard further testified:

> "Breaking it out again, up through last year my parents periodically lent money, and those were loans to pay the tuition.
>
> Beginning in the 2010-2011 school year, my parents agreed to pay the entire amount temporarily, not on a loan basis but actually pay it for the purpose of maintaining stability for Ricky."

Regarding future payment of Ricky's tuition, Richard testified his parents were willing to continue to pay the tuition.[11] Additionally, Richard testified there was no document which indicates certain tuition payments made by his parents were loans.

¶ 54 D. Value of Shuffle Tech

[11]The record does not disclose whether these future tuition payments from Richard's parents would be gifts or loans.

¶ 55 Regarding the value of Shuffle Tech, Richard testified that at the time of trial the company was under water and the capital was substantially negative.[12] Richard testified that at the time of his testimony, Shuffle Tech had $610,559.26 in assets, comprised of $18,300 in liquid and $592,000 in non-liquid assets, such as intellectual property and computer equipment, and had incurred a debt in the amount of $829,614.57. Out of that amount, $421,015.45 was in the form of long term notes payable primarily to Richard's father. Ultimately, Richard testified the value of his company was currently negative $400,000 to $500,000.

¶ 56 E. Real Property

¶ 57 From 1997 until October of 2000, Richard and Barbara lived at a property located at 233 E. Erie in Chicago which was owned by Barbara.[13] In October of 2000, however, the couple moved to Barrington where they resided until June 2004. The couple and their child moved in June 2004 to the Crosby property where they resided until August 2005. Thereafter, Barbara purchased the Riverwalk property where the couple and their child resided together until January 2011. Title to the Riverwalk property was held solely in Barbara's name. In July 2006, Barbara commenced renting the Crosby property.

¶ 58 Regarding Richard's compliance with the court's initial temporary support order,[14] Barbara testified Richard did not make timely payments, did not provide her with proof of

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[12]The general ledger for Shuffle Tech as well as a profit and lost statement from October 2010 were entered into evidence, but were not included in the record on appeal.

[13]The title was held in Barbara's name alone.

[14]The September 8, 2010, order.

payment of the mortgage or utility bills, or with proof of his income. Richard did not provide payments toward the Riverwalk property mortgage for September, October, November, and December of 2010. Richard also did not pay for the electric bill in September 2010.

¶ 59 Barbara further testified Richard has not made the mortgage and real estate tax payments on the Riverwalk property from March 2011 when he commenced occupying the Crosby property to the present. He was also not current on the assessments due to the homeowner's association for the Crosby property for the same time period.

¶ 60 In response, Richard testified, "I haven't seen any of the marital account statements for that period [September 2010 - December 31, 2010], nor have I seen any of the mortgage statements for that period, so I really have no idea whether or not I paid them or if they were paid at all."

¶ 61 F. The Lynch IRA

¶ 62 Barbara testified there was $54,000 currently in her Merrill Lynch individual retirement account (the Lynch IRA). While she was employed with Carl Manufacturing she made contributions to the Lynch IRA, but she could not recall the amount of her contributions. She also could not recall whether Richard made contributions to the Lynch IRA. After 2003, Barbara did not make any contributions to any retirement accounts. Barbara further testified the Lynch IRA was a rollover IRA from employment which occurred prior to working at Carl Manufacturing. Barbara was unable to obtain bank documents related to her retirement account

from before 2003.[15] In 2008, Barbara converted the Lynch IRA into a Roth IRA. At that time the fair market value of the account was $36,694.75.

¶ 63 Richard testified in mid-2000 until early 2002 Barbara was employed by Carl Manufacturing earning $36,000 per year with her employer contributing approximately $4,500 to $5,000 to the Lynch IRA each year in additional funds. Richard further testified he contributed between $2,000 to $4,000 to the Lynch IRA every year from 2000 through 2006.

¶ 64 G. Richard's Airline Miles

¶ 65 Richard testified his airline miles were acquired during the marriage, but he could not recall how many airline miles he currently had available. Richard further testified he used his airline miles in the last 12 months prior to trial to purchase airline tickets for Ricky and himself, which included five flights to Florida and one flight to Colorado.

¶ 66 IV. Petitions for Contribution to Attorney Fees

¶ 67 At the conclusion of trial, Richard and Barbara filed separate petitions for contribution of attorney fees. The trial court entered a briefing schedule on the petitions. Both parties waived their right to an evidentiary hearing as to the petitions. The trial court indicated a decision on the petitions for contribution would be included with the judgment of dissolution.

¶ 68 Richard's petition asserted throughout the course of the litigation Barbara acted in an "unduly litigious manner, unwilling to compromise or otherwise discuss agreed resolutions of

[15]Barbara's attorney made an offer of proof that the reason Barbara was unable to obtain any documents from Merrill Lynch prior to 2003 was because financial institutions are only required to keep documents for seven years.

any issue short of trial" and her behavior supported the entry of a contribution judgment against her. Richard alleged Barbara did not personally compensate her attorneys during the course of litigation, nor had she received a bill for their services. Richard stated his current outstanding attorneys fees totaled $90,521.09. Richard included with his petition an engagement agreement executed between him and Schiller, DuCanto & Fleck LLP as well as an affidavit of Jay P. Dahlin, the attorney primarily responsible for the matter. The affidavit stated Schiller, DuCanto & Fleck LLP were owed $90,521.09 and attorney Dahlin's billing rates are $325.00 per hour for office time and $345.00 per hour for court time.

¶ 69 Barbara's petition for contribution asserted a balance of $45,000 remained due and owing to her counsel as of January 16, 2012. Barbara asserted she did not have the ability to contribute towards the outstanding attorney fees because she is unemployed, receives almost no support from Richard (including months where Richard claimed she owed him $50.00), she has had her phone and internet shut off, and cannot regularly pay her utilities. Barbara contended Richard has the ability to compensate all the attorneys in the matter, as Richard has a business from which he receives income and benefits as well as the fact he is supported financially by his father. Richard has extensive expenses which he pays regularly and Richard's father has provided a personal guarantee in the amount of $40,000 to Richard's counsel. Furthermore, Barbara asserted Richard has been found in contempt of court during the litigation.

¶ 70 Barbara attached to her petition an affidavit from her attorney, Brian Hurst, which averred his current hourly rate is $350.00 for office time and $375.00 for court time. He stated he received $1,500 from Barbara as payment towards a $7,500 retainer.

¶ 71 V. The Judgment of Dissolution

¶ 72 On February 23, 2012, the trial court entered a judgment for dissolution of marriage between Barbara and Richard. The trial court's order contained the following factual findings.

¶ 73 Barbara at the time of judgment was 47 years old. According to social security records and through her testimony she demonstrated an earned income only during three years of the parties' 12-year marriage. In 2001, the most Barbara earned was $31,075. There is no evidence Barbara earned any income from her real estate management endeavor.

¶ 74 Richard at the time of judgment was 42 years old. He obtained an MBA during the marriage and in 2006 he earned $350,000. Since August of 2007, he has been the chief executive officer of Shuffle Tech International. Richard "has ready access to secured and unsecured loans from his father for many purposes, including legal fees, Shuffle Tech, credit card debt, and private school tuition for Ricky."

¶ 75 The parties agree their current marital estate has a negative value, which the evidence demonstrated may be as much as $500,000.

¶ 76 Regarding credibility of the witnesses, the trial court stated, "[n]either party is completely credible. Mrs. Schultz's testimony was inconsistent and repeatedly impeached. Mr. Schultz's testimony reflected detailed recollection on some points and no memory on other related points. In addition, both parties' credibility was undermined during the proceedings. Specifically, it is reasonable to conclude that their extreme animosity toward each other colored their testimony to the extent that it was not wholly credible."

¶ 77 The trial court rendered determinations regarding: (1) the amount of child support and

allocation of child-related expenses; (2) the duration and amount of maintenance; (3) the classification and division of property; and (4) contribution to attorneys fees. The following portions of the order are relevant to this appeal.

¶ 78 1. Child Support and Child-Related Expenses

¶ 79 The trial court determined Richard should pay Barbara child support. Richard's average income from 2008 through 2011 was determined to be $93,000. The trial court further stated,

> "the 'funding' provided to Richard Schultz by his father through promissory notes for purposes such as the payment of credit card debt and Ricky's private school tuition differs from the 'funding' that occurred in *In re Marriage of Rogers*, 213 Ill. 2d 120 (2004) ***. So, there is no factual basis to set child support on an imputed income of $150,000 as Barbara Schultz requests."

Regarding Richard's net income, the trial court determined:

> "because (a) the court lacks a breakdown of allowable deductions (especially his actual tax liability) from Richard Schultz's gross income and (b) Richard Schultz is able to obtain some 'funding' from his father, it is appropriate to treat the $60,000 [Richard earned as income in 2011] as the net income amount (which may not be far from a net of the $93,000 average after allowable deductions) yielding a 20% guidelines amount of $1,000 per month. However, application of the guidelines would be inappropriate here after considering the best interest of the child in light of the evidence on the statutory factors, in particular Richard Schultz's financial resources and standard of living the child would have enjoyed had the marriage not been dissolved (it is likely Richard Schultz

would have obtained the funds to keep the parties' 'beyond their means' lifestyle going indefinitely). Therefore, the evidence supports an upward deviation from the guidelines, and Richard Schultz should be ordered to pay child support in the amount of $1,500 per month, along with 100% of the child's health care insurance premiums and 80% of the child's extracurricular expenses and health care expenses not covered by insurance."

¶ 80 2. The Duration and Amount of Maintenance

¶ 81 The trial court determined that virtually all of the maintenance factors favored an award of maintenance to Barbara. The trial court found Barbara had been out of the workforce for a significant time, took care of the couple's home and son, and lacked the education and experience to readily earn sufficient income to maintain the lifestyle to which she was accustomed. The trial court ordered Richard to pay $800 per month as rehabilitative maintenance to Barbara commencing March 1, 2012, and for 48 months thereafter.

¶ 82 3. Classification and Division of Property

¶ 83 a. Riverwalk Property

¶ 84 The trial court found as of October 2010 the Riverwalk property was valued at $825,000 and the mortgage balance was $800,000. The trial court awarded the Riverwalk residence to Barbara.

¶ 85 b. Crosby Property

¶ 86 The trial court stated Barbara did not provide sufficient credible evidence that she purchased the Crosby property with nonmarital funds and, therefore, determined the Crosby property was marital property. The trial court determined the value of the Crosby property to be

$475,000 in October 2010. The trial court declined to award the Crosby property to either party, finding there was sufficient equity in the property to list the residence for sale immediately and split the proceeds 60% to Barbara and 40% to Richard.

¶ 87 c. The Lynch IRA

¶ 88 The trial court determined Barbara failed to establish that the Lynch IRA existed before the marriage. The trial court ordered $20,000 of the Lynch IRA be placed in an account to satisfy the parenting coordinator fees (representing $10,000 for Barbara's share and $10,000 for Richard's share). The remainder of the Lynch IRA was to be divided 60% to Barbara and 40% to Richard.

¶ 89 d. Shuffle Tech

¶ 90 The trial court could not determine the value of Shuffle Tech based on the evidence provided. The trial court took into consideration that "the parties' animosity toward each other makes it impossible for them to share Shuffle Tech in any way." The court stated Shuffle Tech was struggling financially and "may not survive" and that "under these circumstances, Richard Schultz should receive all of the interest in Shuffle Tech and all of its liabilities."

¶ 91 e. Personal Property

¶ 92 Regarding personal property the court stated it "understands that the parties have already divided their personal items, and therefore, each party should keep what is in her or his possession."

¶ 93 4. Attorney Fees

¶ 94 Each party sought contribution from the other for the attorney fees and costs. The trial

court stated, "Richard Schultz persuasively argues that Barbara Schultz should be barred from contribution because her petition fails 'to demonstrate that the fees incurred were reasonable, or pursuant to a validly executed engagement agreement, or reasonable as demonstrated through itemized billing statements.' " Although the trial court lacked independent factual support for the amount of Barbara's attorney fees, the trial court stated "evidence on the section 503 and 504 factors may favor contribution from Richard Schultz to Barbara Schultz, but the high-conflict nature of the proceedings, for which Barbara Schultz must take at least half the responsibility, outweighs that evidence and precludes a contribution award to Barbara Schultz." The trial court then found neither party was willing to compromise and "[e]ven if the unwillingness were one-sided as Richard Schultz contends, the superior borrowing and earning power of Richard Schultz precludes an order for contribution from Barbara Schultz to his attorney fees and costs."

¶ 95 VI. Posttrial Motions and the Supplemental Judgment of Dissolution

¶ 96 On March 26, 2012, the parties filed cross motions to reconsider the judgment of dissolution. In her motion, Barbara contended the trial court erred in: (1) classifying the Lynch IRA as marital property; (2) determining the amount of Richard's income; (3) failing to award retroactive child support and maintenance; (4) failing to award Barbara attorney fees; (5) failing to require Richard to pay the mortgages on the Crosby and Riverwalk properties according to the September 8, 2010, and January 12, 2011, orders; and (6) failing to allocate Richard's airline miles between the parties. Regarding the Lynch IRA, Barbara attached a 1998 tax return to her motion claiming it was newly discovered evidence. Barbara purported the tax return sufficiently established that prior to the marriage the total value of all IRAs in Barbara's name was valued at

$10,116.

¶ 97 On March 26, 2012, Richard filed a motion to reconsider the judgment for dissolution contending the trial court did not address the allocation of unpaid income tax liabilities or enforcement of previous personal property allocation orders. Richard further contended the trial court erred in its determination of his income and the amount of child support he was ordered to pay, and by failing to consider the $10,000 he was ordered to pay in interim attorney fees to Barbara's counsel.

¶ 98 On July 20, 2012, after briefing and hearing arguments on each party's motion to reconsider the judgment of dissolution, the trial court entered a supplemental judgment of dissolution. The trial court determined the parties' arguments regarding the court's calculation of income and support and allocation of attorney fees lacked merit and declined to reconsider those portions of the judgment.

¶ 99 Regarding Barbara's motion to reconsider the trial court determined: (1) Barbara failed to demonstrate that the 1998 IRS form was not available at trial; (2) Barbara was not entitled to retroactive child support and maintenance; and (3) there was no basis to reconsider either the award of Shuffle Tech to Richard or the failure to allocate airline miles. The trial court determined Barbara was not entitled to retroactive child support or maintenance, but noted the court had previously ordered Richard to pay Barbara $5,000 as "an advanced distribution from her ultimate judgment without prejudice to identification as property or support." Richard's payment of $5,000 in conjunction with the court's allocation of marital debt, were noted as the basis for denying Barbara retroactive child support and maintenance.

¶ 100 Regarding Richard's motion to reconsider, the trial court concluded Richard is to be solely liable for the income tax debt. The trial court then went into great detail surrounding the distribution of personal property between the parties. The trial court pointed out that pursuant to the September 7, 2011, order, the parties were to meet and allocate personal property. Thereafter, the parties had 30 days to physically divide the property according to their agreed allocation. The trial court further referenced the July 5, 2011, order which stated Barbara had 14 days to add items to the "master list" of personal property to be divided between the parties. The trial court added that the order prohibited the parties from disposing of the personal property prior to division and included that if Barbara failed to submit a list "then Rick's list shall be deemed the 'master list.' "

¶ 101 The trial court's supplemental judgment of dissolution stated:

> "[a]lthough the court did not order a specific allocation of personal items, the uncontradicted evidence at trial supports Richard Schultz's position that Exhibit 98 [the master list] includes all the items the parties agreed would be awarded to him, but he was unable to take possession of many of those items. The values assigned by Richard Schultz shall stand, no other values having been offered. He is therefore entitled to credit in the amount of $24,407 *** for the missing items based on those values. However, it is equitable to offset that amount against his past due pre-decree obligations to pay support and as well as mortgage and other expenses, so no additional sums should be granted to Richard Schultz."

¶ 102 VII. Dismissal of Appeal

¶ 103 On August 14, 2012, Richard filed a *pro se* notice of appeal. Richard has proceeded *pro se* on appeal. On August 22, 2012, Barbara filed a notice of cross-appeal. On February 27, 2013, Barbara filed a motion to dismiss Richard's appeal in which she argued Richard failed to submit his appellate brief by the January 30, 2013, due date, and he had not filed a motion for extension of time thereafter. Barbara further alleged Richard contacted her attorney and informed him that he did not intend on proceeding with the appeal. On March 13, 2013, this court entered an order dismissing Richard's appeal.

¶ 104 VIII. Motion to Strike Richard's Response Brief

¶ 105 On July 9, 2013, Barbara filed a motion to strike Richard's response brief in which she argued Richard's brief did not comply with many of the supreme court rules including Illinois Supreme Court Rules 341(b), 341(c), 341(h)(6), 341 (h)(7) and 341(I). Ill. S. Ct. R. 341 (eff. Feb 6, 2013). Richard filed a response to the motion on July 11, 2013. We entered an order on July 17, 2013, in which the motion would either be taken with the case or, in the alternative, Barbara was provided with an extension of time to file her reply brief. On August 28, 2013, Barbara filed her reply brief.

¶ 106 Barbara's reply brief again addressed multiple deficiencies in Richard's *pro se* cross-appellee response brief. Although Barbara is correct that Richard's brief does not perfectly comply with our supreme court rules, the violations of the rules in this case do not hinder our review. Accordingly, we will consider the arguments raised in Richard's response brief. See *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 440-41 (2009).

¶ 107 DISCUSSION

¶ 108 I. The Calculation of Richard's Net Income

¶ 109 Barbara asserts the trial court erred in its calculation of Richard's net income for two reasons. First, Barbara contends that the trial court failed to consider funds Richard received from his father when calculating Richard's net income. Second, Barbara contends, taking into account the funds Richard received from his father, that Richard's current income should have been imputed to be $150,000 under *In re Marriage of Rogers*, 213 Ill. 2d 129 (2004). Barbara concludes that both the child support award and maintenance should be increased based on an imputed net income of $150,000.

¶ 110 Richard asserts that the trial court's determination not to include these funds as part of his net income was correct. Richard further asserts the trial court erred in calculating his net income, as his net income is actually $68,000. Richard requests this court to lower his child support payments to $884 per month based on the statutory guidelines.

¶ 111 We first note Richard's appeal was dismissed by this court on March 13, 2013. Therefore, Richard's contention that the trial court improperly computed his net income is improperly before this court and will not be considered.[16] We also acknowledge that a custody judgment was entered between the parties, wherein Barbara and Richard agreed to joint legal

[16]Richard's brief is rife with improper arguments as to the trial court's determinations. As his appeal was dismissed on March 13, 2013, only his responses to Barbara's contentions will be considered. See *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 41 (when a cross appeal is dismissed, a reviewing court is confined to those issues raised by the appellant and will not consider those urged by the appellee).

custody of Ricky, with Barbara being the "primary residential parent." We now turn to discuss Barbara's contentions.

¶ 112 Generally, in reaching the proper amount of child support, the court must first determine the noncustodial parent's net income. *In re Marriage of Gosney*, 394 Ill. App. 3d 1073, 1077 (2009). The findings of the trial court as to the net income and award of child support are within its sound discretion, and we will not disturb its decision absent an abuse of discretion. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004). An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view of the trial court. *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 467 (2005), quoting *People v. Santos*, 211 Ill. 2d 395, 401 (2004).

¶ 113 Section 505(a) of the Act (750 ILCS 5/505(a)(1) (West 2012)) provides guidelines in determining the minimum amount of child support a noncustodial parent will be required to pay. Section 505(a) has established that a noncustodial parent with one child is to pay a minimum of 20% of his net income in child support. 750 ILCS 5/505(a)(1) (West 2012). "Net income" is defined by the Act as "the total of all income from all sources," minus deductions for state and federal income tax, social security (FICA payments), mandatory retirement contributions, union dues, dependent and individual health/hospitalization insurance premiums, prior obligations of support or maintenance actually paid pursuant to court order, and expenditures for repayment of debts incurred for certain purposes. 750 ILCS 5/505(a)(3) (West 2012). Section 505(a)(5) further provides, "[i]f the net income cannot be determined because of default or any other reason, the court shall order support in an amount considered reasonable in the particular case."

750 ILCS 5/505(a)(5) (West 2012). "In determining net income, the court may consider the party's credibility and forthrightness in disclosing his or her income." *In re Marriage of Sweet*, 316 Ill. App. 3d 101, 109 (2000). Moreover, a court may consider past earnings in making its determination of child support if the present net income is difficult to ascertain or is otherwise uncertain. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 706 (2006).

¶ 114 Gifts qualify as income in computing "net income" under section 505(a)(3) of the Act as they represent a valuable benefit to the parent that enhanced their wealth and facilitated their ability to support the child. *Rogers*, 213 Ill. 2d at 137; see 750 ILCS 5/505(a)(3) (West 2012). In *Rogers*, our supreme court considered whether gifts received by a father from his family qualified as income under section 505 of the Act. *Rogers*, 213 Ill. 2d at 131. There, after considering the mother's motion to modify child support payments, the trial court determined the father's child support payments should increase from $250 per month to $1,000 per month based on section 505 of the Act. *Id.* at 133. In computing the father's net income the trial court determined he earned $15,000 per year as a teacher and received an additional $46,000 per year in gifts and loans from his parents. *Id.* The father appealed and the appellate court affirmed the trial court's determination.

¶ 115 Before our supreme court, the father asserted, as he did below, that "the $46,000 in gifts and loans he received each year from his family should not have been included as part of his 'net income' for purposes of calculating his child support obligations under section 505 of the Act." *Id.* at 135. Our supreme court stated that "the first step in calculating a parent's 'net income' is ascertaining 'the total of all income from all sources' received by that parent." *Id.* at 136. The

court gave "income" its plain and ordinary meaning:

> " 'something that comes in as an increment or addition * * *: a gain or recurrent benefit that is usu[ually] measured in money * * *: the value of goods and services received by an individual in a given period of time.' [Citation.] It has likewise been defined as '[t]he money or other form of payment that one receives, usu[ally] periodically, from employment, business, investments, royalties, gifts and the like.' " *Id.* at 136-37 (quoting Webster's Third New International Dictionary 1143 (1986) and Black's Law Dictionary 778 (8th ed. 2004)).

The court concluded that "the circuit court was correct to include as part of the father's 'income' the annual gifts he received from his parents." *Id.* at 137. The court reasoned that the gifts "represented a valuable benefit to the father and enhanced his wealth and his ability to support [the child]." *Id.*

¶ 116 The court further noted that people's financial circumstances can change, therefore:

> "the relevant focus under section 505 [of the Act (750 ILCS 5/505 (West 2006))] is the parent's economic situation at the time the child support calculations are made by the court. If a parent has received payments that would otherwise qualify as 'income' under the statute, nothing in the law permits those payments to be excluded from consideration merely because like payments might not be forthcoming in the future. As our appellate court has held, 'the Act does not provide for a deduction of nonrecurring income in calculating net income for purposes of child support.' " *Id.* at 138-39, quoting *In re Marriage of Hart*, 194 Ill. App. 3d 839, 850 (1990).

The court, however, added that the nonrecurring nature of an income stream is not irrelevant. "If, however, the evidence shows that a parent is unlikely to continue receiving certain payments in the future, the circuit court my consider that fact when determining, under section 505(a)(2) of the Act [citation], whether, and to what extent, deviation from the statutory support guidelines is warranted." *Id.* at 139.

¶ 117 The court declined to consider whether loan proceeds are "income" under section 505 of the Act. *Id.* at 140. The court did, however, consider the mother's testimony, which was deemed to be more credible, stating it established the father had never been required to repay any part of the loans he received from his parents. *Id.* Based on that evidence, the court found that "the sums at issue here are loans in name only." *Id.* In upholding the circuit court's determination that the "loans" are income, the court concluded that the money the father received from his parents was "no less 'income' than the gifts they gave him or the salary he received from his teaching job." *Id.*

¶ 118 Here, the trial court correctly followed the procedure set forth in section 505(a). It calculated Richard's net income, made a specific finding that 20% of that amount was not appropriate, and adjusted the child support award accordingly. Where Barbara argues the trial court erred was in not considering the funding from Richard's father in the calculation of Richard's net income. We disagree that the trial court did not take into consideration the funding from Richard's father. In fact, in determining Richard's net income the trial court expressly stated in its judgment of dissolution that:

"because (a) the court lacks a breakdown of allowable deductions (especially his actual

> tax liability) from Richard Schultz's gross income and (b) *Richard Schultz is able to obtain some 'funding' from his father*, it is appropriate to treat the $60,000 as the net income amount (which may not be far from a net of the $93,000 average after allowable deductions) yielding a 20% guidelines amount of $1,000 per month." (Emphasis added.)

Accordingly, Barbara's contention that the trial court did not consider funds from Richard's father in the calculation of Richard's net income is not well-made, as it is clearly iterated in the judgment of dissolution that the trial court did consider funding from Richard's father.

¶ 119 Despite the fact the trial court increased Richard's monthly child support payments above the statutory guidelines, Barbara next asserts that the trial court should have imputed Richard's net income to be $150,000. Barbara relies primarily on our supreme court's decision in *Rogers*, to support her position.

¶ 120 In response, Richard attempts to distinguish the gifts received by the father in *Rogers* from the gifts he received from his father. Richard alleges the funds received in *Rogers* were given as an annual gift, and therefore could be counted as part of a steady stream of income, year after year. Richard asserts this is substantially different from the funds received in the present case, as he did not receive reoccurring "annual" gifts from his father.

¶ 121 We disagree with Richard's reading of *Rogers*. As previously discussed, the *Rogers* court did not base its determination that the gifts were income based on the recurring and predictable nature of the funding. To the contrary, our supreme court stated that net income was to be determined by the parent's current economic situation and that the Act did " 'not provide for a deduction of nonrecurring income in calculating net income for the purposes of child support.' "

Id. at 138-39, citing *In re Marriage of Hart*, 194 Ill. App. 3d 839, 850 (1990).

¶ 122 Even assuming for the sake of argument that *Rogers* applies, the trial court here did not commit reversible error. In *Rogers*, our supreme court interpreted section 505 to include gifts (and also "loans in name only") in the definition of "income." *Rogers*, 213 Ill. 2d at 136-37, 140. Here, the trial court did just that when it considered the funds Richard received from his father in determining Richard's net income. Accordingly, the issue in the present case is actually whether the trial court abused its discretion when calculating Richard's net income. See *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 467 (2005).

¶ 123 Barbara asserts Richard's net income should be imputed to $150,000. The trial court determined it to be $60,000. A review of the record indicates that Barbara failed to present the evidence needed for the trial court to impute to Richard a net income of $150,000. The only evidence contained in the record regarding Richard's income was his testimony and Barbara's. One reason the trial court had difficulty was that it found the parties' testimony to lack credibility, and we accord the trial court great deference in assessing credibility. See *In re Marriage of McHenry*, 292 Ill. App. 3d 634, 641 (1997) ("It is well established that determinations by the trier of fact as to the credibility of parties are given great deference.").

¶ 124 Moreover, none of the evidence which was admitted at trial and aided the trial court in determining Richard's net income was included in the record on appeal. This includes, most importantly, the promissory note issued by Richard to his father. It is the duty of the appellant to present this court with a sufficiently complete record of the trial court proceedings to support her claims of error. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003).

Therefore, when the issue on appeal relates to the conduct of a hearing or proceeding, the absence of a transcript or other record of that proceeding means this court must presume the order entered by the circuit court was in conformity with the law and had a sufficient factual basis. *Id.* In addition, the parties failed to present evidence of the deductions listed in section 505(a)(3) of the Act as noted by the trial court in its judgment order. 750 ILCS 5/505(a)(3) (West 2012). Based on the lack of evidence presented at trial and contained in the record on appeal, we cannot say the trial court abused its discretion in its calculation of Richard's net income.

¶ 125 II. Allocation of Shuffle Tech

¶ 126 Barbara maintains the trial court abused its discretion when it awarded Richard 100% of his interest in Shuffle Tech. Barbara contends the asset should have been divided in kind, even if it could not be valued. Barbara further asserts the trial court abused its discretion when it did not reopen proofs after it was informed Richard had been interfering with discovery regarding Shuffle Tech. Namely, Richard was posing as his business partner Toyama in emails regarding the scheduling of Toyama's deposition.

¶ 127 In response, Richard asserts the trial court correctly found it was unwise to divide business assets in a contentious divorce such as the one at hand. Additionally, Barbara failed to produce any evidence of valuation of Shuffle Tech and no newly discovered evidence was derived from the postjudgment deposition of Toyama.

¶ 128 It is well established that decisions concerning the ultimate distribution of marital property lie within the sound discretion of the trial court and will not be disturbed on appeal

absent an abuse of that discretion. *In re Marriage of Polsky*, 387 Ill. App. 3d 126, 135 (2008). The court is to consider all relevant factors which, in this case, include: the duration of the marriage; the value of the property set apart to each spouse; the relevant economic circumstances of each spouse; the amounts and sources of each spouse's income; the age, occupation, vocational skills, employability, and needs of each party; whether the apportionment is in lieu of or in addition to maintenance; and the reasonable opportunity for each spouse for future acquisition of assets and income. 750 ILCS 5/503(d) (West 2012). Courts typically seek to minimize further business dealings between the parties in dissolution proceedings. *In re Marriage of Sales*, 106 Ill. App. 3d 378, 381 (1982); see *In re Marriage of Thomas*, 239 Ill. App. 3d 992, 996 (1993). "Division of small businesses or closely held corporations is particularly disadvantageous where it would require ongoing business association between the parties and the record reflects animosity between the parties." *Id.*

¶ 129 Applying the above-mentioned principles to the present case, we find no abuse of discretion. We note nothing inequitable about the trial court's award of 100% of Richard's interest in Shuffle Tech's assets and liabilities to Richard. Evidence presented at trial established Shuffle Tech is a small business owned in part by Richard, his business partner Toyama, Richard's father, and a few other unnamed investors. The lengthy and contentious pretrial history and testimony at trial demonstrate the parties' acrimony. Additionally, the trial court stated in the judgment of dissolution that the parties had "extreme animosity towards each other." The record further demonstrates Shuffle Tech is a small business making it difficult for the parties to work together because of the acrimony. When this is the case, "it is better to award the business solely

to one party or the other." *Thomas*, 239 Ill. App. 3d at 996. Moreover, Barbara was awarded 60% of other marital assets, such as the Lynch IRA and the Crosby property, which have significant value. Considering Richard's testimony and evidence presented at trial regarding the liabilities of Shuffle Tech, the trial court did not abuse its discretion as to this issue.[17]

¶ 130 Barbara further contends the trial court abused its discretion when it failed to reopen proofs to allow the testimony of Richard's Shuffle Tech business partner, Toyama.

¶ 131 In considering a motion to reopen proofs, the court is to take into account such factors as whether the other side will be surprised or unfairly prejudiced by the new evidence, whether the evidence is of utmost importance to the movant's case, and whether there are more cogent reasons to deny the motion. *In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 249 (1984). The denial of a motion to reopen proofs is within the sound discretion of the trial court; consequently the court's decision will not be overturned absent a clear abuse of that discretion. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1120 (2004). Under the circumstances presented here, we cannot say the court abused its discretion in denying Barbara's motion.

¶ 132 First, we note that there was no offer of proof as to what Toyama's testimony would be. Instead, Barbara stated in her motion to reconsider that Toyama would testify that "no Shuffle Tech shareholders' meetings have been held in many years" and that Toyama had "not reviewed

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[17] Evidence was admitted at trial regarding Shuffle Tech's finances. This evidence was not included in the record on appeal. As it was Barbara's responsibility to present an adequate record for review of the claimed errors, and we will resolve any doubts arising from the incompleteness of the record against her. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 546-47 (1996); see also *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We also note, the trial court entered a protective order regarding these documents.

any financial documents or bank statements." Further, Barbara asserted Toyama had no "personal knowledge as to the terms of the promissory note from Richard's father." We cannot see how any of this potential testimony could be considered "new evidence" or how it could be of the "utmost importance" to Barbara's case. In fact, this testimony offers nothing to aid the trial court in its determination of the value of Shuffle Tech.

¶ 133 Second, it is apparent from the record that Barbara's request to reopen proofs was related to her request for sanctions against Richard for interfering with Toyama's deposition. In her motion to reconsider, Barbara asserts that Toyama would testify that Richard authored emails from his email account and sent those emails to Barbara's counsel. Barbara also explicitly requested that the trial court reopen proofs as a sanction against Richard. In its supplemental order, the trial court declined "to reopen the proofs and conduct additional proceedings as a sanction as she [Barbara] requests." The trial court did, however, award sanctions for Richard's "willful and egregious" interference with discovery in the amount of $6,000.

¶ 134 Based on the record there were cogent reasons the trial court declined to reopen proofs. Specifically, Toyama's testimony would not have aided the trial court in determining Shuffle Tech's value. Moreover, Barbara requested proofs be reopened so she could present evidence from Toyama's deposition in which he indicated Richard used his (Toyama's) email to send communications to Barbara's counsel. Although Barbara's request to reopen proofs was denied, Barbara was granted sanctions against Richard for his interference with the scheduling of Toyama's deposition. We cannot say the trial court abused its discretion in determining not to reopen proofs in this matter.

¶ 135 III. The Lynch IRA

¶ 136 Barbara first contends the trial court erred in classifying the Lynch IRA as marital property. Barbara asserts the trial court failed to consider a 1998 tax form which was submitted with her motion to reconsider setting forth the total value of all IRAs in her name at that time was $10,116. She further asserts Richard did not sufficiently present evidence at trial tracing his contributions to her account. Barbara concludes she is entitled to the entire account.

¶ 137 Richard responds the trial court correctly determined the IRS tax form was not newly discovered evidence. Additionally, he asserts no evidence was presented at trial which establishes the Lynch IRA was nonmarital property. Richard concludes Barbara failed to meet her burden of proof for tracing a nonmarital asset by clear and convincing evidence and, therefore, the trial court properly determined the Lynch IRA was marital property.

¶ 138 According to section 503 of the Act (750 ILCS 5/503 (West 2012)), prior to distributing property upon dissolution of marriage, the trial court must classify the property as marital or nonmarital. *In re Marriage of Davis*, 215 Ill. App. 3d 763, 768 (1991). We apply a manifest weight of the evidence standard to the trial court's findings on the existence of marital and nonmarital property. *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 57. A decision is said to be against the manifest weight of the evidence only where "the opposite conclusion is clearly evident or where it is unreasonable, arbitrary, and not based on the evidence." *In re Marriage of Berger*, 357 Ill. App. 3d 651, 660 (2005).

¶ 139 Section 503(a) of the Act excludes from the definition of marital property certain "property acquired before the marriage." 750 ILCS 5/503(a)(6) (West 2012). Section 503(b) of

the Act states: "The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section." 750 ILCS 5/503(b) (West 2012). This showing must be made with clear and convincing evidence. See *In re Marriage of Didier*, 318 Ill. App. 3d 253, 258 (2000). Ultimately, "[a]ny doubt as to the nature of the property must be resolved in favor of finding that it is marital." *Steel*, 2011 IL App (2d) 080974, ¶ 57.

¶ 140 In the instant case, Barbara testified the Lynch IRA at issue existed prior to her marriage to Richard and that she made retirement contributions to the account until 2003. Barbara, however, did not produce any bank records as to the origin of the Lynch IRA during trial. The trial court determined Barbara "failed to provide sufficient credible evidence of the origin of the IRA to prove that it existed before the marriage."

¶ 141 Subsequent to the judgment of dissolution, Barbara located and attempted to introduce a 1998 tax form which purportedly demonstrated an existing IRA in the amount of $10,116. The trial court, however, determined this was not newly discovered evidence and therefore would not consider it as evidence of the origin of the Lynch IRA. The decision to grant or deny a motion to reconsider lies within the trial court's discretion, and we will not disturb the court's ruling absent an abuse of discretion. *Broadnax v. Morrow*, 326 Ill. App. 3d 1074, 1082 (2002). The trial court's decision not to consider the IRS tax form was not unreasonable or arbitrary considering the divorce petition was filed in July 2010, trial commenced September 21, 2011, and concluded on January 5, 2012. Barbara was afforded 18 months to obtain the IRS tax form prior to the conclusion of trial and failed to do so. Accordingly, the trial court's decision not to consider the

IRS tax form as newly discovered evidence was not an abuse of discretion. Moreover, our review of the record reveals no clear and convincing evidence the Lynch IRA was nonmarital property. Therefore, we cannot say the trial court's judgment as to this issue was against the manifest weight of the evidence.

¶ 142 IV. Attorney fees

¶ 143 Barbara contends the trial court's determination that each party bear the cost of its own attorney fees was in error because: (1) she was not required to demonstrate the fees she incurred were reasonable; and (2) her conduct during the trial proceedings did not warrant a departure from the plain language of section 503(j) which requires the award of contribution to be based on the criteria for the division of marital property. In response, Richard asserts the trial court correctly determined each party must pay their own attorney fees, but argues the trial court erred by failing to reimburse him $10,000 for a prior payment he made to Barbara's attorneys.

¶ 144 Generally, attorney fees are the responsibility of the person for whom the services were rendered. *In re Marriage of Wolf*, 80 Ill. App. 3d 998, 1009 (1989). The Act, however, gives the trial court the discretion to order one spouse to pay all or contribute in part to the other spouse's attorney fees, after considering the parties' financial resources. *In re Marriage of Minear*, 181 Ill. 2d 552, 561-62 (1998). Under section 508(a) of the Act, the trial court may order a party to contribute a reasonable amount of the opposing party's attorney fees. 750 ILCS 5/508(a) (West 2012). A contribution award is based on the criteria for the division of marital property and where maintenance has been awarded, the criteria for an award of maintenance. 750 ILCS 5/503(j)(2) (West 2012). The criteria include the property awarded to each spouse, their incomes

and present and future earning capacities and "any other factor that the court expressly finds to be just and equitable." See 750 ILCS 5/503(d), 504(a) (West 2010).

¶ 145 When determining whether to order contribution, the allocation of assets and liabilities, maintenance and the relative earning abilities of the parties should be considered. *In re Marriage of Suriano*, 324 Ill. App. 3d 839, 852 (2001). The party seeking an award of attorney fees must establish an inability to pay and the other spouse's ability to do so. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005); but see *In re Marriage of Haken*, 394 Ill. App. 3d 155, 162 (2009) (disagreeing with *Schneider* that a contribution award requires that a spouse prove the inability to pay). Financial inability exists where requiring payment of fees would strip that party of his or her means of support or undermine his or her financial stability. *Id.* at 174. A trial court's determination to award fees is a matter of discretion and will not be disturbed absent an abuse of discretion. *In re Marriage of Nesbitt*, 377 Ill. App. 3d 649, 656 (2007). An abuse of discretion can be shown in cases where the evidence reveals a gross disparity in income and earning capacity and the financial inability of the spouse seeking relief to pay. See *In re Marriage of Carpenter*, 286 Ill. App. 3d 969, 976 (1997).

¶ 146 Though not explicitly required by section 503(j), the trial court may consider the reasonableness of the attorneys fees when determining contribution awards. *Nesbitt*, 377 Ill. App. 3d at 658. However, "[a] critical examination of the reasonableness of the petitioner's attorneys' fees would not be consistent with the obvious goals of section 503(j) – to avoid conflicts of interest between petitioner and her attorney and to preserve the lawyer-client privilege." *In re Marriage of Hasabnis*, 322 Ill. App. 3d 582, 597 (2001). In fact, section 508

provides a separate vehicle through which the parties can challenge the reasonableness of their attorneys fees. 750 ILCS 5/508 (West 2012); see *In re Marriage of McGuire*, 305 Ill. App. 3d 474, 477 (1999) (holding petitions for contribution under section 503(j) and petition for approval of final fees under section 508 should be considered in separate and distinct proceedings). In addition, "[i]n determining whether to award attorney fees, the trial court may consider a party's misconduct." *In re Marriage of Hale*, 278 Ill. App. 3d 53, 58 (1996); see *In re Marriage of Patel and Sines-Patel*, 2013 IL App (1st) 112571, ¶ 117. As previously set forth, we will only consider Richard's responses to Barbara's arguments and will not consider his separate contentions. We now turn to consider whether the trial court abused its discretion when it ordered each party to bear the cost of their own attorneys fees.

¶ 147 In the present case, both Barbara and Richard sought contribution. Barbara's petition specifically sought contribution towards her fees in the amount of $45,000. Barbara asserted she did not have the ability to contribute towards her own attorneys fees because she was unemployed, received minimal support from Richard during the course of litigation, and could not pay her bills. Barbara further asserted Richard had the ability to contribute towards her attorneys fees because of the income he earns from his employment and the personal guarantee of $40,000 Richard's father gave to Richard's attorneys. In support of her petition, Barbara attached an affidavit of her counsel which averred his hourly rates are $350.00 per hour for office time and $375.00 per hour for court time.

¶ 148 The trial court denied both petitions. In denying Barbara's request for contribution, the trial court first stated:

> "Richard Schultz persuasively argues that Barbara Schultz should be barred from contribution because her petition fails 'to demonstrate that the fees incurred were reasonable, or pursuant to a validly executed engagement agreement, or reasonable as demonstrated through itemized billing statements.' Contribution to Barbara Schultz should be denied for that reason."

Second, the trial court determined, even if it were to proceed on Barbara's petition in absence of factual support, "the evidence on the section 503 and 504 factors may favor contribution from Richard Schultz to Barbara Schultz, but the high-conflict nature of the proceedings, for which Barbara Schultz must take at least half the responsibility, outweighs that evidence and precludes a contribution award to Barbara Schultz."

¶ 149 Here, in its judgment of dissolution the trial court found "[t]he evidence on virtually all of the maintenance factors favors an award of maintenance to Barbara Schultz." The trial court, however, denied Barbara's petition for contribution because she did not provide a letter of engagement or billing statements from her attorney. Denial of Barbara's petition on this basis was an abuse of discretion. When determining whether a party is entitled to contribution under section 503(j) of the Act, a determination of the reasonableness of fees incurred is not mandatory. *Nesbit*, 377 Ill. App. 3d at 596-97 (While a trial court may review the petitioning party's billing records, it is not required to do so.). In this case, the trial court should have based its determination on its consideration of the section 504 factors and whether Barbara established her inability to pay and Richard's ability to pay. *Schneider*, 214 Ill. 2d at 174. Evidence presented at trial established Barbara's Riverwalk property was in foreclosure, she was unable to pay her bills,

and she was currently unemployed. The record also demonstrates Barbara filed multiple motions seeking payments for utilities and mortgage bills from Richard pursuant to court orders due to her inability to pay. Additionally, Richard testified as of August 2011, he earned $36,905.15 and that despite not receiving an income in December 2011 he was able to dine out, travel to Florida with Ricky, pay his car payment, purchase groceries, and pay $100 to the State of Illinois for taxes owed. Although awarded a larger percentage of the marital property, the record is clear that Barbara still must overcome many financial obstacles in order to pay her attorneys fees. Accordingly, the record demonstrates that payment of her attorneys fees would undermine her economic stability. Moreover, the trial court found that Richard had "ready access to funds for various purposes." Based on the evidence presented at trial as well as what was alleged in her petition for contribution, Barbara sufficiently demonstrated her inability to pay attorney fees and Richard's ability to do so.

¶ 150 The trial court, further denied contribution to Barbara based on her acrimonious conduct throughout litigation. A trial court may take into consideration a party's conduct in determining whether to award contribution of fees. See *Patel*, 2013 IL App (1st) 112571, ¶ 117. This is because "[u]nnecessarily increasing the cost of litigation is a relevant factor in both the division of property and the allocation of attorney fees." *Id.* (citing *Haken*, 394 Ill. App. 3d at 161). The record here, however, demonstrates and the trial court found that *both* Barbara and Richard's conduct throughout the divorce proceedings increased their attorneys fees. We find the trial court abused its discretion in denying Barbara's petition based on her conduct during litigation when the record demonstrates Richard was equally responsible for the increased costs. We note

that although the record here reveals the litigation was "highly contentious," the trial court has the discretion to reduce a fee award "to an amount which it considers reasonable based on the knowledge it acquires in the discharge of its duties." *Nesbitt*, 377 Ill. App. 3d at 659.

¶ 151 Because the trial court based its determination on Barbara's failure to prove the reasonableness of her attorney fees and her conduct during litigation and did not properly consider the relevant property distribution and maintenance criterion in denying a contribution award, we conclude the trial court abused its discretion. We reverse the trial court's determination not to award Barbara contribution and remand the cause for hearing on the issue of the amount of contribution from Richard for Barbara's attorneys fees.

¶ 152 V. Allocation of Assets and Retroactive Support Payments

¶ 153 Barbara sets forth three contentions regarding the allocation of assets and retroactive support payments. Barbara argues the trial court erred by: (1) accepting Richard's valuation of their personal property; (2) failing to issue rulings on the "pending financial motions" which were consolidated with trial; and (3) failing to award her retroactive temporary child support and maintenance.

¶ 154 Section 503(d) of the Act (750 ILCS 5/503(d) (West 2012)) requires the trial court to divide marital property in "just proportions," considering the 12 relevant factors set forth therein. Those statutory factors include:

> "(1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including * * * the contribution of a spouse as a homemaker or to the family unit;

(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, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(6) any obligations and rights arising from a prior marriage of either party;

(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;

(9) the custodial provisions for any children;

(10) whether the apportionment is in lieu of or in addition to maintenance;

(11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and

(12) the tax consequences of the property division upon the respective economic circumstances of the parties." 750 ILCS 5/503(d)(1) to (d)(12) (West 2012).

The trial court's division of property does not require mathematical equality, but rather equitable division based on surrounding circumstances. *In re Marriage of Joynt*, 375 Ill. App. 3d 817, 821 (2007). In determining whether a particular division is equitable, each case must be evaluated based upon its own unique facts. *Id.* "A reviewing court applies the manifest-weight-of-the-evidence standard to the trial court's factual findings on each factor, but it

applies the abuse-of-discretion standard in reviewing the trial court's final property disposition." *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 71; see *In re Marriage of Sheber*, 121 Ill. App. 3d 328, 337-38 (1984).

¶ 155 Barbara specifically challenges the trial court's determination of the value of the parties' personal property allocated to Richard and argues the underlying values for these items were not supported by evidence.

¶ 156 In the present case, the trial court stated, "the uncontradicted evidence at trial supports Richard Schultz's position that Exhibit 98 [the master list of personal property] includes all the items the parties agreed would be awarded to him, but he was unable to take possession of many of those items." Exhibit 98 is not included in the record on appeal. Pursuant to Illinois Supreme Court Rule 328, Barbara was required to file "an appropriate supporting record containing enough of the trial court record to show an appealable order or judgment, a timely filed and served notice of appeal (if required for appellate jurisdiction), and any other matter necessary to the application made." Ill. S. Ct. R. 328 (eff. Feb. 1, 1994). As it was Barbara's responsibility to present an adequate record for review of the claimed errors, and we will resolve any doubts arising from the incompleteness of the record against her. See *Haudrich*, 169 Ill. 2d at 546-47; see also *Foutch,* 99 Ill. 2d at 391-92. Accordingly, we must presume the trial court's statement that "the uncontradicted evidence at trial supports Richard Schultz's position" is proper. See *Haudrich,*169 Ill. 2d at 546-47.

¶ 157 Additionally, the trial court's determination is supported by other evidence contained in the record. The record reveals that Barbara did not provide the trial court with any evidence of

the value of the items during trial. Further, according to the July 5, 2011, order if Barbara failed to submit a list of personal property to the court in 14 days, Richard's list would be deemed the "master list." The trial court ultimately admitted into evidence Richard's list as the master list of personal property as Barbara failed to comply with the court's order. Accordingly, we cannot say the trial court's determination of the value of the personal property was against the manifest weight of the evidence.

¶ 158 We next turn to address Barbara's second contention, that the trial court failed to issue determinations on the pending financial motions. The record on appeal, however, establishes that the trial court did issue determinations as to these issues in its supplemental judgment order. Upon crediting Richard $24,407 for the personal property he was awarded but unable to obtain possession of, the trial court determined it was "equitable to offset that amount against his past due predecree obligations to pay support as well as the mortgage and other expenses." Barbara does not argue on appeal that this allocation of property was in error. Accordingly, we turn to consider Barbara's third contention.

¶ 159 Lastly, Barbara argues that the trial court erred in failing to award her retroactive temporary child support and maintenance. It is within the trial court's discretion to award or to not award child support on a retroactive basis. *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1119 (2004). In the instant case, the trial court determined Barbara was not entitled to retroactive child support and maintenance. The trial court noted, however, that it had ordered Richard to pay Barbara $5,000 before the trial commenced in September 2011 as "an advanced distribution from her ultimate judgment without prejudice to identification as property or support." In addition, in

its January 12, 2011, order, the trial court awarded Barbara 50% of Richard's gross monthly income as "unallocated, taxable family support." The record discloses Barbara received "family support" payments from Richard, albeit in varying amounts as the amount was based on a percentage of Richard's income. Based on the record, we cannot say the trial court abused its discretion in failing to award Barbara retroactive child support and maintenance.

¶ 160 VI. Airline Miles

¶ 161 Lastly, Barbara contends the trial court erred in its failure to allocate Richard's airline miles, as they are marital property. Richard asserts Barbara failed to request that the trial court allocate his airline miles and thus this request is forfeited. Additionally, Richard argues the record contains no evidence of his airline miles.

¶ 162 We conclude Barbara's contention fails for two reasons. First, the record below contains no request prior to trial that the trial court allocate Richard's airline miles. Second, the record is devoid of evidence regarding the number of airline miles Richard has acquired during the marriage. As previously stated, it is the appellant's burden to present a sufficient record on appeal to determine whether error occurred. See *Haudrich*, 169 Ill. 2d at 546-47. Without making a request to the trial court and providing sufficient evidence on which to base a determination, we find this issue to be waived. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769 (1993).

¶ 163 CONCLUSION

¶ 164 For the reasons stated above, the judgment of the trial court is affirmed in part, reversed in part, and remanded for proceedings consistent with this order.

¶ 165 Affirmed in part; reversed in part; and remanded.