2013 IL App (2d) 110719-U
No. 2-11-0719
Order filed May 21, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re the Marriage of:	)	Appeal from the Circuit Court
	)	of Lake County.
JEFFREY B. BLACKBURN,	)	
	)	
Petitioner-Appellant and	)	
Cross-Appellee,	)	
	)	
and	)	No. 07-D-1086
	)	
STEPHANIE J. BLACKBURN,	)	
	)	Honorable
Respondent-Appellee and	)	George D. Strickland,
Cross-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: On appeal, the trial court neither abused its discretion nor made any factual determinations that were against the manifest weight of the evidence in determining the apportionment of stock and other marital property, petitioner's 401(k) account, or interest payments on loans apportioned to respondent. On cross-appeal, the trial court did not abuse its discretion in the procedure and determination of respondent's petition for contribution to attorney fees. The trial court was affirmed.

¶ 2 Petitioner, Jeffrey B. Blackburn, appeals the judgment of the circuit court of Lake County, dissolving his marriage with respondent, Stephanie J. Blackburn. Petitioner appeals the allocation

of property to the marital estate and the division of marital property and debts. Respondent cross-appeals the trial court's judgment declining to assign her attorney's fees to be paid by petitioner, along with irregularities surrounding the decision on that issue. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following factual summary is taken from the record on appeal. In 1996, petitioner and respondent met. At that time, both were divorced and both had children from their previous marriages. In May 1999, the parties married. No children were produced from the parties' marriage; further, their children from previous marriages were not adopted by the other party. As of trial in this matter, the children were at least attending college or were emancipated. No issues regarding the children persist on appeal. On May 31, 2007, petitioner filed this action for dissolution of his marriage.

¶ 5 At the time the parties first met, respondent was unemployed and resided with her parents. Before marrying petitioner, the most money respondent had made in a year was about $18,600. Respondent had graduated from high school and attended two years of college, but had not received a degree. Before marrying petitioner, respondent had worked in various positions, including as a floor planner for a car dealership and a night auditor for a local motel.

¶ 6 Petitioner appears to have been fully aware of respondent's financial circumstances before and during the marriage. Petitioner contributed to respondent's financial support before the two married and was responsible for financial contributions during the parties' marriage. Respondent did not financially contribute to the marriage. Before the parties married, they discussed their expectations regarding the roles each was to play in the marriage and they decided that petitioner would be the breadwinner, and respondent would not work outside of the home, but she would be

the homemaker and take care of the parties' three minor children. Additionally, according primarily to respondent, she undertook the role of host for any necessary social affairs that respondent's business responsibilities required. Respondent also traveled with petitioner on certain of his business-related trips, and she asserted that she would sometimes scout out locations at which to stay or to hold business dinners.

¶ 7 Respondent testified that, when she and petitioner did travel, they stayed at high-end hotels and resorts, such as the Four Seasons and the Ritz Carlton. Likewise, they would dine at high-end restaurants. During their marriage, the parties employed a landscaping service, a cleaning service, and a carpenter/handyman to take care of their marital residence.

¶ 8 Petitioner attended Notre Dame University and also earned an advanced degree, namely an M.A. in religion, from the Trinity Evangelical Divinity School. In 1981, petitioner began working for his father's insurance agency, Assurance, which, prior to the parties' marriage, had merged with its holding company, 3-J Company. Petitioner progressed to the position of chairman of the board of Assurance during his career there. He also remains one of Assurance's top producers, and during the marriage, earned a considerable salary, exceeding $500,000 most years. Assurance ranked in the top 100 insurance agencies in the United States and was the 66th largest insurance agency when this action was filed. Petitioner's income was based on commissions, and in 2008, he earned a gross salary of $631,827, and in 2009, he earned a gross salary of $534,485.

¶ 9 Respondent testified about the standard of living she experienced during the marriage and her current standard of living. Her marital standard of living was determined by the court to be lavish. At the time of trial, respondent was paying $1,900 per month for her residence. She also listed amounts for personal grooming and food that the court determined to be higher than she

needed. As of trial, respondent indicated that she owed her expert witness for the valuation of petitioner's business about $52,000 and she owed her attorneys another $50,000. Further, as of the time this appeal was briefed, respondent indicated that the expert witness and attorney fees had increased to a total of about $140,000.

¶ 10 Respondent testified that she suffers from bipolar disorder; however, the court determined that, as a matter of fact, she had never been diagnosed with bipolar disorder. Respondent testified that she also experiences restless leg syndrome, which makes it difficult to achieve sufficient rest. Respondent claimed that these conditions made it impossible for her to find work easily; the trial court determined, as a matter of fact, that respondent was not disabled and was able to work, if she chose. Regarding work, respondent indicated that she was interested in obtaining schooling and training necessary to become an occupational therapist, but had not yet begun to pursue such a career.

¶ 11 As previously stated, on May 31, 2007, petitioner filed this action. In his petition, petitioner claimed that he possessed nonmarital property; respondent's answer to the petition for dissolution alleged that petitioner had no nonmarital property.

¶ 12 On October 1, 2007, the trial court entered an order that gave respondent a two-month period of exclusive possession of the marital home, after which exclusive possession of the marital home would be assumed by petitioner. The order further required petitioner to borrow $350,000 from his interest in Assurance, and give the funds to respondent as a pre-distribution of marital property. The order further required petitioner to pay respondent $5,800 per month in temporary maintenance, but petitioner was allowed to deduct $400 per month from the temporary maintenance to pay the interest on the loan.

¶ 13 On December 6, 2007, respondent filed a petition to increase the amount of her temporary maintenance. Respondent alleged she needed an increase in order to qualify for a mortgage and purchase a new home. On the same day, respondent also filed a petition for interim attorney fees, alleging that she had no income and needed petitioner to pay her attorney fees in order to level the playing field. Petitioner responded to the interim-attorney-fees petition by alleging that respondent chose to remain unemployed and had at least $140,000 of her own funds in addition to the moneys petitioner had provided to respondent pursuant to the order of October 7, 2007. In responding to the petition for increased maintenance, petitioner again alleged that respondent was not employed by her own choice and he denied that she did not have funds with which to support herself.

¶ 14 On March 27, 2008, the trial court entered an order increasing respondent's temporary maintenance to $13,000 per month less any interest petitioner attributed to respondent's withdrawal in May 2007 of $70,000 from the parties' home equity line of credit.

¶ 15 One of the primary issues during the trial concerned the allocation of 2,305 shares of stock of the Assurance Agency to either the marital estate or to petitioner's nonmarital estate. The parties filed cross-motions for summary judgment on the issue. The parties essentially agreed as to the facts surrounding the acquisition of the 2,305 shares of stock.

¶ 16 We summarize the uncontested facts concerning the stock-allocation issue established in the cross-motions for summary judgment. On October 29, 1996, petitioner was granted 2,305 vested stock options. The stock options had a price of $1 and were fully vested upon issuance. The stock options were granted to petitioner before the parties' marriage. On May 14, 2002, during the marriage, petitioner exercised the stock options by paying the $1-per-share strike price. The $2,305 used to exercise the stock options was taken from a marital bank account into which petitioner

deposited all his income. At the time petitioner acquired the shares of stock, the parties incurred a tax liability totaling about $117,000 as a result of the acquisition. The parties agreed that they used marital funds drawn from petitioner's income and from the line of credit encumbering the marital residence to pay the tax liability resulting from the conversion.

¶ 17 Regarding the stock option acquisition, the parties referred to an agreement issued by 3-J Company. The stock option agreement provided that the options were being issued to key employees whose continued employment was desired by the company. The agreement recited that the options were issued in "consideration for the Employees' past performance, as well as in inducement for the Employees' continued performance and employment with the company." The agreement further provided that: "The options granted hereunder may be exercised by the Employees at any time during, or within 90 days following termination of, their employment with the Company." Regarding the exercise of the stock options, the agreement stated that:

> "The options under this Agreement may be exercised by notifying the Company in writing of such exercise prior to the termination of the option. The option price for the number of common shares for which the option is exercised shall become immediately due and payable. The Employees recognize that any income tax which may become due and payable as a result of such exercise shall be the sole obligation of the Employee, and the Company shall have no responsibility therefore [*sic*]."

¶ 18 In her analysis of whether the contested shares of stock belonged in the marital estate or in petitioner's nonmarital estate, respondent argued that the stock was all marital property because the option agreement granted the options partly as an inducement of future and continuing services, the shares of stock were acquired as new property during the period of the marriage using marital funds,

and marital funds also were used to satisfy the tax liability. Respondent also contended the shares were transmuted into marital property resulting from the commingling of the nonmarital options and the maritally funded strike price of $2,305 resulting in the extinction of the options and the resultant loss of the ability to trace the identity of the shares of stock to the options. Last, respondent argued, alternatively, that there was not a property exchange because the options were extinguished when exercised, and they had not been marketable in their own right and carried no voting rights.

¶ 19 Petitioner's analysis differed markedly. Petitioner argued that the shares of stock were nonmarital because the shares were acquired in an exchange for the nonmarital options. Petitioner also argued that the use of marital funds in accomplishing the exchange was *de minimis* given that the shares of stock were valued at trial at over $6 million. The shares could be traced back to the nonmarital options, so the shares remained petitioner's nonmarital property. As to the amounts expended by the marital estate for the option strike price and resultant tax liability (the sums of which remained *de minimis*), petitioner conceded that the marital estate was entitled to reimbursement for its contribution. Petitioner also contended that respondent had not alleged that any increase in the value of the shares of stock from the date of exercise to the date of valuation at trial were due to the parties' marital efforts, and thus, respondent was foreclosed from trying to raise a transmutation argument based on the parties' marital efforts increasing the value of the stock and extinguishing the ability to trace the shares' value to the original option/share exchange.

¶ 20 The trial court accepted respondent's arguments and rejected petitioner's. The trial court ruled that the stock options had been granted to petitioner in consideration of past and future employment. The options were nonmarital property and fully vested. The parties used marital funds both to exercise the options and to pay the resultant tax liability. The trial court held that the stock

shares were acquired during the marriage using a combination of the options and currency. As a result, petitioner was unable to overcome the presumption that property acquired during the marriage belonged to the marital estate. The trial court additionally held that the money and the options had been commingled and had lost their identity. As a result the trial court ruled that the stock was marital property belonging to the parties' marital estate.

¶ 21 Petitioner filed a motion to reconsider which the trial court denied. In denying petitioner's first motion to reconsider, the court gave oral findings in which it stated that it wished to correct "some of the recitations of what the [c]ourt's ruling was in this case." The court noted that a stock option was not the same thing as a share of stock and that petitioner could not overcome the presumption of marital property because the shares of stock were acquired during the marriage in exchange for both the stock options and currency derived from marital property. As a result (and expressly refusing to consider the transmutation and commingling statute cited by petitioner in the motion for rehearing), the shares of stock remained marital property. Additionally, the trial court held that petitioner's efforts during the life of the marriage substantially enhanced the value of the shares of stock.

¶ 22 Petitioner sought to raise a permissive interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). However, petitioner conceded that the issue was well settled, and the trial court's certified question on appeal did not state that there was a substantial ground for difference of opinion. This court denied leave to appeal.

¶ 23 Petitioner revisited the issue of marital or nonmarital status for the disputed shares of stock two more times. First, at the close of petitioner's case at trial, petitioner moved for a directed finding that the stock was nonmarital property, albeit petitioner noted he was doing so simply to protect his

record and the issue for appeal. The trial court denied the motion for a directed finding for the same reasons stated at the hearings on the cross-motions for summary judgment and petitioner's initial motion to reconsider. In addition, the trial court made a directed finding that the shares of stock were marital property.

¶ 24 Second, petitioner challenged the trial court's determination at the conclusion of the trial. The trial court fixed the value of the 2,305 shares of stock at $6,101,335 (a per-share value of $2,647). The trial court also held that the value of the stock was substantially enhanced during the course of the marriage, but that respondent had played little role in that enhancement, rather, petitioner's contribution to the value of the shares was "exponentially" more significant than respondent's. Petitioner filed a motion to reconsider the judgment following the trial, again arguing that the trial court erred in finding the shares of stock to be marital property. The trial court again denied petitioner's motion.

¶ 25 The matter progressed to an extensive trial, with the main topics consisting of the valuation of petitioner's agency, categorization of marital and nonmarital property, along with respondent's attempt to prove a number of issues that are not on appeal. An aspect of the trial petitioner emphasizes deals with his testimony about his 401(k) plan. Petitioner testified that, one month before the parties' marriage, petitioner's 401(k) was valued at approximately $329,000. On September 30, 2009, the value of the 401(k) account totaled about $905,000. Petitioner provided an exhibit in which he purported to trace the growth of the nonmarital portion of the account separately from the marital portion of the account. The exhibit purported to show that the final value of the nonmarital portion of the fund totaled a little more than $579,000. In contrast to petitioner's calculations, the trial court held that the original $329,000 was petitioner's nonmarital property. The

roughly half-million dollar-plus increase from before the marriage until September 2009 was held to be marital and apportioned $346,000 to respondent, and $231,000 to petitioner. The trial court reasoned that the contribution of marital income into the account over time allowed new investment instruments to be purchased, thereby commingling the funds losing their identities in the newly acquired marital property in the account and transmuting the entire account into marital property. The trial court also noted that it was ruling on the basis of transmutation and not ruling on petitioner's qualifications and expertise to have made the calculation. Nevertheless, the trial court did not accept petitioner's calculations.

¶ 26 The court divided the marital property, allocating approximately $3.3 million to respondent and approximately $4.1 million to petitioner. In addition, the court determined that petitioner retained nonmarital property totaling nearly $1.375 million. Respondent's award was decreased by $155,000 representing loan amounts for which she was responsible due to taking moneys out of the home equity line of credit and taking attorney fee advances which petitioner had to use borrowed money. Additionally, petitioner was made responsible for slightly over $94,000 in credit card debt.

¶ 27 The trial court awarded respondent $11,000 per month in maintenance for two years. The trial court noted that respondent had received $350,000 in temporary maintenance payments and expressly made her responsible for the over $66,000 in taxes due on those moneys. (Respondent, as of the time of trial, had not paid her taxes for the previous two years.)

¶ 28 Following posttrial motions, petitioner timely appeals. Respondent timely cross-appeals.

¶ 29 II. ANALYSIS

¶ 30 On appeal, petitioner contends that the trial court erred in determining that the 2,305 shares of Assurance Agency stock were marital property. Petitioner also contends that the distribution of

marital property to respondent was too large, constituting an abuse of discretion and arguing that the allocation was against the manifest weight of the evidence. Petitioner further contends that the trial court's determination as to the nonmarital portion of petitioner's 401(k) was against the manifest weight of the evidence and constituted an abuse of discretion. Last, petitioner argues that the trial court erred in not making respondent responsible for the continuing interest payments on the $155,000 in borrowed moneys allocated to her.

¶ 31 Respondent cross-appeals, arguing that the trial court erred in several ways regarding her petition for attorney fees. Respondent argues that the trial court erred by failing to conduct a hearing on her fee petition. Respondent also contends that the trial court abused its discretion in determining that respondent did not demonstrate an inability to pay her fees. We consider each party's contentions in turn, beginning with petitioner's arguments on appeal.

¶ 32 A. Petitioner's Appeal

¶ 33 Petitioner initially contends that the trial court erroneously granted summary judgment in favor of respondent on the issue of whether the 2,305 shares of Assurance Agency stock were marital or nonmarital property. Generally, the trial court's determination on the issue of whether property is marital or nonmarital is reviewed to see if that determination was against the manifest weight of the evidence. *In re Marriage of Peters*, 326 Ill. App. 3d 364, 366 (2001). However, this standard is invoked only where the credibility of the witnesses has been weighed to make the determination. *In re Marriage of Joynt*, 375 Ill. App. 3d 817, 819 (2007). Where the facts are not in dispute, the determination of whether an asset belongs to the marital or nonmarital estate will be reviewed *de novo*. *Id.* Likewise, the grant of summary judgment is also reviewed *de novo*. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 25.

¶ 34 Applying these standards here might suggest that we review the issue *de novo*. However, given the posture of this case, namely, that following extensive evidentiary hearings, the trial court reiterated its determination that the 2,305 shares of stock were marital property, along with the trial court's factual determination that the value of the stock was substantially enhanced during the marriage, petitioner urges, and we agree, that our review should employ a manifest-weight-of-the-evidence standard. *Marriage of Joynt*, 375 Ill. App. 3d at 819, *Marriage of Peters*, 326 Ill. App. 3d at 366.

¶ 35 We now turn to the issue of the classification of the 2,305 shares of stock that petitioner acquired during the marriage by exercising the nonmarital stock options for the stock plus using $2,305 of marital funds and, later, using marital funds to pay the income tax accruing from the stock acquisition. The trial court consistently held that the stock was marital property. The trial court reasoned that the stock was obtained during the marriage through the exercise of the nonmarital options utilizing marital funds, resulting in the newly acquired stock being marital property. Petitioner comprehensively challenges the trial court's reasoning. We note, however, that, on appeal, we review the trial court's judgment and not its reasoning, and we may affirm the trial court's judgment on any basis appearing in the record. *Bruel & Kjaer v. Village of Bensenville*, 2012 IL App (2d) 110500, ¶ 22. Accordingly, we first consider the statutory provisions concerning the classification of property.

¶ 36 The statute provides, relevantly:

> "(a) For purposes of the Act, 'marital property' means all property acquired by either spouse subsequent to the marriage, except the following, which is known as 'non-marital property':

***

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;

***

(6) property acquired before the marriage;

(7) the increase in value of property acquired by a method listed in paragraphs (1) through (6) of this subsection, irrespective of whether the increase results from a contribution of marital property, non-marital property, the personal effort of a spouse, or otherwise, subject to the right of reimbursement provided in subsection (c) of this Section;

***

(b) (1) For purposes of distribution of property pursuant to this Section, all property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, including non-marital property transferred into some form of co-ownership between the spouses, is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. 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.

***

(3) For purposes of distribution of property under this Section, all stock options granted to either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage, whether vested or non-vested or whether

their value is ascertainable, are presumed to be marital property. This presumption of marital property is overcome by a showing that the stock options were acquired by a method listed in subsection (a) of this Section. The court shall allocate stock options between the parties at the time of the judgment of dissolution of marriage or declaration of invalidity of marriage recognizing that the value of the stock options may not be then determinable and that the actual division of the options may not occur until a future date. In making the allocation between the parties, the court shall consider, in addition to the factors set forth in subsection (d) of this Section, the following:

(i) All circumstances underlying the grant of the stock option including but not limited to whether the grant was for past, present, or future efforts, or any combination thereof.

(ii) The length of time from the grant of the option to the time the option is exercisable.

(c) Commingled marital and non-marital property shall be treated in the following manner, unless otherwise agreed by the spouses:

(1) When marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution, subject to the provisions of paragraph (2) of this subsection; provided that if marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property, subject to the provisions of paragraph (2) of this subsection.

> (2) When one estate of property makes a contribution to another estate of property, or when a spouse contributes personal effort to non-marital property, the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation; provided, that no such reimbursement shall be made with respect to a contribution which is not retraceable by clear and convincing evidence, or was a gift, or, in the case of a contribution of personal effort of a spouse to non-marital property, unless the effort is significant and results in substantial appreciation of the non-marital property. Personal effort of a spouse shall be deemed a contribution by the marital estate. The court may provide for reimbursement out of the marital property to be divided or by imposing a lien against the non-marital property which received the contribution." 750 ILCS 5/503 (West 2006).

¶ 37 General principles when applying section 503 include the presumption that any property acquired by either spouse after the marriage but before the marriage is dissolved or declared invalid belongs to the marital estate; this is a rebuttable presumption. 750 ILCS 5/ 503(b)(1) (West 2006); *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 670 (2008). The party claiming that the property so acquired is nonmarital has the burden of proving by clear and convincing evidence that the property falls within one of the exceptions of section 503(a). *Heroy*, 385 Ill. App. 3d at 670. Finally, any doubts as to the nature of the property (*i.e.* marital or nonmarital) are resolved in favor of finding that the property is marital. *Id.*

¶ 38 With these principles in mind, we turn to the dispute over the proper classification of the 2,305 shares of stock. Initially, we note that petitioner attacks the trial court's decision that the 2,305 shares of stock were marital property. Petitioner devotes much argument towards refuting the trial

court's reasoning. However, we review the trial court's judgment on appeal, not its reasoning. *Bruel & Kjaer*, 2012 IL App (2d) 110500, ¶ 22.

¶ 39 Respondent argues that, by following the language of section 503(c)(1), it is clear that the stock is marital property. Respondent argues that the options and marital funds were effectively combined and transformed into the shares of stock. Section 503(c)(1) provides, pertinently: "if marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property." 750 ILCS 5/503(c)(1) (West 2006). According to respondent, the options and marital funds were commingled and exchanged for the stocks; the stocks are newly acquired property; and the exchange or transformation caused by executing the options resulted in a loss of identity of the contributing estates. Therefore, according to respondent, the stocks are marital property.

¶ 40 Although it is not entirely clear in the record, the trial court agreed with respondent's result, if not with respondent's chain of reasoning. The trial court seemed to consider that the stock was property acquired during the marriage and requiring petitioner to rebut the presumption that the stocks, being acquired during the marriage, were marital property. Petitioner raised a number of arguments, including ones raised on appeal. Petitioner's main argument below concerned the fact that the stock options were concededly nonmarital property and that the funds used to execute the stock options were small in comparison to the value of the stock at trial. Petitioner argued that, because the stock was obtained by trading the options plus money for it, the stock retains the nonmarital character associated with the options. We disagree.

¶ 41 First, comparing the respective arguments, respondent's is clearly based on the language of the statute. Section 503(c)(1) states that, "if marital and non-marital property are commingled into

newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property." 750 ILCS 5/503(c)(1) (West 2006). Here, the nonmarital options and the marital funds were commingled, resulting in the acquisition of new property, namely, the stocks. Petitioner does not attempt to similarly use statutory language to demonstrate how a different result should be obtained. Instead, petitioner cites to section 503(a)(7) (750 ILCS 5/503(a)(7) (West 2006)) for the proposition that, for nonmarital property, any increase in value remains nonmarital, even if the increase occurred during the marriage. We find this provision to be inapposite. Petitioner seems to conflate the options with the stocks. In our view, once the options were executed, they were gone. Any increase in value of the options likewise went into their exercise to acquire the presumptively marital stock. Thus, while section 503(a)(7) can stand for the proposition that the increase in value of nonmarital property is itself nonmarital, that rule has no application here where the issue is to which estate the newly acquired stocks must be assigned.

¶ 42 In addition, petitioner points to section 503(b)(3) (750 ILCS 5/503(b)(3) (West 2006)). Section 503(b)(3) deals with apportioning stock options. That section provides that stock options can be marital or nonmarital property, depending on the manner and timing of their acquisition. 750 ILCS 5/503(b)(3) (West 2006). Petitioner appears to rely on this section to support his contention that the stocks are nonmarital because the options were nonmarital. We do not agree with this reading of the section. Indeed, section 503(b)(3) has nothing to do with stocks whatever, only stock *options*, so petitioner's reliance is misplaced to the extent that he suggests that this section controls the determination of the estate to which the stock belongs.

¶ 43 Second, we note that respondent's interpretation is supported by *In re Marriage of Patrick*, 233 Ill. App. 3d 561, 569-71 (1992). In that case, the dispute centered on the disposition of farm equipment purchased during the marriage. The wife admitted that the husband possessed nonmarital farm equipment, but argued that the farm equipment purchased during the marriage was marital property because it had been acquired during the marriage. *Id.* at 569. The husband argued that the farm equipment obtained during the marriage was nonmarital because it had been acquired in exchange for the nonmarital farm equipment when the husband traded the old equipment for the new. *Id.*

¶ 44 The court reasoned that the property contributed from the marital estate, money, and the property contributed from the husband's nonmarital estate, the old farm equipment being traded in, was commingled and lost its identity because the purchase resulted in a new piece of property, the newly acquired farm equipment. *Id.* at 570. The court explained that, "[u]nder section 503(c)(1) of the [Marriage and Dissolution of Marriage] Act, commingled property transmutes to marital property, subject to the right of reimbursement, when the properties contributed from the nonmarital and marital estates lose their identity." *Id.* The court continued, noting that under section 503(c)(2), the party claiming reimbursement must trace the amount by clear and convincing evidence and must also prove that the party did not intend to make the contribution of nonmarital property a gift to the marital estate. *Id.* The husband had the opportunity to present evidence about how much he received for the trade-ins, but did not. Likewise, the husband could also have testified about his donative intent and did not (the court also noted that the trial court would not have had to believe or find credible the husband's testimony about his donative intent). *Id.* Accordingly, the court held

that the newly acquired farm equipment was marital property and no reimbursement was owed to the husband's nonmarital estate. *Id.*

¶ 45 *Patrick* clearly supports the reasoning of the trial court. Here, petitioner possessed the nonmarital stock options. Only by paying the strike price with marital funds was petitioner able to obtain the newly acquired property, the stocks themselves. This is clearly akin to the process in *Patrick* of trading in the nonmarital farm equipment plus money and receiving the newly acquired replacement or upgraded farm equipment. The process in this case is sufficiently similar to that in *Patrick*, and it solidly supports the trial court's reasoning.

¶ 46 In addition, however, *Patrick* (and section 503(c)) expressly refer to a right of reimbursement to the contributing estate. The trial court ordered no reimbursement in this case. Petitioner contends that the marital estate can be reimbursed the $2,305 strike price and that the stocks should then retain their nonmarital character. We disagree.

¶ 47 First, petitioner points to nothing that says newly acquired property during the marriage obtained by commingling marital and nonmarital property retains its nonmarital character. By contrast, the Act specifically provides for this situation in section 503(c) (750 ILCS 5/503(c) (West 2006)). Petitioner's argument is squarely contrary to the terms of the statute, and the terms of the statute therefore control.

¶ 48 Second, there is nothing in the record that indicates what was the value of the stock options that were executed. Petitioner argues that the parties indicated that the stock had a value of $368,390 for income tax purposes in the parties' tax return for the year of the execution. At best, then, this suggests that petitioner's nonmarital estate would be entitled to a reimbursement of $365,085 ($368,390 - $2,305) if the court were to accept respondent's argument that the options were worth

$2,305 + b = c, where c is the value of the newly acquired stock. The trial court did not actually make a finding as to the value of the stock options or the value of the newly acquired stock. However, we note that respondent's equation is correct for purposes of determining the value of a stock option. *Wilgus v. CyberSource Corp.*, 393 Ill. App. 3d 1039, 1041 (2009) (the value of a stock option is "the difference between the strike price and the price of the common stock at the time the option was converted to common stock"). There is, then, some supporting evidence (of questionable worth because it was never passed upon by the trial court) in the record to determine the amount that petitioner's nonmarital estate could receive as reimbursement for the execution of the nonmarital stock options. The trial court, however, made no factual finding and, in fact, made no finding that petitioner's nonmarital estate should have been entitled to reimbursement.

¶ 49 We do not believe that this determination (a nonfinding as to reimbursement, or, more properly, effectively an implied finding of no reimbursement) is against the manifest weight of the evidence. First, the stock options were delivered to petitioner several years before the marriage occurred. The options were then executed about three years into the marriage. The marriage continued for another five years before the parties instituted dissolution proceedings. There is nothing in the record to suggest that the exercise of the options and obtaining the shares of stock was other than a routine financial exercise during the marriage. We note that petitioner emphasizes that he worked for Assurance for many years before he received the options. We are unsure as to the significance petitioner wishes to attach to the insinuations about length of possession of the options, other than to establish what has already been agreed and conceded: that the options were nonmarital property. The insinuations do nothing, however, to support the argument that the stock should be deemed nonmarital. It appears to us that petitioner also seeks to insinuate that the lengthy possession

of the options prior to marriage should also tend to support his claim that the shares of stock should be deemed nonmarital (although we cannot precisely recap the purported reasoning). However, we note that petitioner possessed the options about as long before he was married as he did while he was married. Any emphasis on the nonmarital possession of the options, then, is countered by the fact that they were held for an equivalent length of time during the marriage. (Of course we are not stating that the simple act of possession during marriage does anything to their nonmarital character; rather, we are only contradicting whatever insinuation petitioner is trying to achieve by drawing attention to the nonmarital time of possession of the options.) Whatever petitioner seeks to prove through his emphasis on the time of possessing the options, the fact remains that the options were held both before and during the marriage for roughly equal amounts of time; they were apparently exercised at a financially appropriate time for the benefit of the parties at the time of exercise.

¶ 50 Additionally, the record is actually silent as to the precise value of the stock when the options were exercised. We cannot say whether the stock was worth more or less than the amount claimed for taxes at the time of the exercise. It is possible for either condition to obtain, as well as possible that the valuation of the stocks was flat for the remainder of the year after they were obtained. In light of the lack of evidence, there is no basis to formulate a reimbursement. (On the other hand, as we noted above, the valuation for income tax purposes could be used, but that value was not actually argued or otherwise claimed for reimbursement purposes. Further, there is the fact that the marital estate further contributed $117,000 for income taxes due to the exercise of the options. That amount would likely offset some of the funds that would be available to reimburse the nonmarital estate. However, the finder of fact did not pass on this issue.) Based on the lack of evidence or

consideration of the issue, we cannot say that the trial court's implied refusal to order reimbursement was against the manifest weight of the evidence.

¶ 51 We now turn to petitioner's specific contentions. First petitioner tries to distinguish *In re Marriage of Henke*, 313 Ill. App. 3d 159 (2000), arguing that the trial court overstretched the holding in *Henke* to accommodate the facts of this case. In particular, petitioner characterizes the trial court's analysis here as relying on the portion of *Henke* that held that a nonmarital checking account had been transmuted to marital property through 16 years of depositing marital property into it and paying marital bills. See *id.* at 167-69. First, this appears to be looking at the wrong portion of *Henke*. That case also analyzed the trading in of farm equipment for new machines, similar to *Patrick*. *Id.* at 169-71. The trade-in analysis seems to be more fitting to apply here than the transmutation analysis. Second, there is a rationale apparent in the transmutation analysis that suggests that one of the reasons the marital property being deposited in the nonmarital account was not transmuted into nonmarital property was because the parties were simply going about the everyday business of their marriage. The checking account (albeit nonmarital) was convenient and there was no other evidence to suggest that the parties were in any way trying to keep their funds separate or segregated between the original nonmarital estates and the marital estate. *Id.* at 167-68. That rationale is also apparent here: there is no evidence presented that petitioner took pains to segregate the marital and nonmarital estates during the marriage. Rather, it was fortuitous that the newly acquired stock was illiquid and had to be maintained as stock until such time as petitioner might retire and sell the interest back to the firm. This ordinary conduct of everyday married life militates in favor of our determination above and suggests that *Henke* supports the trial court's

decision rather than being over-analyzed and inappropriately stretched. Accordingly we do not accept that *Henke* is properly distinguished.

¶ 52 Petitioner attempts to characterize the issue as being about the stock, and the marital contribution to it. Petitioner cites to *In re Marriage of Demar*, 385 Ill. App. 3d 837, 851-52 (2008), for the proposition that commingling plus many further transactions is required to cause the loss of the ability to trace funds. Petitioner then argues that this case involves simple commingling that can be easily traced. Petitioner's characterization of the case, however, is incorrect. What occurred in this case was the contribution of assets for the creation of wholly new property, as occurred in *Patrick* and *Henke*. Rather than address this issue, petitioner creates a straw-man argument and ignores the proper analytical avenue.

¶ 53 Next, petitioner explores section 503(b)(3) of the Act (750 ILCS 5/503(b)(3) (West 2006)), which is specifically concerned with stock options. Of course, stock options are inapposite here. Petitioner acknowledges as much, claiming, "here the issue is the stock." Nevertheless, petitioner appears to assert that section 503(b)(3) should control, apparently for the sole reason that it contains the word, "stock." The most cursory of examinations, however, shows that section 503(b)(3) deals with stock options and only stock options. It is thus facially inapposite to the circumstance presented here, namely, to which estate should the Assurance stock be assigned.

¶ 54 Continuing his plumb of the depths of section 503(b)(3), petitioner sets up another straw man, noting that the provision creates a rebuttable presumption that stock options acquired during the marriage belong to the marital estate. *Id.* Petitioner then acknowledges that the presumption may be overcome if the options were shown to be acquired by one of the methods shown in section 503(a) (750 ILCS 5/503(a) (West 2006)), which defines nonmarital property. With that, petitioner

sets up a false equivalency to cap his argument on this point: the apparent unfairness accruing when "a person who acquired [stock] options during the marriage can establish they are non-marital[;] a person who acquired them before the marriage cannot unless he exercises them with non-marital funds." The first false equivalency is equating stock options to shares of stock. An option gives a party the opportunity to purchase stock under certain conditions and circumstances. A share of stock represents a person's ownership of a particular company. Ne'er the twain shall meet. Petitioner apparently believes that the options, which have been established to be nonmarital (and there is no issue raised that the options are anything but nonmarital property), should somehow stand as a proxy for the shares of stock acquired by the exercise of the options. But, as we have seen above, the stock itself is marital property because it resulted from the commingling of marital and nonmarital property resulting in the creation of entirely new property. 750 ILCS 5/503(c)(1) (West 2006); *Patrick*, 233 Ill. App. 3d at 570.

¶ 55 The remaining false equivalency is the hypothetical persons who acquire stock options. The first person obtains stock options during the marriage. This makes them presumptively marital, but section 503(b)(3) provides that the "presumption of marital property is overcome by a showing that the stock options were acquired by a method listed" in section 503(a). 750 ILCS 5/503(b)(3) (West 2006). The second person acquired the stock options before marriage. They are outside of section 503(b)(3) entirely, because it applies only to "stock options granted to either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage." *Id.* Further, because the property, namely, the stock options, was acquired before the marriage, it is nonmarital property by definition. 750 ILCS 5/503(a)(6) (West 2006). Thus, the first person may be able to show that his or her stock options are nonmarital; the second person's stock options are,

by definition, nonmarital. Petitioner purports to align himself with the second person in his hypothetical, the one who is precluded from showing his property is nonmarital unless executed with nonmarital funds. (We note that petitioner kind of jumps a step or two here: he is actually discussing the stock but keeping it in terms of the stock options, and his juxtaposition of the first and second persons is demonstrably false.) Petitioner's appeal to fairness, then, is based only on false irony and a hypothetical situation wholly unrelated to the circumstances of this case.

¶ 56 All of this, however, is preliminary to petitioner's clinching argument here: "All options have to be exercised after their grant for the subject matter of the options to be acquired and 503(b)(3) makes it clear it is the options that matter when defining their identity, not the stock received after they are exercised." In support of this incomprehensible circumlocution, petitioner cites to *In re Marriage of Colangelo*, 355 Ill. App. 3d 383, 389 (2005), characterizing it as follows: "unvested stock options (that had both vested and been exercised after the dissolution) *transformed* into a realized distribution." (Emphasis in original.) *Colangelo*, however, was concerned with whether the execution of stock options resulting in a realized distribution could be deemed to be income for purposes of child support. *Id.* at 389-392. *Colangelo* is wholly inapposite and petitioner wrenched its words out of context. Further, petitioner misapprehends the import of section 503(b)(3), which provides ground rules for apportioning stock options between the marital and nonmarital estates. Additionally, petitioner points to nothing pertinent to support his proposition that the stock options define the nature of the resultant stock certificates following their execution. Rather, we believe it is the opposite: the stock is apportioned into the proper estate based on the timing and manner of its acquisition. If, for example, the stock had been acquired using nonmarital options and nonmarital

funds to pay the strike price, then the stock would be nonmarital property because it would be property obtained in exchange for nonmarital property. 750 ILCS 5/503(a)(2) (West 2006).

¶ 57 Petitioner culminates his argument with the statement: "*It is not the character of the money that defines the character of the shares–it is the character of the options.*" (Emphasis in original.) Petitioner cites no pertinent authority for his conclusion; further the argument leading to the conclusion is misused and unpersuasive. As to the bald and unsupported conclusion, despite the convincing nature of italics, it lacks support from any authority. Therefore, petitioner has forfeited the contention. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). The argument leading up to the bald conclusion is not deficient per Rule 341(h)(7), but it is unpersuasive. Thus, we reject petitioner's contentions on this point.

¶ 58 Petitioner attempts to redeem his point by citing to *In re Marriage of Jelinek*, 244 Ill. App. 3d 496 (1993). Petitioner offers that the court held that class B stock acquired during the marriage in exchange for class A stock that was nonmarital remained nonmarital. The rub for petitioner's argument here, is that while nonmarital property was exchanged for the stock, marital property was also exchanged at the same time. In other words, the exchange in *Jelinek* is factually dissimilar to the exercise of options in this case, and, as a result, *Jelinek* is distinguishable. While *Jelinek* could be decided by reference to section 503(a)(2), the controlling statute here was section 503(c)(1) because marital and nonmarital property was commingled into new property.

¶ 59 Next, petitioner cites to *Heroy*, 385 Ill. App. 3d 640, for the proposition that using a marital account as a pass-through or convenience will not cause the nonmarital asset that the funds are being passed through to maintain to be transmuted into marital property. In *Heroy*, the husband used a marital account to place funds earned from a nonmarital asset to pay off a loan on a nonmarital asset.

Id. at 671. We discern no application to this case. In *Heroy*, the husband was repeatedly using the marital checking account as a pass-through to move funds generated by a nonmarital asset to the recipient of those nonmarital funds in order to pay off a loan on a nonmarital asset. Here, petitioner does not point to any repeated transactions, any accounts that acted as a pass-through for nonmarital funds to be applied to nonmarital obligations. Because of the dissimilarity, *Heroy* is unhelpful and distinguishable.

¶ 60 Petitioner attacks the trial court's rationale for holding that the stock was marital property. Specifically, petitioner assails the trial court's statement that the stock was worth little at the time the options were given to petitioner, because there was no evidence provided to support the trial court's conclusion. Petitioner also assails the trial court's statement that the value of the stock had been substantially enhanced by petitioner's employment during the marriage, again because there was no evidence presented to support the court's conclusion. Whether or not the attacks are justified, we have held that the stock was marital because it commingled assets from the marital and the nonmarital estates causing them to lose their identity in the newly acquired property. The trial court's rationale for its decision does not impact our holding; we review the trial court's judgment, not its reasoning. *Bruel & Kjaer*, 2012 IL App (2d) 110500, ¶ 22. Even if the trial court were wrong, and its foundational factual findings were unsupported by the evidence adduced, its ultimate factual finding, that the stock was marital property, was correct. Accordingly, we need not further consider petitioner's contentions about the trial court's reasoning.

¶ 61 Petitioner next complains that respondent's argument that the tax liability of $117,000 incurred by the execution of the stock options and paid from marital funds is irrelevant. Strictly speaking, petitioner is correct, because we do not evaluate the trial court's reasoning, only its

judgment. *Id.* Nevertheless, respondent argued that the $117,000 helped to transmute the stock into marital property, if her other arguments were not accepted. Petitioner asserts that the correct response is to look to reimbursing the marital estate for its contribution to his nonmarital estate. Petitioner is viewing this argument as if it applied to a transmutation situation in which funds from one estate are contributed to another estate. Because, however, the situation is one of commingling assets to create a new, marital asset, petitioner's argument is misplaced and we need not further consider it.

¶ 62 Petitioner ends his argument on the stock by citing to *In re Marriage of Aud*, 142 Ill. App. 3d 320 (1986), for the proposition that an "insignificant" contribution of marital property to nonmarital property will not transmute the nonmarital property into marital property. Petitioner attempts to argue that the payment of $2,305 of marital funds to execute the stock options was insignificant compared to the value of the options and, apparently, the stock. We disagree. First, petitioner is not making the proper argument. The issue here is the stock, not the stock options. The stock was new property acquired during the marriage by commingling property from both estates so they lost their identity. At best, petitioner could be receiving a reimbursement (the refusal of which we determined was not against the manifest weight of the evidence). Second, *Aud* is distinguishable. *Aud* is concerned with the effect of whether contributions by one estate to the other will transmute the property into marital property. *Id.* at 328-29. In its concern, it is important to note that the statutory regime was different than that operating today. *Id.* at 329. The *Aud* court held that transmutation of nonmarital property into marital property will occur only where the contribution of marital assets to the nonmarital property was significant. *Id.* at 330. Here, by contrast, there was no contribution; petitioner further points only to the funding of the strike price through the marital

estate, but, as we have seen above, it was not a contribution of the marital estate to the nonmarital estate, but a commingling of the two estates to produce a new piece of presumptively marital property. *Aud*, therefore, is inapposite, and we reject petitioner's argument as being off point.

¶ 63 Petitioner's next area of argument on appeal concerns the distribution of the marital estate between the parties and the award of maintenance to respondent. Petitioner amorphously argues both that the distribution of the marital estate gave too much to respondent and her maintenance award was too high. The nub of petitioner's argument seems to be encapsulated in two passages: "[Respondent] simply intends to live the rest of her life off of [petitioner's] lifetime of work," and "[T]he trial court unjustly and inequitably rewarded [respondent] for a short, second marriage to which she made no economic contribution, while it stripped [petitioner] of a large measure of the fruits of his pre-marital efforts." Petitioner does not, however, offer any specifics as to how the distribution of property was wrong (other than, perhaps, by implication, because it should have been deemed nonmarital, respondent should have received none of the stock; petitioner does not expressly make that claim), or what would have been a proper distribution, or what amount and duration of maintenance would have been appropriate. We, as best we can, address petitioner's generic and nonspecific argument by first considering the standards of review to be employed in considering the trial court's distribution of property and its award of maintenance.

¶ 64 Section 503(d) of the Act (750 ILCS 5/503(d) (West 2006)) governs the factors a trial court is to consider when distributing marital property. We review the trial court's factual determinations regarding each factor it uses to make the property distribution to see if it against the manifest weight of the evidence. *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 205 (2005). The trial court's final property distribution, however, is reviewed for an abuse of discretion. *Id.* With regard to

maintenance, section 504 of the Act (750 ILCS 5/504 (West 2006)) governs the factors to be considered by the trial court. The purpose of maintenance is not to support the spouse who receives it, but to allow that spouse to become self-sufficient and financially independent, unless an award of permanent maintenance is made, due to the spouse's unemployability or employability at an income that is substantially lower than the standard of living enjoyed during the marriage. *In re Marriage of Smith*, 2012 IL App (2d) 110522, ¶ 44. We review the trial court's award of maintenance for an abuse of discretion. *Id.* at ¶ 46. With these standards in mind, we turn to petitioner's contentions, insofar as we can discern concrete points.

¶ 65 As we have noted, petitioner generally disagrees with both the trial court's property distribution and award of maintenance to respondent. Petitioner offers no concrete points that he claims were erroneous; rather, he complains that respondent received about $3.1 million of the net marital property, a little more than $600,000 in temporary and final maintenance payments, and petitioner was given the debt on respondent's car that was "surreptitiously acquired" after petitioner declared his intention to seek a divorce but does not indicate what, if any, property distribution should have been made, what, if any, maintenance should have been awarded, or how the debts should have been apportioned. Petitioner emphasizes the eight-year length of the marriage, which he characterizes as "short," and the purported excessive amounts of property and maintenance totaling over $3.7 million, while also emphasizing that respondent contributed little economically to the marriage.

¶ 66 We do not believe that the trial court abused its discretion in apportioning the marital property. Section 503(d) contains factors beyond a party's economic contribution to the marriage, including the parties' roles during the marriage, the value of the property assigned to each party

(here, petitioner received about 56% of the marital estate, and respondent received about 44% of the estate), the parties' economic circumstances, including future employment and earning prospects, along with the length of the marriage and any other relevant factors identified by the court. 750 ILCS 5/503(d) (West 2006). Here, petitioner is not able to articulate how the distribution is inequitable, only that it is. In petitioner's view, the purported brevity of the marriage does not entitle respondent to share less than half of the marital estate. We are unable to accept petitioner's arguments. We have carefully considered the record, the trial court's ruling, and the parties' arguments and cannot conclude that the trial court abused its discretion in apportioning the marital property here.

¶ 67 Petitioner argues that we should consider *In re Marriage of Weisman*, 2011 IL App (1st) 101856, ¶ 30, in relation to his argument on this issue on appeal. *Weisman* noted that a party's disproportionately large contribution to the marital estate can be considered in the distribution of property. We do not think that, in this case, the trial court ignored this factor, particularly since respondent received a smaller portion of the marital estate than petitioner and because respondent has markedly fewer economic and employment prospects. We are not quite sure as to the reason petitioner cited this case; he does not state that the trial court ignored the principle for which petitioner cited the case and the case is otherwise inapposite. To the extent that petitioner is perhaps suggesting that consideration of adjusting the relative property distribution among the parties based on their respective economic contributions to the marital estate should mean that the property is distributed according to that proportion, we reject the notion, noting that section 503(d) has a number of other factors requiring consideration and the weight accorded each factor is determined on a case-by-case basis. *In re Marriage of Polsky*, 387 Ill. App. 3d 126, 136 (2008).

¶ 68 Next, petitioner cites to *Heroy* and *In re Marriage of Jones*, 187 Ill. App. 3d 206 (1989), for the proposition that the economic contributions of one party take on less substance as the duration of the marriage grows. In *Heroy*, the parties were married for 26 years (*Heroy*, 385 Ill. App. 3d at 64), and despite the fact that the husband earned virtually all of the family's income during the marriage, the trial court's division of property, giving 55% of the marital estate to the wife, was not an abuse of discretion in light of the long duration of the marriage and the wife's homemaking contribution to it (*id.* at 660-62). In contrast, in *Jones*, the trial court awarded the husband more of the marital estate in light of his disproportionate economic contribution notwithstanding the 24-year marriage. *Jones*, 187 Ill. App. 3d at 210, 225-26.

¶ 69 We do not believe that *Heroy* and *Jones* present such a facile rule as petitioner seems to attempt to imply: the marriages were both lengthy, but the precise circumstances were different. Thus, what is fair in one case is not so fair in another. We further note that petitioner's point, that a party's economic contribution to the marriage is entitled to consideration is enshrined in the statute as well as in the trial court's decision. The trial court gave a greater share of the marital estate to petitioner, justified by his greater economic contribution. Apparently, petitioner suggests that he should have received an even greater proportion of the marital estate (even though petitioner does not go so far as to express what a fair distribution, in his opinion, would be). It seems to us that petitioner actually prevailed on this point and in the absence of any express and concrete suggestion as to how the trial court may have erred, we cannot find an abuse of discretion because the trial court did not overlook the disproportionate economic contribution petitioner made to the marriage and the marital estate.

¶ 70 Petitioner's last contention in this vein incorporates the brevity of the marriage, the magnitude of the stock compared to the other assets in the marital estate, and respondent's bad conduct. Petitioner expresses indignation that the his efforts in accumulating assets prior to and during the marriage have to be divided with respondent, who simply took money from the estate and from petitioner. This narrative does not fly upon consideration of the record. Further, petitioner still fails to suggest what he thinks to be an equitable alternative. Petitioner lamely states that, even if the Assurance stock is deemed marital, this court should "reverse the division of property and remand this cause with instructions to redistribute the assets consistent with true just proportions." Given the tenor of petitioner's arguments in this portion of the appeal, we suspect that petitioner may actually mean that respondent should get literally nothing–a sort of "as you came into the marriage so should you leave it." We disagree. Our review of the record shows that the trial court properly considered the applicable factors and made a reasoned decision. We cannot discern an abuse of discretion.

¶ 71 We also must make one further observation. Petitioner indicated that he believed the maintenance award also to be an abuse of discretion. However, petitioner made no arguments in support of the position in his initial brief on appeal. Accordingly, petitioner has forfeited any contention on appeal concerning the award of maintenance. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). We note that petitioner did take up and argue the issue of maintenance in his reply brief. Nevertheless, the issue remains forfeited, because an issue raised for the first time in the reply brief is forfeited. *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 30.

¶ 72 Petitioner next contends on appeal that the trial court's distribution of petitioner's 401(k) account was against the manifest weight of the evidence. Property belongs either to the husband's

nonmarital estate, the wife's nonmarital estate, or the marital estate, and the trial court must place property into one of the three estates before distributing it. *In re Marriage of Blunda*, 299 Ill. App. 3d 855, 861 (1998). The trial court's classification of property as marital or nonmarital will not be disturbed unless it is against the manifest weight of the evidence. *Id.*

¶ 73 Petitioner provided a calculation regarding his 401(k) account. It purported to show what proportion of the account was marital and what was nonmarital. Evidence showed that, one month before the parties' marriage, the account contained nearly $329,000. In September 2009, the account balance was more than $905,000 (petitioner placed the amount at $861,000, but the trial court's order places it at $905,000. We follow the trial court's order.). Petitioner's calculation purported to trace the accrual of interest to the nonmarital portion, marital contributions, accrual of interest to the marital portion, and the repayments of loans from the account. Petitioner's calculations showed that, as of September 2009, the nonmarital portion of the account had grown to more than $579,000. The trial court did not use petitioner's calculation. Instead, it deemed that the $329,000 was nonmarital, which would be reimbursed to petitioner's nonmarital estate. The increase of $577,000 was divided between respondent and petitioner.

¶ 74 Petitioner argues that the trial court erred in rejecting his calculation. Petitioner notes that no other evidence on the marital/nonmarital division of the 401(k) account was submitted and that he graduated with a degree in finance from Notre Dame University, apparently to demonstrate his expertise at and qualification for making this calculation. In rejecting petitioner's calculation, the trial court expressly stated it was not making a determination whether petitioner had the expertise to make and explain his calculation. Instead, the trial court ruled that the 401(k) had been entirely transmuted to marital property, so $329,000 would be reimbursed to petitioner's nonmarital estate,

and the remainder would be split between petitioner (40% or $231,000) and respondent (60% or $346,000). Petitioner contends this is error.

¶ 75 Petitioner attacks the trial court's ruling on two grounds. First, petitioner contends that, contrary to section 503(c)(1) (750 ILCS 5/503(c)(1) (West 2006)), the trial court erroneously held that the 401(k) account was transmuted into marital property. According to petitioner, the account should have retained its nonmarital character despite the contribution of marital funds to it during the course of the marriage, because section 503(c)(1) states that "[w]hen marital and non-marital property are commingled by contributing one estate of property into another resulting in a loss of identity of the contributed property, the classification of the contributed property is transmuted to the estate receiving the contribution." 750 ILCS 5/503(c)(1) (West 2006). According to petitioner, since the marital funds were contributed to the nonmarital 401(k) account, the marital funds lost their identity and were transmuted into nonmarital property. Petitioner concludes that the trial court should have held that the account was nonmarital property and then reimbursed the marital estate for its contributions. We disagree.

¶ 76 First, and foremost, petitioner misapprehends the trial court's ruling. Petitioner argues as if the trial court mistakenly ruled according to the first clause of section 503(c)(1). Examination of the trial court's ruling shows that it followed the second clause of 503(c)(1). The trial court held, pertinently, that, after "having considered [s]ection 503 finds that although this account was created prior to the marriage, new assets within it were created and purchased, and the plan has otherwise lost its nonmarital character." The second clause of section 503(c)(1) provides: "if marital and non-marital property are commingled into newly acquired property resulting in a loss of identity of the contributing estates, the commingled property shall be deemed transmuted to marital property"

subject to reimbursement. 750 ILCS 5/ 503(c)(1) (West 2006). Petitioner offers no argument to dispute the trial court's actual ruling: specifically, petitioner does not dispute that the 401(k) account used marital and nonmarital funds to purchase new investments during the course of the marriage, thereby commingling the estates and causing the loss of identity of the contributing estates. Thus, the trial court properly followed section 503(c)(1), second clause, and its holding, that the entire 401(k) account was transmuted to marital property, was not against the manifest weight of the evidence.

¶ 77 Even if the trial court erred in attributing the 401(k) account to the marital estate, the math it employed works out to the same result. The court held that the account was marital, that the portion accrued before marriage, totaling $329,000, was reimbursable to petitioner's nonmarital estate, and that the remaining $577,000 was divisible between the parties as marital property. Even if this calculation was wrong, and the entire account should have been deemed nonmarital, the same $577,000 would have been divided between the parties. The account, in the trial court's view, divides into the $329,000 accrued before the marriage, and the $577,000 of marital contributions over the duration of the marriage. The $329,000 remains in petitioner's nonmarital estate. The marital contributions are transmuted into nonmarital property, but petitioner must reimburse the marital estate. If the $577,000 is reimbursed to the marital estate, it is then divided between the parties, and the parties receive the same amounts as they did when the trial court held the 401(k) account was transmuted to marital property. Thus, the error, if any, is harmless, because the same result is reached in both cases. Accordingly, we reject petitioner's first contention of error on this issue.

¶ 78 Petitioner cites to *In re Marriage of Phillips*, 229 Ill. App. 3d 809 (1992), and *In re Marriage of DiAngelo*, 159 Ill. App. 3d 293 (1987), for the proposition that employment benefits that are funded before and during the marriage have marital and nonmarital components. While this may be true under the circumstances of those cases, here, the trial court determined that marital and nonmarital assets were combined in the 401(k) account and used to acquire new investments to be housed under the account, thereby losing their independent identities and transmuting to marital property. 750 ILCS 5/503(c)(1) (West 2006). This determination is not against the manifest weight of the evidence and serves to make both *Phillips* and *DiAngelo* inapposite.

¶ 79 Petitioner's second contention of error concerning the 401(k) account is that the trial court erroneously rejected petitioner's calculation of how the nonmarital portion of the 401(k) account should have accrued, and how the marital portion should have accrued, resulting in a nonmarital portion of $579,000. Petitioner asserts that, because his calculation was admitted into evidence, and his was the only evidence on the topic presented, the trial court could not ignore or reject his calculation, but had to accept and follow the calculation. We disagree.

¶ 80 Petitioner's unstated assumption in this argument is that he is a fact witness and his calculation is nothing more than mathematical fact. We do not think that this is the actual case. In preparing his calculation, petitioner made assumptions, consciously or unconsciously, that influenced what he chose to include and how he chose to analyze it. In other words, petitioner, in preparing his analysis of the marital and nonmarital portions of the 401(k) account, acted as would any other expert opinion witness.

¶ 81 Further, petitioner's calculation proceeded from a faulty legal assumption: that there were distinct marital and nonmarital portions that coexisted in the 401(k) account. Petitioner's

assumptions, then, were contrary to the trial court's legal holding, and this provided a solid reason for the trial court to reject the calculation apart from the issue of whether petitioner was sufficiently qualified to perform the calculation and provide his opinion as to the results. See *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 123 (a trial court may not reject the unimpeached and uncontradicted testimony of an expert arbitrarily). Thus, the trial court did not reject petitioner's testimony arbitrarily; instead, because the testimony was based upon a calculation that, as a matter of law, was incorrectly conceived, it had a definite and reasoned justification not to accept petitioner's testimony about how he calculated the marital and nonmarital portions of the 401(k) account.

¶ 82 Petitioner cites to *Ashley v. IM Steel, Inc.*, 406 Ill. App. 3d 222 (2010), for the proposition that a court must accept the uncontradicted and credible testimony of a witness, because to reach a result that conflicts with that testimony is against the manifest weight of the evidence. *Ashley* has little bearing here. First, it appears in *Ashley*, that the witness is a fact, not opinion, witness. Petitioner here was actually an opinion witness for purposes of his 401(k) account analysis and calculation. Thus, the cases are not on a similar footing. Second, petitioner's calculation was based on an incorrect legal assumption, that there were distinct and traceable marital and nonmarital portions of the 401(k) account. Because the trial court determined that the 401(k) account became newly acquired property resulting from the commingling and loss of identity of marital and nonmarital property, petitioner's starting point was not based on this case's legal reality. Accordingly, we determine that *Ashley* is distinguishable.

¶ 83 Petitioner also cites to *In re Marriage of Donovan*, 361 Ill. App. 3d 1059, 1064-65 (2005), for the proposition that, "where only one party tenders an exhibit with [a] 401(k) valuation, that

exhibit must be followed." There are two problems with petitioner's reasoning in light *Donovan*. First, petitioner reads the holding incorrectly. The issue was whether the trial court's determination of the value of the wife's 401(k) account was against the manifest weight of the evidence. The husband had provided no exhibits or calculations to support his view of the account's value, while the wife provided an exhibit demonstrating a lower value than that claimed by the husband. The court determined that the trial court's decision to follow the wife's evidence was not against the manifest weight of the evidence. *Id.* The case was not about following unimpeached or uncontradicted evidence, but whether there was a sufficient basis to support the trial court's holding. Petitioner's statement of the case's principle is simply not supported by the actual language and holding of the case. Second, the values of the 401(k) are not in dispute. Petitioner agrees that the premarital portion was $329,000, and the final value upon dissolution was $905,000. Petitioner objects to the determination of the amount of reimbursement to be made to his nonmarital estate, which is not the same thing as the value of the 401(k) account. In *Donovan*, there was a question as to the value of the 401(k) account, not any amounts to be reimbursed or distributed among marital and nonmarital estates. *Id.* Thus, *Donovan* is also inapposite. Accordingly, we reject petitioner's contentions.

¶ 84 Petitioner's final argument on appeal concerns the interest on $155,000 in loans that the trial court allocated to respondent. This falls under the rubric of division of property, which includes debts as well as assets (*In re Marriage of Eidson*, 235 Ill. App. 3d 907, 911 (1992)), and the touchstone of which is whether the apportionment is equitable (*In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 121). We review the court's factual findings under the manifest-weight-of-the-

evidence standard and its final judgment of apportioning the property under an abuse-of-discretion standard. *Id.*

¶ 85 Petitioner first points to interim orders in which respondent was made responsible for the interest on $70,000 she took from the parties' home equity line of credit, and an $85,000 loan against petitioner's commercial line of credit which was used to provide a payment of respondent's attorney fees. Petitioner complains that, while the $155,000 in loan debt was allocated to respondent in the final order of dissolution, the interest payments on the loan were not similarly allocated to respondent. Petitioner contends, in other words, that respondent received the benefit of the loan proceeds, and was allocated the principal debt for those loans, but did not have to bear the cost of the loans, namely, the interest payments. We disagree.

¶ 86 Petitioner's position is flatly incorrect. Respondent was allocated the debt in the amount of the principal on the loans. In respondent's view, then, she has paid off the principal. Respondent was also specifically ordered, in the interim orders, to pay the interest associated with the loans. Having paid off the principal, the interest she was responsible for should similarly abate. In other words, by extracting $155,000 from respondent's share of the marital estate, respondent has effectively closed the loan. In the final order, the loan was returned to petitioner, but also with the $155,000 principal amount taken from respondent's share of the marital estate. In principle, petitioner, too, could have paid off the $155,000 principal of the loans, thereby relieving him of any further interest payments on the loan. If any of the $155,000 loan amounts remain outstanding and accruing interest, then it is by petitioner's choice. Further, not that we would expect or suggest that petitioner would employ such a tactic, but if the interest were assigned to respondent while petitioner controlled the loan, then petitioner could simply never pay off the principal and allow interest to

continue to accrue that respondent would have to pay. This offers a potential for abuse (again, we are not saying that the petitioner has or would indulge in such a tactic) that the trial court would not have intended. Instead, the matter was settled when the principal of the loan was accounted for and subtracted from respondent's share of the marital estate. Petitioner's argument, then, is misconceived.

¶ 87 We further note, and admonish petitioner not to employ this tactic, that petitioner attempted to support his argument by citation to *In re Marriage of Bowlby*, 338 Ill. App. 3d 720, 727-28 (2003), overruled on other grounds, *In re Marriage of Rogers*, 213 Ill. 2d 129 (2004), for the proposition that "debt should be allocated with the corresponding asset." In *Bowlby*, the proposition was not a general one, but rather, was very specific. In point of fact, *Bowlby*'s closest statement of the proposition came in a parenthetical explanation: "farm debts and assets should remain in one person." *Id.* (citing *In re Marriage of Smith*, 122 Ill. App. 3d 213, 216 (1984)). Indeed, our research reveals that the proposition is specific to cases in which one of the parties was involved in farming. We have found no other cases to support the broad proposition, "debt should be allocated with the corresponding asset." Indeed, in *Romano*, similar to this case, the trial court awarded the wife the residence while awarding the husband the mortgage on the residence. *Romano*, 2012 IL App (2d) 091339, ¶ 123. The court held this not to be an abuse of discretion because the debt was illusory, because the husband owned the trust which was the mortgage creditor. Thus, the husband held both the mortgage and the obligation to pay the mortgage. *Id.* This is effectively the same as the situation here, in which petitioner should have paid off the principal of the loan when it was deducted from respondent's portion of the marital estate. In this argument, then, petitioner has misstated and

amplified a statement in a case into a purported broad legal principal for which, using petitioner's terms in our research, we have found no support. Accordingly, we reject petitioner's argument.

¶ 88 Petitioner further attempts to support his argument with citation to *Heroy* and *In re Marriage of Davis*, 292 Ill. App. 3d 802 (1997). *Heroy* is actually somewhat an apt cite, except the situation does not exist in this case. In *Heroy*, the court found error when the trial court had assigned debt to one party in interim orders, but did not persist in the assignment of or accounting for the same debt in the final order. *Heroy*, 385 Ill. App. 3d at 667. In effect, there, the failure to account for the interim orders resulted in husband being double-dipped on the interim debt. *Id.* at 668. Here, by contrast, when respondent was made responsible for the principle of the loans, her obligation on the loans was actually extinguished. If the loans were not then paid off by petitioner, that was his choice; respondent had fully paid back the principle and had been paying the interest to carry the loan up until the entry of the final order. *Heroy* is thus factually distinguishable. In *Davis*, the husband was allocated a debt but did not pay it. The creditor sued the wife to collect, but she was found to be not liable for any portion of the debt. The court held that the attorney fees the wife incurred defending herself on the husband's debt were properly attributed to the husband. *Davis*, 292 Ill. App. 3d at 812-13. Here, any continued interest on the $155,000 in loans is due to petitioner's choice, and should not be respondent's responsibility. Indeed, if respondent were assigned the interest payments for the loan after, from her perspective, extinguishing it by having the principal amount deducted from her portion of the marital estate, the very cases cited by petitioner, *Heroy* and *Davis*, would compel reversal. *Davis*, therefore, is also inapposite.

¶ 89 We have fully considered petitioner's arguments raised in his appeal. We have determined them to be without merit and, accordingly, affirm the trial court's judgment on all issues raised in petitioner's appeal. We now turn to respondent's cross-appeal.

¶ 90 B.. Respondent's Cross-Appeal

¶ 91 Respondent first argues that the trial court erred in not holding a hearing on her petition for contribution pursuant to sections 503(j) and 508 of the Act (750 ILCS 503(j), 508 (West 2006)). According to respondent, the trial court refused to allow a hearing despite the requirement that the trial court consider a petition for contribution on due notice and hearing (750 ILCS 5/508 (West 2006)), and the requirement that a petition for contribution shall be heard and decided (750 ILS 5/503(j) (West 2006)). Petitioner argues that the plain language of the statue requires a hearing. While this may be so (we comment further below), we nevertheless disagree with petitioner's first argument.

¶ 92 The trial court's order on the petition for contribution states, pertinently:

> "This cause coming to be heard on RESPONDENT'S VERIFIED PETITION FOR CONTRIBUTION TO ATTORNEY'S FEES[,] COSTS[,] AND EXPERTS FEES/COSTS PURSUANT TO 750 ILCS 5/503(j), 508(b) and amended addendum, and on PETITIONER'S VERIFIED RESPONSE, the court hearing argument of counsel, reviewing the memorandums in support[,] IT IS HEREBY ORDERED[:]
>
> (1) The Petition for Contribution is denied." (Emphasis in original.)

We see by the terms of the order itself, first, that the matter came on to be heard (*i.e.*, a hearing was held), and, second, that the trial court heard argument of counsel along with reviewing the written

submissions of the parties. There is no transcript of the hearing in the record. Accordingly, we hold that the record affirmatively rebuts respondent's contention that no hearing was held.

¶ 93 The words of the trial court's order are not meaningless ritual and formality; they inform the reviewing court what transpired. Here, according to that order, a hearing was held. Because the record affirmatively indicates that, as a matter of fact, a hearing was held, we cannot accept respondent's argument that the trial court did not hold a hearing on her petition for contribution. Accordingly we reject respondent's initial contention.

¶ 94 Even if the record did not clearly show that respondent's argument regarding the hearing was factually inaccurate, the law gives the trial court the discretion whether to hold an evidentiary hearing. In *In re Marriage of Sellinger*, 351 Ill. App. 3d 611, 622-23 (2004), the court held that the plain language of the statute did not require a separate hearing, only that the trial court decide the issue of contribution based on any additional proofs it required. Here, the trial court, even if it had not conducted a hearing, received the submissions and supporting documentation of the parties, as well as presided over the extensive pretrial activities and the extensive trial. Based on *Sellinger*, the trial court's procedure in resolving this matter was sufficient and not an abuse of discretion.

¶ 95 We further note that, in a previous order setting the hearing date for the petition for contribution, the trial court indicated that the potentially initial hearing was solely concerned with the issue of respondent's entitlement to contribution; if respondent prevailed, then the trial court would have set the matter for an evidentiary hearing on the necessity and reasonableness of the attorney fees claimed and the determination of the amount of contribution that respondent would receive. Thus, to the extent that respondent is claiming an evidentiary hearing is mandated by the statute, we do not disagree, but we note that the trial court divided the hearing into potentially two

parts: the legal issue of entitlement to contribution and, depending on the outcome of the first hearing, the factual and evidentiary issue of the amount of contribution to be awarded. Respondent's argument, then, is further rebutted by the record.

¶ 96 Respondent cites to *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 345 (1999), for the proposition that the trial court must conduct a hearing on a party's petition for contribution. We agree that *Brackett* required the trial court in that case to conduct a hearing, but only because the record in that case "contain[ed] no indication that the trial court made a separate ruling on [the] respondent's petition for contribution." *Id.* Here, by contrast, the record affirmatively shows that the trial court held a hearing and resolved respondent's petition for contribution. *Brackett*, then, is distinguishable. Further, the *Brackett* court cautioned "against too literal a reading of section 503(j)." *Id.* The court did "not read section 503(j) as requiring an additional hearing, which would further burden already overburdened trial courts, but, rather, [it required] a trial court to hear, through testimony or otherwise, additional proofs when a petition for contribution [was] filed in accordance with section 503(j)." *Id.* Here, the trial court held a hearing on the propriety of allowing contribution before proceeding to determine the amount, if any, that would be allowed, and this is fully in conformity with the holding of *Brackett*.

¶ 97 Respondent also cites to *In re Marriage of McGuire*, 305 Ill. App. 3d 474, 477 (1999), for the proposition that the court needed to conduct a separate proceeding on the petition for contribution. The record demonstrates that the trial court did, in fact, conduct a hearing on the petition for contribution, thus, *McGuire* is satisfied. Accordingly, we reject respondent's first contention on cross-appeal.

¶ 98 Respondent's remaining issue on cross-appeal is whether the trial court abused its discretion when it based its order denying respondent's petition for contribution on its finding that, "based on the aggregate amount of the award to [respondent] she cannot demonstrate 'inability' to pay her [attorney] fees." Respondent argues that the trial court abused its discretion in basing its decision on its view of the aggregate amount of the marital estate awarded to her. Instead, the trial court was required to follow the factors listed in sections 503 and 504 (750 ILCS 5/503, 504 (West 1996)).

¶ 99 The Act will allow the trial court to order one party to contribute to the other's attorney fees where one party lacks the financial resources to pay them and the other party has the ability to pay. *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). The party seeking contribution must establish his or her inability to pay and the other spouse's ability to do so. *Id.* Financial inability to pay exists where the payment of attorney fees would strip the party of his or her means of support or would undermine his or her financial stability. *Id.* The trial court's decision on a petition for contribution is reviewed for an abuse of discretion. *Id.*

¶ 100 Respondent argues that the trial court abused its discretion because the order entered does not show that it expressly considered the factors listed in sections 503 and 504 when deciding whether contribution was warranted. Respondent also argues that, because the award of marital property is illiquid and coming in installments, paying the roughly $140,000 in attorney and expert witness fees would undermine her financial stability due to the adverse cash flow resulting from the judgment. Respondent contends that she would be left with only $135,000 on which to survive for the next 12 months, which is below the standard of living that was established during her marriage and by the division of property and award of maintenance. We disagree.

¶ 101 Once again, we note that we review the trial court's judgment, not its reasoning. *Bruel & Kjaer*, 2012 IL App (2d) 110500, ¶ 22. The touchstone of the contribution analysis is the party's inability to pay. Respondent has not demonstrated her inability to pay her attorney fees. She received roughly $3.3 million in the division of marital property, of which at least $2.5 million will be liquid, as it represents cash from the stock distribution. The proportion of the fees to the property she received in settlement is about 4%. We cannot say that maintaining respondent's responsibility for her attorney fees and expert fees will undermine her financial position and security following the divorce in this matter. Accepting that the cash flow will be somewhat tight in that first year, respondent retains sufficient resources, including the $11,000 in maintenance each month, to pay her fees. Accordingly, we cannot say that respondent demonstrated an inability to pay. Therefore, we conclude that the trial court did not abuse its discretion in denying respondent's petition for contribution.

¶ 102 Respondent's argument is effectively a reweighing of the factors listed in sections 503 and 504 of the Act. The trial court did not need to accept respondent's view; this is especially true given the trial court's extensive involvement in the hearings in this case. Further, the key point of the analysis, even in respondent's cases (see, *e.g.*, *In re Marriage of Smith*, 128 Ill. App. 3d 1017 (1984) (discussing inability to pay as necessity for ordering contribution); *Kenly v. Kenly*, 47 Ill. App. 3d 694 (1977) (key factor for contribution is spouse's inability to pay)), is the inability to pay. Our careful review of the record, as briefly discussed above, convinces us that the trial court's factual conclusion that respondent had not demonstrated an inability to pay, was not against the manifest weight of the evidence. Because respondent had not demonstrated an inability to pay, she was not

entitled to contribution and the trial court did not abuse its discretion in refusing to order contribution from petitioner.

¶ 103 Summing up on the cross-appeal, respondent challenged both the procedure used and the conclusion the trial court reached in considering her petition for contribution. Our review determined that the procedure was not faulty; the record affirmatively demonstrated that a hearing was held on respondent's petition for contribution. Our review further showed that the trial court's judgment was reached in a reasonable fashion and not from an abuse of its discretion. Accordingly, we affirm the trial court's judgment on cross-appeal.

¶ 104 III. CONCLUSION

¶ 105 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 106 Affirmed.