ILLINOIS OFFICIAL REPORTS

Appellate Court

***In re Marriage of Dann*, 2012 IL App (2d) 100343**

Appellate Court Caption	*In re* MARRIAGE OF RUSSELL DANN, Petitioner and Counterrespondent-Appellee, and LORI DANN, Respondent and Counterpetitioner-Appellant.
District & No.	Second District Docket No. 2-10-0343
Filed	July 20, 2012
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	A summary judgment finding that certain business-related assets in a marriage dissolution proceeding were part of petitioner's nonmarital estate was reversed where genuine issues of material fact existed as to the classification of those assets, and the appellate court's decision rendered moot the trial court's rulings on property division, maintenance and contribution to attorney fees.
Decision Under Review	Appeal from the Circuit Court of Lake County, No. 06-D-2348; the Hon. Diane E. Winter, Judge, presiding.
Judgment	Affirmed in part and reversed in part; cause remanded.

Counsel on Appeal

Joel S. Ostrow, of Law Offices of Joel Ostrow, of Bannockburn, for appellant.

Michael J. Berger and Rebecca S. Berlin, both of Berger Schatz, of Chicago, and Jennifer J. Gibson, of Zukowski, Rogers, Flood & McArdle, of Crystal Lake, for appellee.

Panel

JUSTICE BIRKETT delivered the judgment of the court, with opinion.

Presiding Justice Jorgensen and Justice Hudson concurred in the judgment and opinion.

OPINION

¶ 1 Respondent, Lori Dann, appeals from the order of the circuit court dissolving her marriage to petitioner, Russell Dann. First, she challenges the trial court's summary judgment ruling that certain assets were part of Russell's nonmarital estate. Second, she challenges multiple aspects of the trial court's dissolution decree that followed an evidentiary hearing on the dissolution petitions. The rulings she challenges pertain to property division, reimbursement between the marital and nonmarital estates, spousal maintenance, and contribution to attorney fees. We hold that the trial court erred in granting summary judgment, because issues of material fact exist as to the classification of the assets in question. Because the property classification issues on which summary judgment was erroneously granted affect the issue of property division, and by extension might impact the issues of maintenance and contribution to attorney fees, we decline to decide those issues. We do, however, reach certain reimbursement issues raised by Lori and affirm the trial court's disposition of them. For the following reasons, we affirm in part and reverse in part and remand this case for further proceedings.

¶ 2 I. PRELIMINARY COMMENTS

¶ 3 We note at the outset our concerns with the manner in which the record on appeal was assembled. The reports of proceedings contain multiple, misleadingly designated "excerpts" of proceedings that are in fact duplicates of full transcriptions that appear nearby in the reports. There is also a period between July 11, 2008, and January 23, 2009, for which there are no reports of proceedings even though the corresponding common-law record indicates that there were proceedings on the record during that period. The January 23 transcript is of a hearing on the summary judgment motion as it resumed after the noon break. Apparently, Russell had concluded his arguments in the morning, but there is no transcript of the morning session. Since we sit in review of the decision below, it is important for us to know what

arguments were before the trial court for decision. Relatedly, though the briefs reference a hearing at which the trial court announced its decision to grant summary judgment, the record contains no transcript of that hearing. Although our review of a summary judgment ruling is *de novo* (*Ries v. City of Chicago*, 242 Ill. 2d 205, 216 (2011)), it is our preference to have before us whatever rationale the trial court offered in deciding the motion for summary judgment.

¶ 4 Moreover, two of the multiple boxes comprising the record on appeal contain several loose documents that bear no file stamps, exhibit markings, or other indications that they were made part of the trial record below. Also lying loose in the boxes is an exhibit list dated December 28, 2009, for an unidentified proceeding. Possibly, the other documents were the received exhibits, but we cannot verify as the documents have no exhibit stickers.

¶ 5 Two of these documents warrant specific mention. The first is a transcript of a January 9, 2009, deposition of John Barsella.[1] Russell asserts in his brief that "[t]he record prepared does not include John Barsella's January 6, 2009 deposition." We are not sure how to take this remark. Either Russell has overlooked the deposition in the box, or he has noticed it but nonetheless believes that it is not properly part of the record. Russell notes that he has included a copy of the January 6, 2009, deposition in the appendix to his response brief. Our review confirms that the document Russell has attached is identical to the document in the box. Nonetheless, we will not consider the document for the purpose for which Russell asks us to consider it, *i.e.*, to judge the propriety of the summary judgment ruling. Our review extends only to those materials submitted to the trial court for consideration in deciding the initial summary judgment motion or the motion to reconsider. See *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 947 (1993). Barsella's January 6, 2009, deposition was not attached to any of the parties' submissions at the summary judgment stage. Russell asserts that Barsella's January 6, 2009, deposition was received as an exhibit at the January 23, 2009, hearing on the summary judgment motion. At that hearing (for which, as noted, we have only a partial transcript), the parties did reference both a deposition of Russell and a deposition of Barsella, and Russell's counsel did remark that he would give the court "copies of the depositions." We cannot verify, however, that the document in the box is the same document, or a copy thereof, that the parties referenced at the January 23 hearing and that the court received. (Notably, there is another deposition of Barsella, dated November 11, 2008, attached to a response by Lori to one of Russell's summary judgment motions.) Illinois Supreme Court Rule 329 (eff. Jan. 1, 2006) allows the parties to supplement the record by stipulation, but the parties have tendered no stipulation concerning Barsella's January 6, 2009, deposition. We decline to consider the deposition for purposes of reviewing the summary judgment ruling.[2] As we explain below, however, the deposition would not have

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[1]Since no deposition appears on the exhibit list, the presence of Barsella's deposition is all the more puzzling.

[2]Also puzzling is Russell's inclusion in his appendix of documents denominated partnership agreements for Benefit Planning Associates and Benefit Planning Associates LLC. Russell cites these, too, in defending the trial court's summary judgment ruling. He does not, however, direct us

changed our opinion that summary judgment was granted in error.

¶ 6 Another of these loose documents in the boxes is captioned as "Lori's Response to Russell Dann's Amendment to Amended Motion for Summary Judgment and Lori's Motion to Continue December 15, 2008, Hearing." This document, which bears no exhibit sticker or file stamp, appears to be identical in all respects to a document with the same caption appearing in a bound volume of the common-law record, except for one difference: while both versions reference an attached group exhibit "N," consisting of "gift letters" from Armand Dann, Russell's father, to Russell and Lori, the version in the boxes attaches nine letters while the version in the bound volume attaches only one letter. We will not consider those additional eight letters, because we cannot verify that the version that the trial court considered in rendering its decision was in fact the unbound version in the boxes. See *McCullough*, 254 Ill. App. 3d at 947.[3]

¶ 7 The boxes contain multiple other documents that bear no exhibit stickers or file stamps. For instance, there are several printouts from online research services. Another document appears to consist of an attorney's notes in preparation for arguing the summary judgment issues. When documents of uncertain origin appear in the appellate record, we are rightfully concerned.

¶ 8 The briefing, too, has shortcomings that we must mention. The statement of facts in the appellant's brief "shall contain the facts necessary to an understanding of the case" (Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008)). Lori, however, devotes most of her statement of facts to an exhaustive, nearly line-by-line recitation of the filings in the summary judgment proceedings. Lori's aim in supplying such a detailed history is, evidently, to demonstrate that Russell was evasive in presenting his theory for summary judgment, but she also should have included a condensed statement of facts to assist us in resolving the substantive issues on appeal that are independent of Russell's alleged procedural mischief. Many of the facts necessary for our decision do not appear until the argument section.

¶ 9 As for Russell, we are surprised by his apparent attempt to incorporate his summary judgment filings into his appellate brief. Russell states that, rather than "laboriously detail all the transactions" that occurred after Russell liquidated the assets whose classification is at issue in this appeal, he "respectfully stands on the allegations and supporting documents in his Amended Motion for Summary Judgment as well as deposition testimony regarding the transactions occurring after receipt of the proceeds." If this material is germane, Russell ought to have included it in his appellate brief, even if in summary form (and if that were not feasible, he could have moved us to relax the length restrictions on his brief). A party on

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where to find these documents in the record, and indeed we have not located them. As with the January 6, 2009, deposition of Barsella, we cannot consider them.

[3]The exhibit list in the boxes does reference a "Copy–Response to Russell Dann's amended motion." Even if the document in the boxes is the document referenced on the exhibit list, we cannot be sure that it is the same document filed in the summary judgment proceedings, which concluded months before the date on the exhibit list.

appeal may not adopt by mere reference the arguments of his trial pleading.[4] See *Wilson v. Department of Professional Regulation*, 344 Ill. App. 3d 897, 907 n.4 (2003); *Stenger v. Germanos*, 265 Ill. App. 3d 942, 952-53 (1994); *Gruse v. Belline*, 138 Ill. App. 3d 689, 698 (1985).

¶ 10 We now proceed to the substance of the appeal.

¶ 11 The parties were married on December 22, 1995. Two children issued from the marriage: Frank, born August 25, 1997, and Joseph, born January 26, 1999. On November 16, 2006, Russell filed his petition for dissolution of marriage. On January 25, 2007, Lori filed her counterpetition for dissolution.

¶ 12 II. SUMMARY JUDGMENT

¶ 13 A. Background

¶ 14 On February 28, 2008, Russell filed a motion for summary judgment, triggering a flood of filings that did not subside until March 23, 2009, when Lori moved for reconsideration of the trial court's March 13, 2009, summary judgment ruling. Russell amended the motion on June 23, 2008, and again on August 13, 2008. In a somewhat unusual procedure, the trial court commenced trial on July 10, 2008, while Russell's summary judgment motions were still pending. Three witnesses had testified before the trial court entered summary judgment on March 13, 2009. Moreover, the trial concluded before the trial court denied, on May 5, 2009, Lori's motion to reconsider.

¶ 15 Even before we describe the issues that Russell raised below in his summary judgment motions, we address a contention by Lori regarding the manner in which Russell presented his summary judgment claims below. As Lori notes, Russell's portrayal of the intricate factual background of this case substantially evolved during the course of the three motions he filed. Lori complains about the "metamorphoses" of Russell's "allegations and documents" and "the continual changing of the purported facts in [Russell's] summary judgment] pleadings." She asserts that "[c]omplicated factual scenarios which keep changing and are proffered by a party who in the end was shown to have, at best, a faulty memory, as well as an admitted willingness to lie when it was to his financial benefit, are not properly amenable to summary judgment." To extent that Lori is insinuating that Russell's withdrawal or addition of legal or factual assertions in his successive summary judgment motions is in itself a ground for relief, we cannot agree. First, as Russell points out, and as Lori does not contest, Lori has not preserved for appeal any claim that Russell should not have been allowed to file his successive motions. Second, the issue on review of a summary judgment ruling is whether there is an issue of material fact (see 735 ILCS 5/2-1005(c) (West 2010)), which depends on the nature of the claims brought and their underlying facts. Russell's litigation tactics were, simply, not the subject of the summary judgment motions.

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[4]In this connection we note again Russell's inclusion in his appendix of documents that appear not to have been made part of the trial record below, at least not for purposes of summary judgment.

¶ 16 Lori cites *Myers v. Levy*, 348 Ill. App. 3d 906 (2004), for the proposition (as she frames it) that "even prior consistent statements made outside of court proceedings will create a material issue of fact and defeat a motion for summary judgment." The statements in *Myers*, consisting of the defendant's praise of the plaintiff's job performance, were found by the appellate court to be relevant to whether the defendant acted knowingly and recklessly when, a short time after his praise of the plaintiff, he lobbied the plaintiff's superiors to have him fired. *Id.* at 917. Again, the issue for purposes of summary judgment is not the rectitude of Russell's litigation choices. As we explain below, we do find an issue of material fact, but not because Russell presented somewhat of a moving target in arguing for summary judgment.

¶ 17 Returning to the procedural history, we note that Russell's latest summary judgment motion, filed August 13, 2008, incorporated some of the assertions in his amended motion filed June 23, 2008, but none of the assertions in his original motion filed February 28, 2008. (Hereinafter, we refer to Russell's latest two motions collectively as his "amended motion.") The following is a brief statement of the relief that Russell sought in the amended motion. First, Russell asked that the trial court declare as nonmarital property the interests in Dann Brothers, Inc. (DBI), and the Dann Rotstein Insurance Partnership (DRIP) held by a trust of which Russell was beneficiary (Russell's trust). Russell was employed by DBI from 1979 to 2005. Russell also claimed as nonmarital his individual interest in Benefit Planning Associates LLC (BPA LLC). In January 2005, Russell's trust sold its interests in DBI and DRIP, and Russell sold his individual interest in BPA LLC. With some of the proceeds, Russell purchased life insurance policies from DRIP. The remainder of the proceeds he deposited into two accounts. The first was a trust account titled the "Russell R. Dann Irrevocable Stock Trust Account," which had a balance of zero when the proceeds were deposited. The second was a joint account held by the parties. Using the new funds in the trust account, Russell made several investments and opened several investment accounts held in the name of his trust. In his amended motion, Russell specified several assets that he claimed were nonmarital because they were purchased with the proceeds of the sale of the (allegedly) nonmarital interests in DBI, DRIP, and BPA LLC.

¶ 18 Russell's amended motion contained mostly a recitation of facts and did not appear to develop a legal theory as to why the interests in DBI, DRIP, and BPA LLC were nonmarital. We can reconstruct his position, however, from the (incomplete) transcript we have of the oral arguments on the motions and from Lori's written responses, which set forth her understanding of Russell's positions. Russell, it seems, argued that, of the 2,050 shares of DBI owned by his trust, 1,500 were acquired before the parties' marriage and 550 were acquired during the marriage but with the use of nonmarital funds, namely, distributions from DBI and a $300,000 gift from Armand to Russell. Russell also appeared to argue that his interest in DRIP was nonmarital because it, too, was purchased with distributions from DBI. Finally, Russell argued that, though BPA LLC was formed during the marriage, his interest in the firm was nonmarital because the firm was the successor in interest to a company in which Russell had acquired an interest before the parties' marriage.

¶ 19 In her response to the amended motion, Lori argued that there were issues of material fact as to whether Russell's trust's interests in DBI and DRIP, and his individual interest in BPA

LLC, were entirely nonmarital. As to DBI, Lori argued that Russell failed to establish that the transfers from DBI with which Russell's trust purchased the 550 shares were nonmarital property. Lori also argued that the $300,000 transfer from Armand was actually a joint gift to both Russell and her. The final source of funds Lori identified as having been contributed to the purchase of the 550 shares was a $13,736.92 withdrawal that Russell made from the parties' joint account. Lori concluded that there were triable issues of fact as to whether the funds used to purchase the 550 shares were nonmarital and, hence, whether the shares themselves were nonmarital.

¶ 20 Lori likewise argued that Russell failed to establish that the transfers from DBI with which Russell's trust purchased its interest in DRIP were nonmarital. She concluded that triable issues of fact remained as to whether the interest in DRIP was nonmarital.

¶ 21 Lori further argued that summary judgment was inappropriate on whether Russell's interest in BPA LLC, a firm that was established during the marriage, was nonmarital.

¶ 22 Lastly, Lori contended that, if the trust's interests in DBI and DRIP, and Russell's individual interest in BPA LCC, were marital, then the proceeds from the sale of those interests, as well as any assets or investments purchased with those funds, would be marital. Lori further argued that Russell understated the amounts he received for his interests in the three entities.

¶ 23 We set forth the relevant factual background for the summary judgment issues. We base this recitation on the following sources: (1) Russell's amended motion; (2) Lori's response; (3) the manifold documentary evidence attached to the filings; (4) two depositions of Russell from June 30 and December 3, 2008; (5) two undated affidavits of Russell; (6) the deposition of Barsella from November 11, 2008; (7) two undated affidavits of Barsella; and (8) an undated affidavit of Armand. For clarity, we subdivide the statement of facts.

¶ 24 1. The Trust's Interest in DBI

¶ 25 DBI was established on June 1, 1960, by Armand and his brothers, Charles and Donald Dann. Russell averred that DBI is now "defunct." DBI was an insurance and risk management company. The record demonstrates that DBI was privately held, but there is no information as to its internal governance or its status for tax purposes (*i.e.*, whether it was a subchapter C corporation or a subchapter S corporation). (Russell's arguments on appeal make some assumptions about the discretion of DBI shareholders to take distributions from the company, but the record is silent on the issue.) Russell was employed by DBI from 1979 until his retirement in 2005. When DBI was established, 9,000 shares were issued, with Armand and his two brothers each receiving 3,000 shares. On July 9, 1990, approximately five years prior to the parties' marriage, Russell's parents, Armand and Elaine, established trusts for the benefit of Russell and his brother, Scott. Each trust was funded with 1,500 shares of DBI. Russell's trust was named the "Russell K. Dann Stock Trust." Scott was appointed trustee of Russell's trust, and Russell trustee of Scott's trust. Russell testified at his June 30, 2008, deposition that his trust had no bank account until January 2005.

¶ 26 In October 1995, Donald retired from DBI and decided to sell his shares. On October 6, 1995, Russell's trust and Donald entered into a "Stock Redemption and Purchase

Agreement" (stock purchase agreement) by which Russell's trust agreed to purchase 550 shares of Donald's DBI stock for $386,576.75 plus interest. The agreement did not specify a price per share. The agreement called for the issuance of a promissory note consistent with the trust's payment obligation. The note was to be secured by a pledge of the purchased shares as well as a portion of the trust's current shares in DBI. Scott signed the stock purchase agreement as trustee of Russell's trust. Closing on the sale was set for January 1, 1996.

¶ 27 On January 1, 1996, at least three additional documents were signed. First, Donald signed an "Assignment Separate From Certificate" transferring 550 shares of DBI, with a "$1.00 par value per share," to Russell's trust. Second, Scott, as trustee of Russell's trust, signed a promissory note for $386,576.75 plus interest of 8.75% annually computed from January 1, 1996. Consistent with an amortization schedule formulated under the guidance of Barsella, an accountant who was giving tax advice to DBI, DRIP, and BPA LLC, the trust was to pay the principal and interest in 10 annual installments of $59,575.20 commencing January 1, 1997, and ending January 1, 2006.[5] Third, Donald and Scott (again as trustee) signed a "Pledge Agreement" by which Scott pledged as security 1,000 shares of DBI held by Russell's trust.

¶ 28 The actual payment on the note injected considerable complexity into the situation. The payments came from three principal sources. First, the annual payments for 1997, 1998, and 1999 came from DBI. As will be seen, the nature of these payments was crucial to the asset classification issues presented for summary judgment. The only evidence, however, as to the character and mechanics of the three payments came from the recollections of Russell and Barsella. In one of his affidavits, Barsella remarked as follows about the payments from DBI:

> "In accordance with the terms of the [promissory note and amortization schedule], [DBI], for the benefit of Russell's Trust, paid Donald $59,575.21 on January 1st in the years 1997, 1998, and 1999."

Russell provided an identical description in one of his affidavits:

> "In accordance with the terms of the [promissory note and amortization schedule], [DBI], for the benefit of my Trust, paid Donald Dann $59,575.21 on January 1st in the years 1997, 1998, and 1999."

¶ 29 At his December 3, 2008, deposition, Russell testified in relevant part:

> "Q. *** I see that much of it is set forth in your affidavit. But in your own words, if you could tell me from A to Z how your trust came to acquire those 550 shares [from Donald]?
>
> A. I think originally, the way the trust was originally set up, it was for my interest in [DBI] and that when Donald retired, the trust–you know, we redeemed his shares that went into the trust.
>
> Q. Well, can you tell me about the mechanics of that?

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[5]The amortization schedule actually called for 10 annual payments of $59,575.21–a one-cent difference.

A. It can be–

Q. How is it–how is it paid for, how was the purchase funded, [et cetera].

A. How was it paid for? It was paid for from distributions from [DBI] to–to the trust to acquire the shares.

Q. [Were] there any promissory notes executed in connection with the acquisition of the 550 shares? ***

***

A. I believe that we were paying this.

Q. When you say 'we,' who are you referring to?

A. Or I should say the company was.

Q. The 'company' being [DBI]?

A. Yes, was paying, you know, this plus interest. I'm–I'm guessing.

Q. Well–

A. I'm not guessing but–

Q. What was the name of your uncle?

A. Donald.

Q. Donald was the seller of 550 shares?

A. Right. And we were paying–I forget what interest rate. [DBI] was paying eight and three-quarters percent.

Q. So there was a promissory note executed to Donald?

A. Yes. Yes.

Q. And who signed that–that promissory note?

***

A. It looks like my brother signed it, Scott Dann, as trustee.

Q. In his capacity as trustee of the trust?

A. Right. Yes.

Q. And there was a schedule set, and there were annual payments made for some time–

A. Yes."

Russell then was asked again who made the payments to Donald, and in response he quoted the portion of his affidavit reproduced above. Though Russell knew "for a fact" that DBI made the three payments, he was unaware of any documentation reflecting the payments. Asked if the payments were made by check or wire transfer, Russell answered that he did not recall "how the physical check was made out." We note that no documentary evidence of the payments by DBI was adduced at the summary judgment stage (or, for that matter, at trial). On appeal, the parties agree that DBI made the payments, but dispute whether they and the 550 shares of DBI stock they purchased should be classified as marital or nonmarital.

¶ 30 According to Russell and Barsella, Russell's trust owed Donald $313,736.92 as of June

1999.[6] Armand was involved in the next portion that was paid on the loan. Russell and Armand stated in their affidavits that attorneys for DBI gave specific instructions for how to pay the balance owed Donald. The record contains a letter to Scott from the law firm of Horwood Marcus & Berk. (Russell and Armand did not confirm that these were the attorneys for DBI whom they mentioned.) The letter suggests the following "action steps to pay off Donald": (1) "Armand should issue a check in the amount of $313,736.92 to Russell"; and (2) "Russell should endorse his check to the Russell R. Dann Stock Trust and then Scott, as trustee of the Russell R. Dann Stock Trust, should endorse the check to Donald." Armand averred that, pursuant to the instructions from DBI's attorneys, he issued a check to Russell for $300,000. (It is not apparent why Armand issued a check for only $300,000.) The record contains a copy of a check, dated June 4, 1999, from Armand and Elaine to Russell for $300,000. Though there is no documentation of these further steps, Russell, Armand, and Barsella all stated that Russell endorsed the check to his trust, and then Scott, as trustee, endorsed the check to Donald. The record also contains a "Term Note" dated June 4, 1999, and signed by Russell himself. (Barsella stated in his deposition that "it should have been the trust" that signed the note.) By the note, Russell promised to pay Donald $300,000 plus interest at 5.66% annually.

¶ 31 At his December 3, 2008, deposition, Russell testified that, when Armand issued the check, he told Russell that it was a gift, not a loan. Russell stated in his affidavit that Armand "always intended to gift $300,000 to me" and that the transfer was "deemed [a] 'loan[ ]' for gift and estate tax purposes." Similarly, Armand averred that he "always intended to gift $300,000 to *** Russell" and that the transfer was "couched as [a] 'loan[ ]' pursuant to my accountants' advice for gift and estate tax purposes." Barsella also averred that the transfer was characterized as a loan simply for tax purposes. Barsella elaborated at his deposition, testifying that, "because of *** gift and estate tax rules, Armand lent the money to Russell *** and then forgave it over time according to annual exclusion limits and unified credit limits over the years." Barsella testified that Armand filed gift tax returns in association with incremental forgiveness of the "loan." Russell, Barsella, and Armand all claimed that neither Russell nor his trust ever paid Armand any money toward the $300,000 "loan."

¶ 32 As we noted, attached to Lori's response as it appears in the bound volumes of the record is a single letter from Armand and Elaine to Russell memorializing a gift. As noted, we will not consider the additional gift letters attached to the copy of Lori's response that we found loose in one of the boxes comprising the record. The single letter we do consider is dated January 4, 2000, and its salutation is "Russell." The body of the letter reads:

> "Please accept this letter as Mom's and my annual gift to you and your wife, Lori, in the amount of $40,000. $11,266 will be paid in cash; the balance of $28,734 will be used to reduce your outstanding loan."

The letter is signed by Armand and Elaine. As can be seen, the letter gives no suggestion as

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[6]According to the amortization schedule, only $302,371.06 in principal would have been outstanding after the January 1999 payment. The schedule contains a handwritten notation adding $11,365.86 to $302,371.06 for a total of $313,736.92. The parties provide no explanation for this.

to the nature of the "loan" to which it refers.

¶ 33 Also attached to Lori's response are gift tax returns filed by Armand for the years 1999 through 2005. The returns acknowledge gifts to several individuals including Russell and Lori. The gifts are listed by date and amount, but the returns do not indicate which, if any, of the gifts are related to the $300,000 transfer from Armand to Russell. Armand's testimony at trial was the only evidence linking the gift letters and gift tax returns to the $300,000.

¶ 34 It is undisputed that, with the purchase of the 550 additional shares, Russell's trust held a 25% interest in DBI. The remaining four shareholders in DBI were Marvin Rotstein and three trusts for the benefit of, respectively, Scott, Debra Dann, and Julie Dann.

¶ 35 2. The Trust's Interest in DRIP

¶ 36 On February 13, 1998–during the parties' marriage–DRIP was formed. The partnership agreement for DRIP specifies nine partners. The first four partners are designated "principals": Russell, Scott, Julie, and Marvin. The second five are designated "shareholders" (who are also identified as shareholders of DBI): the four trusts for the benefit of Russell, Scott, Julie, and Debra, respectively, and Rotstein. DRIP's purpose, as stated in the agreement, is "the ownership and administration of life insurance policies and proceeds and disability policies and proceeds in order to facilitate transition of the ownership of [DBI stock] upon the death or [p]ermanent disability of a [p]rincipal." The agreement calls for initial capital contributions by all partners in the amounts indicated in the attached "Exhibit A." Exhibit A grants Russell and his fellow "principals" each a 1.09% interest for a capital contribution of $2,500. The "shareholders" are granted more substantial interests in exchange for more substantial capital contributions. For instance, Russell's trust is given a 23.91% interest in exchange for a capital contribution of $54,753.99. The agreement empowers the partnership to purchase, maintain, and hold a life or disability policy insuring any principal. The agreement also imposes a continuing obligation on partners to make capital contributions "as required to make timely premium payments on any life insurance policies and disability insurance policies owned by the [p]artnership or any of the [p]rincipals." Finally, the agreement grants a partner who withdraws from the partnership the right to purchase "any or all of the cash value policies insuring the life of the *** partner."

¶ 37 Russell testified at his December 3, 2008, deposition that, though the partnership agreement for DRIP contemplated that he would receive a 1.09% personal interest in DRIP, he had no recollection of ever receiving, or paying to receive, a personal interest in DRIP. Russell made the same assertion in his affidavit.

¶ 38 Barsella asserted in his affidavit that neither Russell, Scott, Julie, nor Debra owned any individual interest in DRIP. (Rotstein did, however, own an individual interest.) Rather, as Barsella averred, "[a]ll of Russell's, Scott's, Julie's, and Debra's [t]rust interest and [Rotstein's] individual interest in DRIP were funded through the transfer of life insurance policies owned by [DBI] and cash contributions made by [DBI]." Barsella indicated that these insurance policies, which insured the lives of Russell, Scott, Julie, and Debra, had as beneficiaries either the trusts or DBI. Barsella referred to a document (which is in the record) that lists all insurance policies held by DRIP.

¶ 39 Barsella explained the initial capitalization of DRIP:

> "Along with the transfer of the life insurance policies relative to the initial capitalization of Russell's [t]rust's interest in DRIP (which had a total cash surrender value of $59,129 as of August 1, 1998), [DBI] made a distribution to Russell's [t]rust in the amount of $12,456, which was then transferred to DRIP[7] to pay the premiums for these life insurance policies, for a total capitalization of $71,585 in 1998."

Elsewhere in his affidavit, Barsella described the $12,456 distribution as "a cash contribution by [DBI] to pay the life insurance premiums." Barsella said that the initial capitalization of $71,585 was reflected on Russell's trust's 1998 Schedule K-1 from DRIP. The 1998 Schedule K-1 is in the record and shows that the trust contributed $71,585 in capital that year and had a "capital account" of $64,562 at the end of the year. The K-1 indicates that the trust held an initial 25% in capital ownership, which increased to 26.82% by the end of the year.

¶ 40 In his affidavit, Barsella also referenced transfers that DBI made subsequent to the initial capitalization. He noted that there were "subsequent contributions to DRIP on behalf of Russell's [t]rust" and that these were all "made through distributions to Russell's [trust] from [DBI]." In his own affidavit, Russell gave a virtually identical account of the capitalization of DRIP.

¶ 41 Barsella did not reference them, but the record contains documents showing the capital balances of the DRIP partners for the years 1998, 1999, 2000, 2001, and 2004. Russell is not represented on these balances as holding an individual interest in DRIP; the only partners listed are Rotstein and the trusts for the benefit of Russell, Julie, Scott, and Debra. In his appellate brief, Russell represents that these balances "show[ ] *** cash contributions from DBI to pay for the life insurance policies." The balance sheets themselves refer to "cash contribution[s]" from DBI on behalf of the partners of DRIP. The contributions made by DBI on behalf of Russell's trust consisted of $12,456 in 1998; $23,035 in 1999; $23,364 in 2000; $30,114 in 2001; and $34,644 in 2004. The total capital attributed to Russell's trust (including the $59,129 cash value of insurance policies transferred to DRIP when it was established) increased from $71,585 in 1998 to $181,397 in 2005. (The total capital did not increase dollar-for-dollar with the cash contributed by DBI, because a certain amount was deducted each year as "DRIP Income Allocation." Thus, while the total capital that DBI contributed in 1998 on behalf of Russell's trust was $71,585, the year-end balance showed a lesser total of $64,452.) A partner's individual capital percentage fluctuated from year to year; Russell's trust's year-end percentage was 26.82 in 1998 and 25.62 in 2004.

¶ 42 At his November 11, 2008, deposition, Barsella reiterated that none of the partners made their own capital contributions to DRIP. In the case of Russell's trust, "all of the capital contributions *** came from funds that the trust received as distributions from [DBI]." At his June 30, 2008, deposition, Russell testified that his trust's interest in DRIP was funded "one hundred percent" by DBI.

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[7]Russell, however, testified at his June 30, 2008, deposition that the trust had no bank account until 2005.

¶ 43 3. Russell's Interest in BPA LLC

¶ 44 Russell held an individual interest in BPA LLC. Lori develops no argument on appeal that the interest was marital. Since the interest in BPA LLC figures in the asset sale that we describe below, we provide a brief sketch of the information on the origin of BPA LLC that was provided to the trial court for purposes of summary judgment. This information comes exclusively from the affidavits of Russell and Barsella.[8] On January 1, 1984, several years before the parties' marriage, Benefit Planning Associates (BPA) was formed. Russell was a partner in BPA. On January 1, 1996, the owners of BPA formed BPA LLC for the purpose of converting the partnership into a limited liability company. Russell and the other partners in BPA transferred their ownership interests to BPA LLC.

¶ 45 4. Sale of the Interests in DBI, DRIP, and BPA LLC

¶ 46 On January 11, 2004, Russell and Scott (as trustee of Russell's trust) signed an "Equity Redemption Agreement and Mutual Release" (redemption agreement). The redemption agreement provided that closing must occur no later than January 2005, and it was uncontested below that closing occurred in January 2005.

¶ 47 The redemption agreement provides that DBI, DRIP, and BPA LLC will redeem Russell's trust's interests in DBI and DRIP and Russell's individual interest in BPA LLC. The agreement specifies a total purchase price of $4,150,000, of which $3.9 million was for the trust's interests in DBI and DRIP and the remaining $250,000 for Russell's interest in BPA LLC. Under paragraph 2, entitled "Additional Obligations," the agreement provides that DBI, DRIP, and BPA LLC will pay Russell $100,000 "in consideration of" a "Protective Agreement" described in paragraph 4. Further in paragraph 2, there is a provision requiring that Russell, for an 18-month period following his termination as an employee of DBI, continue to assist DBI in providing services for certain of its clients. Paragraph 4, entitled "Protective Covenants," sets forth a confidentiality agreement as well as a noncompete agreement by which Russell agrees that he will not, *inter alia*, "contact [or] solicit *** any of DBI's or BPA [LLC's] clients *** for the purposes of providing any services that are the same as or similar to the services provided by DBI and BPA [LLC] to their clients."

¶ 48 Although the redemption agreement does not specify how the $3.9 million is to be allocated between DBI and DRIP, Barsella stated in his affidavit and at his deposition that $194,454 of the $3.9 million was allocated to DRIP. Barsella's apparent source for this assertion was a document entitled "Dann Brothers Inc., Russell Dann Purchase Price Allocation" (allocation memorandum), which is in the record. Barsella testified that the memorandum was prepared by his accounting firm for general accounting purposes and not

[8]Russell includes in his appendix copies of what are denominated operating agreements for BPA LLC and another partnership, Benefit Planning Associates. Russell does not indicate where these documents appear in the record. The only record citations that he provides are to the body of his summary judgment motions and to his and Barsella's affidavits. As our own review of the record has not located these documents, we will not consider them, but will draw from only Russell's and Barsella's affidavits.

"for tax purposes." The memorandum states that the "purchase price allocated to DRIP is the fair value of [Russell's] insurance policy[9] held in DRIP." The memorandum values the insurance policy at $194,454 as of December 31, 2004. Barsella stated that, instead of receiving the $194,454 in cash, Russell elected to receive the insurance policies themselves that DRIP owned on his life. By the time the polices were transferred to Russell, the cash surrender value had increased to $195,303. Barsella stated that this amount was reflected on Russell's trust's 2004 Schedule K-1 from DRIP. The Schedule K-1, which is in the record, shows $195,303 as a "distribution" from DRIP.

¶ 49 As for the $250,000 from BPA LLC, Russell gave a different account in his August 13, 2008, amended motion than he had in his June 23, 2008, amendment. The earlier amendment alleged that he used part of the $250,000 to purchase life insurance policies from DRIP and that "[t]he remainder of the money, along with the $100,000 Russell received from the protective covenant," was deposited in the parties' joint checking account. Russell, however, produced no documentation to support this report of the proceeds from BPA LLC. In the later amendment, Russell alleged, supported by his own affidavit and that of Barsella, that BPA LLC was able to pay only $149,135 and that the remaining $100,865 was paid to Russell's trust by DBI on behalf of BPA LLC.

¶ 50 The allocation memorandum also mentions the "$100,000 payment for additional obligations relat[ing] to [Russell] serving as an independent contractor for the next 18 months." Finally, the allocation memorandum mentions the noncompete agreement, stating in relevant part:

> "Per discussion with DBI, they do feel there is value to the non-compete. [Russell] has a $700,000 book of business. These customers have been with DBI as well as Russell for some time. Therefore, we can assume that Russell may be able to get some of the customers to leave if he wanted to. If DBI assumes that 50% of the customers would leave, that is $350,000 of annual lost revenue. There is an approximate 20% profit margin, therefore lost income is $70,000 annually. DBI feels that five is a reasonable multiplier for lost income, therefore the non-compete is valued at $350,000. DBI also felt that this is reasonable, as it is approximately 10% of the purchase price for DBI ***."

Though Barsella relied on the allocation memorandum to show what part of the $4,150,000 represented the purchase price for DRIP, Barsella denied in his affidavit that the $350,000 recommended by the memorandum as an appropriate value for the noncompete clause actually became an agreed sum to be paid Russell. At his deposition, however, Barsella acknowledged that a tax return filed by DBI shows that it intended to amortize the noncompete agreement in the amount of $350,000.[10] Barsella could not recall why DBI would attempt to expense $350,000 when the redemption agreement had not required it to

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[9]The allocation memorandum speaks of just a "policy" when the other documents in the record suggest that DRIP owned several policies on Russell's life.

[10]Barsella did not identify the year for the tax return. The submissions at the summary judgment stage contain a one-page fragment from DBI's 2005 return, but the document sheds no light on whether DBI intended to amortize any payment for the noncompete agreement.

make a payment in that amount.

¶ 51 Russell's account of the proceeds from the January 2005 sale was not materially different from Barsella's. Russell was questioned at his January 3, 2008, deposition about the $100,000 specified in the redemption agreement. He clarified that the $100,000 was for the noncompete obligations specified in paragraph 4 of the redemption agreement, not for the consulting duties specified in paragraph 2.

¶ 52 5. History of the Proceeds From the January 2005 Sale

¶ 53 In his amended motion, Russell alleged in detail how he disposed of the proceeds from the January 2005 sale. He claimed that, because his trust's interests in DRIP and DBI, and his individual interest in BPA LCC, were all nonmarital, the assets he acquired from the proceeds of the sale were nonmarital, too. In this court, however, neither party revisits how the proceeds were used. Lori focuses only on "the initial acquisition of the assets resulting in funds claimed to be nonmarital." As for the acquired assets, she "simply *** state[s] that they were all acquired during marriage and that if Russell did not prove by clear and convincing evidence at the summary judgment stage that the funds which acquired them were non-marital, there is no basis to award the assets acquired with those funds as his non-marital property." Hence Lori stakes the success of her appeal entirely on the strength of her argument that the interests sold in January 2005 were marital. Russell disputes that the sold interests were marital, but makes no independent argument about the classification of the assets purchased with the proceeds. He refers us to his amended motion for an account of the proceeds of the January 2005 sale.

¶ 54 We will not detail the manifold transactions and transfers that occurred after January 2005. The trial court, we hold, erred in ruling as a matter of law that Russell's trust's interests in DBI and DRIP were nonmarital (Lori raises no argument about BPA LCC). In doing so, we reject Russell's related contention that any use of marital funds to acquire the trust's interests in DBI and DRIP would result at most in a right of Lori to reimbursement of the marital funds used. Because neither party discusses the issue, we do not opine on how the classification of DBI and DRIP might impact the classification of the assets acquired with the proceeds from the January 2005 sale.

¶ 55 6. Trial Court's Decision on Summary Judgment

¶ 56 The parties allude to the trial court's oral pronouncement of its ruling on summary judgment, but no transcript of it appears in the record. The trial court's written ruling grants Russell's amended motion. The order states: "Lori's counsel raises issues relative to Russell's summary judgment arguments which the Court finds, to the extent there are discrepancies which may exist, any such discrepancies do not raise genuine issues of material fact." The assets that the trial court determined were nonmarital consisted of two groups: those that existed prior to the January 2005 sale, and those that were created or acquired after the January 2005 sale. The first group consisted of (1) Russell's trust, established July 9, 1990, (2) Russell's trust's interests in DBI and DRIP, and (3) Russell's individual interest in BPA LLC. The second group consisted of bank accounts, investment accounts, insurance

policies, and other interests.

¶ 57 The trial court added that Lori "has the right to claim that the marital estate is entitled to be reimbursed from Russell's non-marital estate."

¶ 58 There is a transcript of the hearing at which the trial court denied Lori's motion to reconsider the grant of summary judgment. (The motion to reconsider was heard after the proofs at trial were closed but before the court entered its dissolution judgment.) The court began by addressing Lori's claim (which she reasserts on appeal) that Russell was deliberately obfuscatory in his amended motion:

> "The Court agrees that there were several amendments to affidavits and new affidavits filed, but in the end, the Court is looking for what is the truth, what is the ultimate result of all of the documents that have been gathered.
>
> This was not a simple matter.
>
> This was complicated.
>
> The Court agrees that Russell Dann himself is probably not as sharp as his counsel would like him to have been on the details of his transaction, but ultimately when the documents that were signed were tendered to Mr. Dann he certainly could then recall the details.
>
> And I don't think that it is because of trying to hide what the true nature of the transaction was.
>
> They were complicated transactions.
>
> The accountants and lawyers set them up and Mr. Dann may not have understood exactly why things were being done a certain way at the time.
>
> The Court has looked at all of the affidavits previously on the Summary Judgment motion.
>
> The testimony at trial was extensive and there were issues on whether something had been, in fact, decided on Summary Judgment and, therefore, should not have been gone into, but they were gone into.
>
> So I feel I have not only–I granted summary judgment, but now I've heard testimony on some of the same issues.
>
> A lot of it because there are issues of reimbursement.
>
> No transaction is perfectly documented.
>
> And many times the clients do not follow through with what they were supposed to follow through with.
>
> And having considered all of that, the Court is denying the motion."

¶ 59 B. Analysis

¶ 60 1. General Principles

¶ 61 Lori argues that the trial court erred in entering judgment that the trust's interests in DBI and DRIP were nonmarital. Lori develops no argument that the court also erred with respect

to Russell's individual interest in BPA LCC. We agree that the trial court did err in determining as a matter of law that the trust's interests in DBI and DRIP were nonmarital.

¶ 62 We first set forth the particular standards that govern our review of a summary judgment ruling. "The purpose of summary judgment is to determine whether a genuine issue of material fact exists." *Adames v. Sheahan*, 233 Ill. 2d 276, 295 (2009). Summary judgment is proper only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). "In determining whether a genuine issue of material fact exists, the pleadings, depositions, admissions and affidavits must be construed strictly against the movant and liberally in favor of the opponent." *Adames*, 233 Ill. 2d at 295-96. "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* at 296. "Summary judgment is a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt." *Id.* We review *de novo* an order granting summary judgment. *Id.*

¶ 63 We are guided as well by substantive standards provided by section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/503 (West 2010)) and case law interpreting it. Before the trial court may distribute property upon the dissolution of a marriage, the court must first classify the property as either marital or nonmarital. *In re Marriage of Henke*, 313 Ill. App. 3d 159, 166 (2000). Section 503(a) of the Act establishes a rebuttable presumption that "all property acquired by either spouse subsequent to the marriage" is marital property. 750 ILCS 5/503(a) (West 2010). A party can overcome this presumption only by a showing of clear and convincing evidence that the property falls within one of the eight exceptions listed in section 503(a). *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009). Those exceptions are as follows:

> "(1) property acquired by gift, legacy or descent;
>
> (2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent;
>
> (3) property acquired by a spouse after a judgment of legal separation;
>
> (4) property excluded by valid agreement of the parties;
>
> (5) any judgment or property obtained by judgment awarded to a spouse from the other spouse;
>
> (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; and
>
> (8) income from property acquired by a method listed in paragraphs (1) through (7) of this subsection if the income is not attributable to the personal effort of a spouse." 750

ILCS 5/503(a) (West 2010).

¶ 64 "[A]ny doubts as to the nature of the property are resolved in favor of finding that the property is marital." *Schmitt*, 391 Ill. App. 3d at 1017.

¶ 65 2. The 550 Shares of DBI Stock

¶ 66 Lori contends that there is a genuine issue of material fact as to the classification of the 550 shares of DBI stock that Russell's trust purchased from Donald. Lori argues that, since the shares were acquired during her marriage to Russell, they were presumptively marital property under section 503(a). Russell, she asserts, did not overcome the presumption with clear and convincing evidence that the shares were acquired with nonmarital funds. The evidence showed that the price for the 550 shares was paid entirely by the following funds: (1) transfers from DBI in 1997, 1998, and 1999, totaling 178,725.63; (2) a $300,000 check from Armand to Russell, which was ultimately signed over to Donald; and (3) a $13,736.92 payment from the parties' joint account. Lori argues that the transfers from DBI and the $300,000 from Armand were not, as a matter of law, nonmarital property, and hence neither were the 550 shares of DBI stock. Lori raises no argument regarding the $13,736.92; in its dissolution judgment, the trial court required Russell to reimburse the marital estate in that amount.

¶ 67 a. The DBI Transfers

¶ 68 Russell raises the threshold issue of whether the 550 shares of DBI stock were even acquired during the marriage. Russell reasons that, if the shares were not acquired during the marriage, then they would not be presumptively marital property under section 503(a), and the trial court would have been right to grant summary judgment.

¶ 69 Russell contends that, though the shares were not transferred until January 1, 1996, after the parties' December 1995 marriage, the October 1995 stock purchase agreement gave Russell's trust a "vested contractual property right" to the shares. Russell suggests that the right his trust obtained in October 1995 met the case law's definition of "property" for purposes of the Act, namely, " 'any tangible or intangible *res* which might be made the subject of ownership.' " *In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 244 (1984) (quoting *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 1026 (1981)). The wife in *Weinstein* argued that the husband's medical degree and license, acquired during the marriage, were marital property. The appellate court held that the degree and license were not even "property" under the Act because

> "[a] degree or license is at most a mere expectancy of some future income or earnings. [Citation.] Neither has a present assignable value, as neither can be sold as can other items of an intangible nature such as goodwill of a business [citation], nor can either be said to represent a guarantee of receipt of a set amount in the future such as pension benefits." *Id.* at 244-45.

¶ 70 *Weinstein* is distinguishable. The wife in *Weinstein* claimed only the expectancy, but Lori claims not the expectancy but the *res* itself, *i.e.*, the shares. Russell is mistaken to conflate

a contractual expectancy with the *res* of the contract. Property is not rendered nonmarital simply because a contract for its purchase was signed before the marriage. For instance, in *In re Marriage of Tatham*, 173 Ill. App. 3d 1072, 1089-90 (1988), the property at issue, a tractor, was purchased and acquired before the marriage, but was held to be marital because the loan through which it was purchased was paid during the marriage from marital funds. If an asset can be considered marital even if purchased and acquired before the marriage, as was the case in *Tatham*, then the mere signing of the contract before the marriage will not in itself overcome the presumption that the purchased property, if acquired during the marriage, is marital. Rather, the status of that property, like all property acquired during the marriage, will turn on whether it falls within one of the exceptions listed in section 503(a). It is beyond question here that the shares were acquired during the marriage and, hence, were presumptively marital property under section 503(a).

¶ 71 Russell alternatively contends that the shares would be nonmarital even if they were acquired during the marriage, because the funds used to purchase them were nonmarital. Notably, Russell does not claim that the shares were insulated from Lori's claims because they were held in trust. He also does not vest any significance in whether the transfers from DBI came directly to the trust, though we note that the evidence on that point was in conflict. Barsella and Russell averred that DBI "for the benefit of [Russell's] Trust, paid Donald," which suggests that DBI paid Donald directly. In his December 3, 2008, deposition, however, Russell testified that the shares were "paid for from distributions from [DBI] to–to the trust to acquire the shares." This seems to suggest that the transfers were to the trust first. There is no documentation of the transfers, so their precise mechanics remain unknown. As for the transfer from Armand, the record shows that the check was written to Russell before it was signed over first to the trust and then to Donald.

¶ 72 It was Russell's burden below to establish that the 550 shares of DBI stock were acquired by one of the methods specified in section 503(a). In arguing below that the funds from Armand were a gift, and hence that the shares acquired with them were nonmarital property, Russell was presumably invoking section 503(a)(1) (750 ILCS 5/503(a)(1) (West 2010)), under which property "acquired in exchange for property acquired by gift, legacy or descent" is nonmarital. In arguing that the transfers from DBI were nonmarital, and hence so were the interests in DBI purchased with them, it is not clear what section Russell was invoking. In this court, Russell argues that the transfers fell under section 503(a)(8), which declares as nonmarital "income from property acquired by a method listed in paragraphs (1) though (7) of this subsection if the income is not attributable to the personal effort of a spouse" (750 ILCS 5/503(a)(8) (West 2010)). Under this theory, the transfers were income from an asset, *i.e.*, the prior interest in DBI, that was acquired before the marriage. See 750 ILCS 5/503(a)(6) (West 2010) (nonmarital property includes "property acquired before the marriage"). As the argument continues, since the funds from DBI were nonmarital, then so were the interests exchanged for them. See 750 ILCS 5/503(a)(2) (West 2010) (nonmarital property includes "property acquired in exchange for property acquired before the marriage").

¶ 73 As we shall see, Russell's claim that the DBI transfers were income overlaps with his claim that they were not attributable to his personal effort. Russell's theory is that DBI made

the transfers on account of Russell's premarital part-ownership of DBI, not his employment by DBI. If the transfers were unrelated to Russell's ownership interest in DBI, the transfers would not be "income from property" unless, as is doubtful, his employment was itself "property."

¶ 74 Before we reach the substance of whether the DBI transfers qualified as "income" under section 503(a)(8), we address Russell's claim that it was actually not his burden below to establish that the DBI transfers were not attributable to his personal effort. According to Russell, it is not presumed, but rather must be proved, that income received during the marriage from a nonmarital asset is attributable to the personal effort of a spouse. Russell claims to find support for this approach in the case law, but he is mistaken, as we explain in more detail below. The approach of our courts is, rather, embodied in the oft-stated principles that all property acquired by either spouse during the marriage is presumed to be marital property and that the "presumption can only be overcome with a showing, by clear and convincing evidence, that the property falls within one of the statutory exceptions listed in subsection (a)" (*In re Marriage of Hegge*, 285 Ill. App. 3d 138, 141 (1996)). Proving the exception requires proving all elements of the exception, which in the case of section 503(a)(8) means proving both that the property is "income" and that it is "not attributable to the personal effort of a spouse." See *In re Marriage of Landfield*, 209 Ill. App. 3d 678, 692-93 (1991) (stressing that the presumption under section 503(a) is not overcome "as soon as any evidence to the contrary is produced," but rather remains in place until the spouse proves by clear and convincing evidence that property was acquired in one of the ways listed in section 503(a)). We see no other way to harmonize the presumption with the language of section 503(a)(8).

¶ 75 This district's decision in *Schmitt* illustrates the proper application of section 503(a)(8). Kim, the husband in *Schmitt*, was hired in 1969 by the Colonial Brick Company (Colonial), a subchapter S corporation. In 1970, he was given a 49% interest in the company, while his partner, Mumford, owned the remaining 51%. In 1974, the parties were married. In 1999, Kim and Mumford purchased properties on Kedzie Avenue in Chicago (the Kedzie properties) with funds from Colonial. The payments were made from the retained earnings account of Colonial and recorded as distributions to Kim and Mumford in their respective ownership percentages. Kim and Mumford, not Colonial, held title to the properties. *Schmitt*, 391 Ill. App. 3d at 1012. Later, Kim formed another subchapter S corporation, Bricks, Inc., of which he was sole owner. Colonial dissolved, with Bricks succeeding to its interests and continuing to make mortgage payments on the Kedzie properties. Funds from Bricks were also used to purchase properties in suburban Chicago (the suburban properties). Kim did not know whether his retained earnings account was charged to reflect the disbursements for the suburban properties. Title to the suburban properties was held by a land trust of which Kim was the sole beneficiary. *Id.* at 1013-15.

¶ 76 The trial court held that all of the properties were nonmarital. Reversing that judgment, this district held that, while Kim established that the funds disbursed by Colonial and Bricks to purchase the properties constituted "income" under section 503(a)(8), he failed to demonstrate that the income was not attributable to his personal effort. *Id.* at 1018-22. As to the Kedzie properties, we said:

"[It] is undisputed that Kim worked for Colonial and that he was given distributions to make the down payments and mortgage payments for the Kedzie properties. Kim testified that the payments for the properties, made on behalf of himself and Mumford, were reflected on Colonial's books at the end of the year as distributions to Kim and Mumford in their respective ownership percentages. Thus, the distributions were income to Kim. Kim also testified that he purchased the Kedzie properties as an individual. We find nothing in the record sufficient to rebut the presumption that the distributions were attributable to Kim's personal efforts. Therefore, the trial court's finding that the Kedzie properties were purchased with nonmarital funds, and were thus nonmarital, is against the manifest weight of the evidence." *Id.* at 1018.

As to the suburban properties, we said:

"Kim testified that he did not know whether the money from Bricks was credited to his retained earnings account. Kim, as sole shareholder of Bricks, had complete control of and access to the retained earnings. Thus, the inference to be drawn from the evidence is that the funds were attributable to his personal efforts. Accordingly, the retained earnings of Bricks, and all assets Kim purchased with them, are presumed to be marital, and the record does not show that Kim rebutted with sufficient evidence either the inference or the presumption. Thus, the trial court's finding that Bricks and the assets purchased by Bricks were nonmarital is against the manifest weight of the evidence." *Id.* at 1020.

¶ 77 In *Schmitt*, we considered it Kim's burden to establish, by clear and convincing evidence, that the distributions were not attributable to his personal effort. As we found in *Schmitt* nothing to rebut the presumption that the distributions used to purchase the properties were attributable to Kim's personal effort, so we find nothing in the record here to overcome, or to even weigh against, the presumption that the transfers from DBI were attributable to Russell's personal effort. We explain further as our analysis continues. For now, we simply note that *Schmitt* shows a proper understanding of a spouse's burden under section 503(a)(8).

¶ 78 *Schmitt* also provides a springboard for discussion of other cases that Russell and Lori cite here. In holding that the suburban properties were marital, this district cited not only a presumption of personal effort but also actual evidence of personal effort in that Kim had sole control over the disbursement of the retained earnings of Bricks. Our discussion of retained earnings was informed by two decisions: *In re Marriage of Lundahl*, 396 Ill. App. 3d 495 (2009), and *In re Marriage of Joynt*, 375 Ill. App. 3d 817 (2007). Both cases addressed the issue of when the retained earnings of a subchapter S corporation of which a spouse is a shareholder may be considered marital property. *Joynt* explained the nature of a subchapter S corporation and its retained earnings:

"A subchapter S corporation is a pass-through entity utilized for federal tax purposes. [Citation.] Unlike a subchapter C corporation, [a subchapter S corporation] does not pay corporate-level taxes on its income. Instead, the corporation's income is taxed directly to its shareholders based on their ownership of corporate stock, whether or not the income is actually distributed to the shareholders. See I.R.C. §§ 1361 through 1379 (2000) (defining and explaining subchapter S and subchapter C corporations). A

subchapter S corporation monitors its retained corporate earnings using an account which is then used to determine each shareholder's basis for taxed but undistributed corporate income. However, retained earnings and profits of a subchapter S corporation are a corporate asset and remain the corporation's property until severed from the other corporate assets and distributed as dividends. [Citation.]" *Joynt*, 375 Ill. App. 3d at 820-21.

¶ 79 *Joynt* held that the issue of whether retained earnings constitute marital property depends on "two primary factors: (1) the nature and extent of the stock holdings, *i.e.*, is a majority of the stock held by a single shareholder spouse with the power to distribute the retained earnings; and (2) to what extent are retained earnings considered in the value of the corporation." *Id.* at 819. The court held that the retained earnings at issue in that case were the husband's nonmarital property. The court gave several reasons. First, the husband was not a controlling shareholder and, hence, could not unilaterally disburse or withhold a dividend. Second, the corporation held the retained earnings to pay expenses. Third, though the husband reported his share of the retained earnings as taxable income to him on his individual tax return, the corporation paid the tax through year-end designated payments to him. *Id.* at 820-21. Fourth, the husband received a salary from the corporation, and "[t]he only expert testimony found in the record indicates that [the husband's] compensation during the marriage was reasonable and fair for the services he provided." *Id.* at 821. The court did not explain the significance of this fourth factor, the principle behind which is that, if the shareholder-spouse is undercompensated by his own choosing, and the corporation retains more earnings than are necessary to maintain its business, further income in the form of a portion of the retained earnings may be imputed to the spouse and considered marital property. See *Bates v. Bates*, 761 S.W.2d 186, 188 (Mo. Ct. App. 1988) (the court determined that shareholder-spouse underpaid himself by a total of $50,000, and the court increased the marital estate by this amount).

¶ 80 Notably, *Joynt* did not identify which subsection of section 503 it believed the retained earnings fell under. It seems *Joynt*'s analysis has much in common with the considerations relevant to determining, under section 503(a)(8), whether income is attributable to the personal effort of a spouse.

¶ 81 *Lundahl*, applying the principles of *Joynt*, did rely on a subsection of section 503, namely subsection (a)(8), and held that the retained earnings at issue were income attributable to the spouse's personal effort. *Lundahl*, 396 Ill. App. 3d at 504. First, the spouse in *Lundahl* was the sole shareholder of the corporation and could, and did, declare dividends to himself without the approval of anyone else. From 2004 to 2006, the spouse took nearly $800,000 in dividends. Second,

> "[t]he retained earnings of [the corporation] were not held by the corporation to pay expenses. They were not used to pay dividends, nor were they used in connection with the corporation. Additionally, they were taxed to [the spouse], who paid the income tax on the earnings." *Id.*

¶ 82 Russell suggests that, in light of *Joynt*, *Lundahl*, and *Schmitt*, "spousal control over the funds is the key factor in determining if they result from personal effort and are marital." We

do not deny that evidence of "spousal control" is relevant, but we do dispute Russell's further suggestion that, if there is a presumption of personal effort under Illinois law, "it is only triggered by the existence of a sole proprietorship." At one point, Russell goes further, suggesting that it "is reasonable to conclude that even in a case of sole ownership, there is no presumption of personal efforts for purposes of [s]ection 503(a)(8)[,] and the burden of showing personal efforts falls to the non-owning spouse." For support, Russell cites *In re Marriage of Booth*, 255 Ill. App. 3d 707 (1993), a case from the Fourth District Appellate Court. The husband in *Booth* was the sole proprietor of a business that preexisted the parties' marriage. The wife claimed on appeal that the marital estate was entitled to reimbursement for contributions to the nonmarital business "from marital income." *Id.* at 710. The appellate court rejected the contention, as it found no evidence that marital funds were contributed to the business. "In making this determination," the court said, "we are well aware that sole proprietorship, noncorporate business net income might be considered income attributable to the *personal effort* of the owner and thus marital property [under section 503(a)(8)]." (Emphasis in original.) *Id.* at 711.

¶ 83 Russell extracts from the discussion in *Booth* the principle that "income from *** non-marital property remain[s] non-marital unless shown that it was for personal efforts," which, Russell claims, "implicitly plac[es] the burden of making that showing upon the non-owning spouse." Russell is mistaken. First, the principle he claims to derive from *Booth* is not consistent with the statutory scheme. While it is true that not all proceeds from a nonmarital business are necessarily "income" under section 503(a)(8), such proceeds are, when received during the marriage, presumptively marital property, and if the owning spouse would find haven in section 503(a)(8), he must prove both that the proceeds are "income" and that they are "not attributable to [his] personal effort" (750 ILCS 5/503(a)(8) (West 2010)). Second, we do not read *Booth* as holding otherwise. Even if we did, we would decline to follow *Booth*, out of fidelity, firstly, to the clear language and structure of section 503(a) and, secondly, to this district's decision in *Schmitt*, which faithfully applies section 503(a). See *Schramer v. Tiger Athletic Ass'n*, 351 Ill. App. 3d 1016, 1020 (2004) (appellate district not bound by decisions of sister districts).

¶ 84 *Schmitt* correctly applied section 503(a)(8) by requiring Kim to prove not only that the funds disbursed to him during the marriage and used by him to acquire the Kedzie and suburban properties were "income," but also that they were "not attributable to [his] personal effort." In the case of the suburban properties, we relied on evidence of personal effort, *i.e.*, that Kim was the sole owner of Bricks. In the case of the Kedzie properties, however, we relied on the presumption alone and found nothing in the record to rebut it.[11] Russell comments:

> "Because the husband in *Schmitt* was a sole proprietor, the *Schmitt* court did not have the chance to distinguish between earned marital income and non-marital ownership

[11]Though we did not mention it in our actual analysis, Kim held a minority interest in Colonial. *Schmitt*, 391 Ill. App. 3d at 1012. Evidently, we did not believe that this was enough to overcome the presumption of personal effort.

distributions. Because the husband was the sole owner, the *Schmitt* court generally referred to all income from his business as marital."

Russell ignores the reality that different facts underlay the analyses of the properties purchased by Colonial and those purchased by Bricks. Kim was the sole proprietor of Bricks but not the sole proprietor of Colonial. We made no presumption based on Kim's degree of ownership in either company, but recognized only the presumption that all property acquired by either spouse during the marriage was marital. We simply held Kim to his burden under section 503(a)(8).

¶ 85 In insisting that the presumption of personal effort arises, if at all, only in the case of a sole proprietorship, Russell distorts section 503(a). If, whether in all cases or just in the case of a sole proprietorship, the spouse claiming the property as nonmarital need prove only that the property is "income" under section 503(a)(8), then the presumption under section 503(a) is only a half presumption.

¶ 86 Applying the foregoing principles, we hold that the record before the trial court when it entered summary judgment contained no evidence to rebut the presumption that the payments from DBI for the purchase of the 550 shares were attributable to Russell's personal effort. Essentially, the only evidence before the trial court was Russell's and Barsella's averments that DBI made payments so that the trust could purchase 550 additional shares of DBI, and Russell's deposition testimony that the payments were "distributions" from DBI. Citing *Joynt*, *Schmitt*, and *Lundahl*, Russell notes that he did not have a controlling interest in DBI. This fact alone did not overcome the presumption. The thrust of the analyses in *Joynt* and *Lundahl* is that "distributions" or "dividends" disbursed during the marriage may be considered nonmarital property if proven not to be compensation to the spouse, that is, if proven not to be due to "the personal effort of a spouse." Here, the record at the summary judgment stage was silent on whether DBI even deemed the transfers to be distributions or dividends rather than salary, which is typically compensation for personal effort. See *In re Marriage of Phillips*, 229 Ill. App. 3d 809, 818 (1992) ("remuneration to a spouse, in whatever form, during the marriage is considered marital property"). Moreover, Russell's deposition testimony that the transfers were "distributions" is not determinative, for he did not indicate what he meant by the term, nor does the context reveal it. As material fact questions remained, summary judgment for Russell was improper.

¶ 87 Our opinion would not change even if we considered Barsella's January 6, 2008, deposition. Russell points to the following exchange from that deposition:

"Q. *** With respect to the distributions that–none of the individuals, when they acquired the–

A. Right.

Q. –the DRIP policies–

A. Ah-huh.

Q. –ever paid any–Russell never paid anything personally. It was paid on behalf of the trust?

A. Correct. I mean, that's my understanding, that all of the–

Q. Well, that's what you testified [at his November 11, 2008, deposition].

A. Right. And the money came from [DBI] as distributions out to the trust.

Q. Okay. Now, that's my question.

A. From the time that DRIP was set up. I believe there [were] policies contributed into DRIP.

Q. That's right.

A. From the–

Q. And used some of the reserve and those policies to capitalize the transaction?

A. Correct.

Q. Okay. Now, when you talked about distributions, what type of distributions were these? Were these from current earnings or from the M-2 account?

A. Well, you know, I'd have to go back and look at each year. Usually, they would distribute current earnings.

Q. So when you say 'current earnings'–

A. Out of [DBI].

Q. –out of [DBI], that would be in addition–in the form of what, a salary?

A. No. Salary would be different from distributions.

Q. Okay. So what would–

A. I think each of the officers who were also employees did receive a salary. But then they received distributions out of the company as owners–the trust, as owners of the business, received distributions."

¶ 88 Barsella was discussing the funding of DRIP, not the purchase of the DBI stock. He referred to "distributions" paid to owners of DBI, but it is not clear that the funds that DBI put toward the purchase of the stock also were such "distributions." (Neither at his November 11, 2008, deposition nor in his affidavits did Barsella refer to the payments for the stock as "distributions"; only Russell used that term, at his December 3, 2008, deposition.) To infer that his comments applied as well to the funds used to purchase the DBI stock would be to ignore two important principles: (1) we draw all permissible inferences against the party moving for summary judgment; and (2) we resolve all doubts in favor of finding property to be marital. Even if we were to indulge Russell on this point and agree that Barsella's testimony could be applied to the transfers used to purchase the DBI stock, we would still conclude that he failed to prove that the transfers were not attributable to his personal effort. Russell cites two grounds for concluding that the DBI transfers were nonmarital property according to the criteria of *Joynt* and *Lundahl*. First, Russell was a minority shareholder of DBI. Second, because the "distributions" came from earnings of the corporation and were distinct from salary, they were a "result of [the trust's] ownership interests in DBI and not due to the personal efforts of any potential owner who was also an employee of DBI."[12]

[12]We note that Russell has not directed us to, nor have we found, any evidence at the summary judgment stage as to whether DBI was a subchapter S or a subchapter C corporation.

¶ 89 Russell did not meet his burden. First, the fact that Russell received a salary in addition to the distributions would not by itself be dispositive, for Russell would also have to establish that the salary adequately compensated him, otherwise the retained earnings from which the distributions were made would not be considered part of the corporate assets, but rather would themselves constitute compensation in whole or in part. See *Joynt*, 375 Ill. App. 3d at 821. The record does not even disclose what salary Russell was paid at DBI, let alone that the salary was adequate compensation. As it was Russell's burden to establish that the DBI transfers were not attributable to his personal effort, he cannot rely on a silent record.

¶ 90 Russell's status as a minority shareholder of DBI also is not determinative. Russell would have us conclude from this fact alone that he lacked influence over the disbursement of funds from DBI, but we decline the invitation. "[W]hen a shareholder spouse has a majority of stock *or* otherwise has substantial influence over the decision to retain the net earnings or to disburse them in the form of cash dividends, courts have held that retained earnings are marital property." (Emphasis added.) *Id.* at 820. Russell adduced no evidence of DBI's policies on distributions and so did not foreclose the possibility that, despite his minority interest, he had substantial influence over the decision to retain or disburse earnings. Thus, even if we could consider Barsella's January 6, 2008, deposition, we would not conclude that Russell proved his entitlement to summary judgment.

¶ 91 We turn to the several other cases Russell cites. The first group consists of five cases, *In re Marriage of Heroy*, 385 Ill. App. 3d 640 (2008), *In re Marriage of Werries*, 247 Ill. App. 3d 639 (1993), *In re Marriage of Jelinek*, 244 Ill. App. 3d 496 (1993), *In re Marriage of Perlmutter*, 225 Ill. App. 3d 362 (1992), and *In re Marriage of Eddy*, 210 Ill. App. 3d 450 (1991). He describes their common facts and analyses as follows:

> "[C]ertain loans used to acquire property were either uncollateralized, collateralized with non-marital property received by inheritance or gift, or collateralized with the newly acquired assets themselves, or repaid with proceeds from the new asset. The courts, in each instance, held the acquired assets were non-marital in light of the favorable terms of the transaction and its relation to a preexisting non-marital business interest. ***
>
> The purpose of [the analyses in these cases] is to determine whether the marital estate was burdened or prejudiced by the acquisition. If the marital estate was not prejudiced by the acquisition, Illinois courts, without exception, have characterized the acquired assets as non-marital property."

Applying these principles to the case at hand, Russell continues:

> "Here, the undisputed facts demonstrate that the marital estate was never involved, let alone burdened, in the acquisition of [Russell's trust's] additional 550 shares of DBI. The shares were acquired without benefit of a down-payment and with no marital guaranty. The shares related to a preexisting family business interest in which Russell's [t]rust already owned 1500 shares."

Theoretically, Russell could have had the requisite "control" over the disbursement of DBI funds regardless of the corporation's designation for tax purposes.

In the course of his argument, Russell alludes to additional cases, which we will incorporate into our discussion where appropriate.

¶ 92 We can distinguish two principles in Russell's distillation of the holdings in *Heroy*, *Werries*, *Jelinek*, *Perlmutter*, and *Eddy*: (1) that property acquired during the marriage is nonmarital if the acquisition was without prejudice or burden to the marital estate; and (2) that property acquired during the marriage is nonmarital if the terms of the transaction are favorable and related to a preexisting nonmarital business interest. We are not sure if and how Russell believes that these principles are related. We take them in turn.

¶ 93 First, we reject, as plainly contrary to section 503(a), Russell's suggestion that our criterion should be whether the marital estate was burdened or prejudiced by the transfers from DBI through which the trust purchased the 550 shares. Marital property comprises "all property acquired by either spouse subsequent to the marriage," except for property acquired by one of the means described in subsections (a)(1) through (a)(8). Some of these methods might involve no prejudice or burden to the marital estate, but the absence of prejudice or burden is not itself an exception under section 503(a) and will not itself overcome the marital-property presumption. A spouse who finds a chest of treasure during the marriage cannot claim that the property is nonmarital simply because the acquisition did not prejudice or burden the marital estate.

¶ 94 We begin by discussing *Eddy* and *Heroy*. The issue in *Eddy* was the classification of business interests that the husband, Michael, acquired during the marriage. The evidence was that Michael and his brother acquired, through inheritance from their parents, a farm and ranch business. During Michael's marriage, the brothers formed a partnership called Eddy Foods. Pursuant to the partnership agreement, each brother made a $2,500 capital contribution. Eddy Foods then purchased three McDonald's franchises. To fund the transaction, the brothers obtained several loans totaling about $475,000. Some loans came from private lenders and others from family members. The loans from private lenders were secured by the farm and ranch business that the brothers inherited. The loans were repaid with proceeds from the inherited business or from the McDonald's businesses themselves. Some of the family debt was cancelled when the proceeds were deemed a gift. Eddy Foods eventually became Eddy Corporation. *Eddy*, 210 Ill. App. 3d at 453, 457-58.

¶ 95 The trial court held that the McDonald's franchises, though acquired during the marriage, were nonmarital. The court "found that, although Michael's business interests had been acquired during the marriage, since no family income or marital money was used to acquire those business interests or was used for business loans and since no marital property was ever pledged as security on any loans relating to those business transactions," the presumption that the McDonald's franchises were marital property had been rebutted by clear and convincing evidence. *Id.* at 454.

¶ 96 We pause to examine the rationale of the trial court as it was paraphrased by the appellate court in the remarks just quoted. The trial court appeared to reason that, because no marital assets were involved in their acquisition, the new assets were nonmarital property. The presumption under section 503(a) is not, however, overcome simply with proof that no marital assets were involved in the acquisition of the new assets. While the exceptions in

section 503(a) cover several situations in which the marital estate might have no involvement in the acquisition of the new assets, lack of involvement with the marital estate is not in itself an exception under section 503(a). Thus, when an asset is acquired during the marriage but the record is silent as to how the asset was acquired, the presumption under section 503(a) is unrebutted. If nothing further can be inferred from the acquisition than that no marital property was involved, the presumption still stands. This is not to deny that it will be possible in some situations to prove the involvement of nonmarital property by proving the *non*involvement of marital property. The process of elimination will at times succeed. In the above-quoted passage, however, the court in *Eddy* did not make that further inference.

¶ 97 Later in its opinion, however, the appellate court gave a different account of the trial court's reasoning, commenting that the lower court "correctly determined, after tracing the stock of Eddy Corporation back to Eddy Foods, that the funds used to purchase the McDonald's restaurants were nonmarital." *Id.* at 457. This would have been the correct approach because it focused on whether the new assets were acquired in exchange for nonmarital property.

¶ 98 On appeal in *Eddy*, the wife contended that Michael "failed to present clear and convincing evidence that the three McDonald's franchises, the genesis of the Eddy Corporation, were acquired in exchange for nonmarital property." *Id.*; 750 ILCS 5/503(a)(2) (West 2010) (nonmarital property includes "property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, legacy or descent"). She argued "that the evidence established that Michael [and his brother] borrowed all of the money needed to buy the franchises and that they did not exchange nonmarital property for the franchises nor did they repay the loans with nonmarital property." *Eddy*, 210 Ill. App. 3d at 457. By this argument, the wife was holding Michael to his burden of affirmatively demonstrating that nonmarital property was involved in the acquisition of the McDonald's franchises.

¶ 99 The appellate court determined that the McDonald's franchises indeed were acquired in exchange for nonmarital property:

> "The $5,000 listed as capital and the funds to purchase the McDonald's restaurants were derived from Eddy Farms. At the time of purchase, Michael's salary was approximately $24,000 and the house of the parties was then valued at $64,000. These figures and the loan documents in the record show that the collateral for the loans of money and the funds used to purchase the McDonald's restaurants were derived from the properties Michael received through inheritance and as gifts. Michael did prove by clear and convincing evidence that the property which formed Eddy Foods was nonmarital property. Furthermore, since the McDonald's business itself repaid the loans, there was clear and convincing evidence that the assets were acquired by exchanging nonmarital property for them. [Citations.]" *Id.* at 458.

¶ 100 It is vital to recognize that the court did not affirm simply because it determined that no marital assets were used to acquire the McDonald's franchises. That fact alone would not have satisfied any exception under section 503(a), but would have left standing the presumption that the franchises, having been acquired during the marriage, were marital

property. Rather, the court made the further determination that nonmarital assets were used to acquire the franchises and thus that the "exchange" exception in section 503(a)(2) was fulfilled.

¶ 101 In *Heroy*, the wife claimed as marital property certain real estate that the husband, David, and his brother acquired during the parties' marriage. David and his brother purchased the property from David's parents in exchange for a promissory note. They made no down payment, and they paid the monthly installments entirely from rental income generated by the property. After reviewing the facts of *Eddy*, the *Heroy* court concluded that David had proven that the property fell under the "exchange" exception of section 503(a)(2):

> "In this case, David, like the husband in *Eddy*, acquired real estate without ever using marital income or assets to secure and repay the original and subsequent loans on the property. Indeed, David paid for the property with income generated by the property. Accordingly, we find that the exception applies and the trial court did not err in classifying the [property] as a nonmarital asset." *Heroy*, 385 Ill. App. 3d at 672.

¶ 102 The rationales in *Eddy* and *Heroy* are somewhat obscure. In each case, the court applied the "exchange" exception of section 503(a)(2), but the funds exchanged for the assets in question were acquired during the marriage, and it is unclear what exception the court believed the funds themselves satisfied. *Lundahl*, *Joynt*, *Schmitt*, and (as we shall see) *Perlmutter* indicate that even funds from an entity in which a spouse has a premarital ownership interest will not necessarily be nonmarital property. Perhaps there were some unstated premises in *Eddy* and *Heroy*. In any event, neither case was decided by this district. We follow *Schmitt*, and so decline Russell's suggestion to hold, on the basis of *Heroy* and *Eddy*, that the 550 shares were nonmarital property simply because the marital estate was not burdened or prejudiced by their acquisition. If the 550 shares are indeed nonmarital, it will be because they meet one of the exceptions in section 503(a), not because they meet independent criteria of "prejudice" or "burden" such as Russell proposes.

¶ 103 We turn next to Russell's assertion that the 550 shares were nonmarital because they "relate[d] to a preexisting family business in which [the trust] already owned 1500 shares." *Eddy*, *Perlmutter*, and *Werries* each involved an acquisition of assets by a business in which the husband had an interest. (*Jelinek* involved a somewhat different fact pattern and is discussed later in this opinion.)

¶ 104 We begin with *Perlmutter*, a decision from this district that shows consistency with *Schmitt* in how to analyze a spouse's acquisition of assets using funds from a business in which the spouse has an interest. In *Perlmutter*, the husband had a premarital interest in HC Partnership (HC). HC purchased a company called Heitman Group in exchange for a promissory note for $10 million. The husband was an officer and employee of Heitman and was paid a salary. The sale of Heitman closed in November 1977. The parties were married in January 1978. Between December 1978 and December 1979, the note was paid down to $386,875. Also during the parties' marriage, HC acquired multiple other investments. *Perlmutter*, 225 Ill. App. 3d at 368-69, 373.

¶ 105 The trial court held that Heitman was nonmarital property because the funds used to pay the note were nonmarital property, consisting entirely of income from Heitman that was due

to the husband's personal effort. The appellate court noted that the trial court was apparently invoking section 503(a)(8), dealing with "income *** not attributable to the personal effort of a spouse" (750 ILCS 5/503(a)(8) (West 2010)). The appellate court disagreed with the trial court, noting the testimony of Heitman's chief financial officer that the note was paid down at least partly "from the sale of Heitman assets and investments and not solely from [the husband's] income in the form of earnings from employment." *Perlmutter*, 225 Ill. App. 3d at 373. The court held that the use of the husband's employment income would not have transmuted the Heitman interest into marital property, but would have at most entitled the marital estate to reimbursement for the amount of employment income used. *Id.*

¶ 106 As for the remaining assets that HC acquired during the marriage, the appellate court agreed with the trial court that the husband did not overcome the presumption that the assets were nonmarital. The court rejected the husband's contention that the assets were nonmarital because they met the exception in section 503(a)(7) for the "increase in value of [nonmarital] property" (750 ILCS 5/503(a)(7) (West 2010)). The assets were, rather, "new and distinguishable property." *Perlmutter*, 225 Ill. App. 3d at 375.

¶ 107 The *Perlmutter* court drew a distinction between (1) Heitman's investments and assets, and (2) the salary Heitman paid the husband. This district evidently was prepared to hold that Heitman was marital property if the trial court was correct that Heitman was purchased entirety with the husband's salary, which without dispute was income due to the husband's personal effort. Instead, this court determined that Heitman was purchased, at least in part, with proceeds from the sale of Heitman's assets and investments–proceeds that were, uncontestedly, not due to the husband's personal effort. Here, unlike in *Perlmutter*, the parties dispute whether the DBI transfers were due to Russell's personal effort, and there is nothing in the record resolving the question. There is no documentation of the transfers. Further, Russell's characterization of them (in his December 3, 2008, deposition) as "distributions" is not determinative, for he did not explain what he meant by the term, nor does the context suggest a meaning. Not only are all permissible inferences made against the party moving for summary judgment, but any doubts as to the classification of property are resolved in favor of finding it to be marital. These principles, both of which work against Russell, compel us to conclude that Russell did not establish as a matter of law that the DBI transfers were nonmarital property under section 503(a)(8).

¶ 108 Russell contends that it was significant in *Perlmutter* that the purchase of Heitman was "related to [a] pre-marital business interest." This "relation" would have been significant only insofar as it indicated whether the funds used to purchase Heitman were attributable to the husband's personal effort. Again, it apparently was not disputed in *Perlmutter* which funds were attributable to the husband's personal effort and which were not. Here, by contrast, it is contested whether the DBI transfers that went toward the purchase of the 550 shares were attributable to Russell's personal effort. The record does not settle the issue.

¶ 109 Russell also argues that *Perlmutter* contains "no reference to a presumption of personal efforts under section 503(a)(8)," the "income" exception. *Perlmutter* did not expressly state that there is a presumption of personal effort under section 503(a)(8), but this court did quote section 503(a) in full, and we have no reason to suspect that this court did not understand that, in order for marital assets to qualify under section 503(a)(8), all elements of the

exception–namely, that the property in question is income and that it is not attributable to a spouse's personal effort–must be satisfied. There is no reason to believe that *Perlmutter* runs contrary to *Schmitt*.

¶ 110 *Werries* cited and distinguished *Perlmutter*. In *Werries*, the husband purchased, prior to the marriage, an interest in a farm partnership. The appellate court held that the partnership was nonmarital property even though the loan that the husband obtained to purchase the interest was repaid partly by marital funds. *Werries*, 247 Ill. App. 3d at 644. The court reasoned that "the loan was taken out several years prior to the marriage and only a portion, albeit a significant portion, was paid back after the marriage." *Id.* The court held that the wife could at most claim reimbursement for marital contributions toward the loan. *Id.*

¶ 111 The wife in *Werries* went on to argue that, even if the husband's interest in the partnership were nonmarital, the equipment and buildings purchased by the partnership during the marriage were marital. The court acknowledged *Perlmutter*'s holding that the investment assets (other than Heitman) acquired by HC did not represent an increase in value but, rather, were new and separate property. *Id.* at 645 (citing *Perlmutter*, 225 Ill. App. 3d at 375). The *Werries* court found a distinction, however, between the assets of an investment partnership, like HC, and "assets of a farm partnership where the farm equipment was purchased for the purpose of keeping the business operating." *Id.* The court explained: "Nonmarital, closely held corporations, partnerships, or individually owned businesses, including farm operations, can accumulate income and assets in a variety of ways resulting in a substantial increase to the nonmarital estate which should continue to be treated as nonmarital property." *Id.* at 646. The court held, based on their role in the continuation of the farm business, that the newly acquired assets were nonmarital. *Id.* at 645-46.

¶ 112 According to Russell, the wife in *Werries* "attempted to claim that income from the [farm partnership] was marital pursuant to Section 503(a)(8) but the Court held that income from the non-marital property was likewise non-marital because the ownership 'draws' were subject to an 'evening' up at the end of the year." Russell misunderstands *Werries*. The wife in *Werries* did not claim on appeal that the partnership income was marital, and the court never applied section 503(a)(8). Rather, the discussion of the farm partnership appeared to be based on the principles of commingling in section 503(c)(2) (750 ILCS 5/503(c)(2) (West 2010)), and the discussion of the new farm assets appeared to be based on section 503(a)(7), the "increase in value" exception, the same section on which *Perlmutter* relied. Russell finds it significant that "there is no mention whatever in *Werries* of a presumption of personal efforts under [section] 503(a)(8)," but it seems the court simply was not applying that section.

¶ 113 We do wish to comment that the *Werries* court did not expressly consider the nature of the funds that went toward the purchase of the additional farm assets, but seemed to classify the assets based on their purpose. In doing so, *Werries* distinguished this district's decision in *Perlmutter* (which, notably, did consider the nature of the funds in classifying the purchased assets) on the ground that a difference lies between an investment partnership and a farm partnership. Without endorsing that distinction, we note that the evidence here discloses no business purpose for Russell's trust to purchase the 550 shares.

¶ 114 Unlike *Eddy*, *Perlmutter*, and *Werries*, *Jelinek* dealt with a spouse's personal acquisition of an asset from the very entity in which the spouse had a business interest. The *Jelinek* court was asked to determine whether the acquisition of this asset, namely stock in the entity, represented an increase in value of the spouse's premarital equity in the firm and, therefore, met the exception in section 503(a)(7).

¶ 115 The husband in *Jelinek* was an employee and part-owner of a venture capital firm, which, prior to the parties' marriage, issued him 40,000 shares of common stock. *Jelinek*, 244 Ill. App. 3d at 498. Three years after the parties married, the husband's common-share holdings in the firm diminished to 38,500 shares, and the firm issued him 40,000 shares of newly created class B stock. The appellate court reversed the trial court's determination that the class B stock was compensation for the husband's services. The appellate court reviewed the conflicting evidence as to the purpose of the class B stock. Tax records maintained by the firm labeled the stock as compensation to the husband, but other documents, and the trial testimony, indicated that the stock was issued to maintain the husband's original equity in the company. The court also found it significant that the class B stock was issued to officers as well as employees and that still other documents maintained by the firm suggested that the stock was issued to make the company more attractive for resale. *Id.* at 499, 505-06. The court likened the issuance of the class B stock to a "[stock] split or [stock] dividend *** to be considered as an appreciation in value to the premarital holding." *Id.* at 505.

¶ 116 The *Jelinek* court had considerable evidence by which to determine whether the stock represented an increase in value of a premarital holding or, rather, was "compensation for *** services." *Id.* The record here, by contrast, contains no evidence as to whether the transfers from DBI for the purchase of the additional stock represented compensation to Russell or some other form of payment. Therefore, Russell did not overcome the presumption that the transfers were marital property.

¶ 117 The remaining cases Russell cites are *In re Marriage of Samardzija*, 365 Ill. App. 3d 702 (2006), *In re Marriage of Morris*, 147 Ill. App. 3d 380 (1986), and *Landfield*. Russell submits that these decisions demonstrate our courts' "consistent recognition of the important distinction between income earned as a result of a spouse's personal efforts and income received merely as a result of a spouse's ownership interest in a company." While we do not quarrel with this interpretation, these cases do not aid Russell, because here the evidence at the summary judgment stage did not show that the DBI transfers were made "merely as a result of [Russell's] ownership interest in [the] company."

¶ 118 The husband in *Samardzija* was president of a corporation in which he owned stock that was given to him by his parents. The company regularly issued profit bonuses, which, the company's accountant testified, were given only to stockholders and were not based on employment. The appellate court held that the husband's stock was a gift under section 503(a)(1) and that the profit bonuses were income from that nonmarital property under section 503(a)(8). *Samardzija*, 365 Ill. App. 3d at 707. Similarly, the court in *Morris* held that dividends that the husband received on stock that had been gifted to him by his parents were nonmarital property under section 503(a)(8). *Morris*, 147 Ill. App. 3d at 391-92.

¶ 119 *Samardzija* and *Morris* are both examples of passive income not attributable to the

personal effort of the spouse. Russell argues that the DBI transfers were likewise passive income to him because they were "the result of [his] ownership interest[ ] in DBI and not due to [his] personal effort." The record at the summary judgment stage, however, did not reveal the character of the funds from DBI. Although the DBI transfers could, theoretically, have been passive income in several possible ways, there certainly is no indication in the record that they represented dividends (*Morris*) or bonus payments (*Samardzija*) to shareholders of DBI.

¶ 120 In *Landfield*, the appellate court dealt with several issues, but Russell cites the case for the court's discussion of the wife's claim that the marital estate was entitled to reimbursement for the husband's efforts during the marriage in managing a building owned by a partnership in which the husband had a premarital interest. The court held that no reimbursement was required, because the husband received a salary from the partnership, which the court determined was reasonable compensation to the marital estate for the husband's efforts. *Landfield*, 209 Ill. App. 3d at 695.

¶ 121 Russell contends that, in distinction to *Landfield*, he did not expend any personal effort in order to receive the DBI transfers. Again, the record neither supports nor confutes that claim.

¶ 122 We summarize the discussion thus far. The contract for the sale of the 550 shares of DBI stock was signed on January 11, 2004, before the parties were married. The shares were not acquired by Russell's trust until the sale closed on January 1, 2005, after the parties married. Therefore, the shares were presumptively marital property, and Russell bore the burden below of establishing that they fell within one of the exceptions in section 503(a). Russell attempted to meet that burden below by establishing that the funds used to purchase the shares were nonmarital property. Those funds consisted partly of three transfers of $59,575.21 each from DBI to Donald. Russell argues that these transfers constituted "income" from DBI under section 503(a)(8). He initially argues that it was not his burden to show that the transfers were not due to his personal effort, but rather Lori's burden to show that the transfers were due to his personal effort. The plain language of section 503(a), faithfully applied in *Schmitt*, placed on Russell the burden of showing that the transfers were not due to his personal effort.

¶ 123 Also erroneous, as we have explained, is Russell's further assertion that, under the evidence that was adduced at the summary judgment stage, there is no question of material fact that the DBI transfers were not due to his personal effort. Barsella's January 6, 2009, deposition is not properly before us, but even if it were, we would hold that the record does not establish that Russell's entitlement to summary judgment is clear and free from doubt. It is not clear that, in distinguishing between "salary" and "distributions," Barsella was speaking about the transfers made for the purchase of the 550 shares. Moreover, the testimony does not address vital questions under *Schmitt*, *Joynt*, and *Lundahl*, as to when a "distribution" will be deemed compensation. Without Barsella's deposition, the only evidence as to the nature of the DBI transfers is Russell's description of them as "distributions," but that evidence also is inconclusive. Accordingly, we cannot say as a matter of law that the three transfers from DBI for the purchase of the 550 shares of stock were nonmarital property.

¶ 124 We next address Russell's contention that, even if the DBI transfers were marital property, the 550 shares would not thereby be transmuted into marital property. Russell cites our statement in *Perlmutter* that "nonmarital property is not transmuted into marital property merely as a result of the use of marital funds to reduce indebtedness" (internal quotation marks omitted) (*Perlmutter*, 225 Ill. App. 3d at 373 (citing *In re Marriage of Crouch*, 88 Ill. App. 3d 426, 430 (1980)). "Nonmarital property" begs the question; the more appropriate language is, "property that is otherwise nonmarital." In both *Perlmutter* and *Crouch* the property at issue would otherwise have been nonmarital because it was acquired and possessed before the marriage, though outstanding debt existed into the marriage. See *Perlmutter*, 225 Ill. App. 3d at 368 (sale to HC of Heitman closed prior to parties' marriage); *Crouch*, 88 Ill. App. 3d at 428-29 (artwork purchased prior to parties' marriage). Here, however, since the sale of the 550 shares closed during the marriage, and only then were the shares acquired, the shares were not otherwise nonmarital property, but in fact were presumptively marital property. Therefore, the present facts are not appropriately characterized as the reduction, by marital funds, of indebtedness on what would otherwise be nonmarital property. Essentially, Russell has attempted to invert the analysis by asserting that property acquired during a marriage becomes nonmarital because nonmarital funds are used to pay down the indebtedness on the property. He cites no authority to that effect, nor can we imagine that any exists.

¶ 125 We analyze this, rather, as an instance of commingling of marital and nonmarital funds into the purchase of a new asset. By "nonmarital funds" we mean the $300,000 from Armand to Russell. Below (*infra* ¶¶ 130-37), we hold that the trial court properly held as a matter of law that the $300,000 was a gift and, hence, nonmarital.

¶ 126 Commingling is addressed in section 503(c) of the Act (750 ILCS 5/503(c) (West 2010)), which provides:

> "(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." (Emphasis added.)

¶ 127 Russell asserts that any "supposed commingling would result maximally in a right of reimbursement to the marital estate." He suggests that "[t]he reimbursement analysis is exactly why the parties stipulated that the $13,736.92 that Russell paid to Donald in 1999 would be reimbursed to the marital estate, as Russell could not show that the source of the funds was non-marital." We are not sure what Russell means by this comment. The dissolution judgment does state that the parties agree that $13,736.92 should be reimbursed to the marital estate. There is no suggestion, however, that Lori relinquished at the summary judgment stage any claim regarding the remaining proceeds that went toward the purchase of the 550 shares.

¶ 128 Russell makes no argument on commingling, but rather has devoted his energies to arguing that the transfers from DBI were an instance of reduction of indebtedness on otherwise nonmarital property through the use of marital funds, such that section 503(c) has no application. Accordingly, we, too, will not linger on the issue, but will point out that there is a triable issue of fact whether the contributing estates lost their identity. We note particularly that the absence of a specified price-per-share in the stock purchase agreement calls into doubt the possibility of ascertaining how many shares were purchased by each estate. See *In re Marriage of Davis*, 215 Ill. App. 3d 763, 769 (1991) (where marital and nonmarital funds were deposited into an account and not differentiated, stock purchased with those funds could not be differentiated based on source of funds). Thus, we cannot conclude as a matter of law that the 550 shares of DBI stock were not transmuted into marital property.

¶ 129 In a case such as this that involves many layers of analysis, we would have appreciated some indication of why the trial court ruled as it did, if only so that we could note the points on which we agree with the court. Here, however, we do not know if the trial court (1) determined that the 550 shares were acquired *before* the marriage and that the subsequent payments represented mere marital reduction of indebtedness on nonmarital property, for which Lori was entitled, at most, to reimbursement; or (2) determined that the 550 shares were acquired *after* the marriage, and further determined either that (a) Russell overcame the presumption under section 503(a) by establishing that the transfers from DBI were nonmarital; or that (b) Russell did not overcome the presumption that the transfers were marital, but nonetheless the 550 shares were not transmuted into marital property, and Lori had the right to claim reimbursement for the marital estate's contribution (see 750 ILCS 5/503(c)(2) (West 2010) (right of reimbursement for one estate's contribution to the other)). The trial court's remark that Lori had "the right" at trial to claim reimbursement does not highlight which of these was the rationale adopted by the court.

¶ 130 b. The $300,000 Transfer From Armand to Russell

¶ 131 The parties disputed below whether the $300,000 from Armand to Russell was a gift under section 503(a)(1) of the Act (750 ILCS 5/503(a)(1) (West 2010) (nonmarital property

includes "property acquired by gift, legacy or descent")). The dispute continues into this appeal.

¶ 132 First, for the reasons stated above, we reject Russell's assertion that the 550 shares of DBI stock were acquired before the marriage. The shares were, rather, acquired in January 2006, subsequent to the parties' marriage, when the sale of the stock closed. There arose, then, a presumption that the stock was marital property. Russell claimed below, and reasserts on appeal, that the stock was exchanged for a gift, namely the $300,000 transfer from Armand to Russell. Lori asserts that there is a triable issue of fact whether the $300,000 was a gift. (Lori touches on the issue again later in her brief when she addresses the trial court's ruling in its dissolution judgment that the marital estate is not entitled to reimbursement for the $300,000.) We disagree.

¶ 133 As a preliminary matter, we note that Lori cites portions of the record that are not appropriate for us to consider in reviewing the grant of summary judgment. She cites testimony that Armand gave at the portion of the dissolution hearing that occurred between the trial court's grant of summary judgment and its ruling on Lori's motion to reconsider. Our review extends only to those materials submitted to the trial court for consideration in deciding the initial summary judgment motion or the motion to reconsider. See *McCullough*, 254 Ill. App. 3d at 947. There is no indication that any trial testimony was submitted to the trial court for review in deciding the motion to reconsider. Therefore, we will not consider Armand's testimony.

¶ 134 A transfer from a parent to a child is presumed to be a gift. *In re Marriage of Hagshenas*, 234 Ill. App. 3d 178, 186 (1992). This presumption can be overcome only by clear and convincing evidence to the contrary. *Id.* Likewise, the presumption that all property acquired after marriage is marital property can be overcome only by clear and convincing evidence. *Id.* Accordingly, in a case where the presumptions are in conflict over certain property, they cancel each other out, and the trial court is free to determine the issue of whether the asset in question is marital or nonmarital without resort to either presumption. *Id.* at 186-87. In order to obtain summary judgment, however, Russell had to establish that it was clear and free from doubt that the $300,000 was a gift. *Adames*, 233 Ill. 2d at 296.

¶ 135 The relevant documentary evidence consisted of (1) a $300,000 check, dated June 4, 1999, written to Russell by Armand, (2) a promissory note of the same date, charging principal of $300,000 plus interest, (3) a January 4, 2000, letter from Armand and Elaine memorializing a gift of $40,000 to both Russell and Lori, consisting in part of $28,734 in forgiven debt, and (4) gift tax returns filed by Armand for the years 1999 though 2005, acknowledging gifts in certain amounts to Lori and Russell but not explaining the context of those gifts. There are also affidavits from Barsella, Russell, and Armand, and depositions from Russell and Barsella. Armand and Russell both state in their affidavits that Armand "always intended to gift $300,000 to [Russell]" and that the transfer was couched as a loan for tax and estate purposes (Armand added that he followed the advice of his accountant in characterizing the transfer as a loan). Barsella, too, averred that the transfer was characterized as a loan simply for tax purposes. He repeated this assertion at his deposition, and also testified that the plan was to have Armand loan the money to Russell and then forgive it over time, which Armand ultimately did through gift tax returns. At his December 3, 2008,

deposition, Russell testified that, when Armand presented him with the check for $300,000, Armand said that it was a gift.

¶ 136 In her argument, however, Lori neglects most of this evidence and asserts instead that Armand should not be permitted to deny that the $300,000 was a joint gift to her and Russell given that Armand acknowledged writing her gift letters and reporting gifts to her on his income tax returns. "Armand and Russell," she contends, "should not be allowed to use Lori as the recipient of gifts to aid them with tax liabilities, and then deny her that status to suit their purposes in this case." She asserts that "[a] party should never be able to take advantage of its own wrong to defeat the other party's cause of action." Lori, however, cites Armand's trial testimony, which, as we noted, had not yet occurred when the trial court made its initial summary judgment ruling, and which was not submitted to the trial court as part of Lori's motion to reconsider. In that testimony, Armand indicated that the gift letters and gift tax returns represented gifts to Russell and Lori of the $300,000 that was originally styled as a loan. The letters and returns themselves, however, do not explain the context for any of the amounts listed. In any event, since Armand's trial testimony was not properly before the court for purposes of summary judgment, there was no evidence at that stage that the $300,000 was a joint gift to Lori as well. Thus her argument, at least as evaluated on the record at the summary judgment stage, rests on the false premise that Armand claimed her as a recipient of the $300,000. We stress that Lori makes no other argument, such as that the $300,000 was not a gift at all. (In any case, it is not immediately obvious how, if there was a loan rather than a gift, the loan proceeds could be considered marital property.)

¶ 137 Lori, we conclude, has not established the existence of any dispute of material fact as to whether the $300,000 was a gift to Russell.

¶ 138 c. Conclusion

¶ 139 For the foregoing reasons, we hold the trial court erred in concluding, as a matter of law, that the trust's interest in DBI was nonmarital property. The parties do not address the potential downstream impact if the interest in DBI was at least partially nonmarital, *i.e.*, whether that status would have affected the classification of assets purchased from the proceeds of the sale of the interest. Neither will we opine on that issue.

¶ 140 3. The Trust's Interest in DRIP

¶ 141 Lori argues that the trial court also erred in determining as a matter of law that the trust's interest in DRIP was nonmarital. We agree.

¶ 142 DRIP was created in 1998, and Russell does not dispute that his interest in DRIP was acquired after the marriage. A presumption arose, therefore, that the interest was marital. Russell argues that, like his trust's interest in DBI, his trust's interest in DRIP was exchanged for income that he received from a nonmarital asset, namely DBI, and that this income was not attributable to his personal effort.

¶ 143 We address first Lori's contention that Russell did not prove by clear and convincing evidence that the "distributions" (as she terms them) that DBI made on behalf of Russell's

trust to fund its interest in DRIP were not attributable to his personal effort. Russell responds by pointing to Barsella's January 6, 2009, deposition. As noted above, we do not consider the deposition, because it was not made part of the record presented to the trial court in the summary judgment proceedings. Even if we did consider the deposition, however, we would still hold that summary judgment was improper. In his deposition, Barsella characterized as "distributions" the payments that DBI made to DRIP on behalf of Russell's trust. Barsella testified that distributions were paid to officers of DBI based on their ownership in the company and were "usually" disbursed from current earnings. Barsella remarked that distributions were "different" from the salary that officers also received if they were employees of DBI. Russell argues that Barsella's deposition leaves no room for dispute that, under *Joynt* and *Lundahl*, the distributions paid to DRIP were not attributable to his personal effort. We disagree. As we explained above, the record is silent on issues vital to an analysis under *Joynt* and *Lundahl*, such as the reasonableness of Russell's salary and his access to the retained earnings of DBI. Our presuming a set of facts favorable to Russell on these points would contravene the dictates that all permissible inferences must be made against the party moving for summary judgment and that all doubts must be resolved in favor of finding property to be marital. See *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 21 (facts that permit a reasonable inference against the movant cannot support summary judgment). Because such a significant factual gap remains as to Russell's salary and DBI's policy on distributions, there is nothing barring the inference that the distributions represented compensation to Russell.

¶ 144 We note that Lori does not argue that the insurance policies transferred from DBI to DRIP were marital property, and we express no opinion on that issue.

¶ 145 Lori also argues that there is evidence in conflict with Russell's and Barsella's testimony and averments that Russell never had an individual interest in DRIP. First, Lori notes that the DRIP agreement states that Russell will obtain a 1.09% interest in DRIP. Second, with respect to Barsella's averment that the initial distribution to DRIP in 1998 was made first to the trust, which then transferred it to DRIP, Lori notes Russell's deposition testimony that the trust did not have a bank account until January 2005. Because we have already held that a question of material fact exists on the issue of DRIP's capitalization, we need not decide this question. Nothing in our opinion, however, should be construed as barring Lori from further litigating the issue of which entities or individuals held interests in DRIP.

¶ 146 4. Russell's Interest in BPA LLC

¶ 147 In the court below, Lori opposed Russell's motion for summary judgment on the classification of Russell's interest in BPA LCC. She does not address here, however, the propriety of the summary determination that BPA LCC is nonmarital property.

¶ 148 5. The Noncompete Agreement

¶ 149 Lori's argument on the summary judgment ruling also includes this sentence: "While Russell claimed the restrictive covenant was part of a $149,135 deposit he made into the parties' joint checking account [citation], the redemption agreement called for a $350,000

payment." This argument relies on Russell's trial testimony, which we have no reason to believe was considered by the trial court in rendering summary judgment. Accordingly, the argument is forfeited for failure to cite a relevant portion of the record. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *McCullough*, 254 Ill. App. 3d at 947 (reviewing court limited to what was submitted to the trial court for consideration in deciding the initial summary judgment motion or the motion to reconsider).

¶ 150 Lori revisits this issue later in her brief where she characterizes it as a reimbursement issue that was not appropriate for summary judgment. We see no indication, however, that this issue was presented to the trial court for summary judgment. The court decided the issue in its dissolution judgment. If Lori believes that the issue was decided on summary judgment, she gives no explanation for why the trial court believed that the issue was outstanding at the time of trial.

¶ 151 C. Conclusion

¶ 152 For the foregoing reasons, we hold that the trial court erred in determining as a matter of law that the interests in DBI and DRIP held by Russell's trust were nonmarital. We do not address whether this error impacted the classification of the assets purchased with the proceeds of the trust's interests in DBI and DRIP.

¶ 153 III. THE JUDGMENT OF DISSOLUTION

¶ 154 Lori raises four main arguments concerning the dissolution judgment. First, she argues that the trial court erred in determining the amount of reimbursement that the marital estate was due from Russell's nonmarital estate. Second, she argues that the trial court's division of the marital estate was inequitable. Third, she asserts that the court erred in denying her petition for contribution to attorney fees and costs. Fourth, she argues that the amount of maintenance awarded her is inadequate.

¶ 155 We decline to decide the issues regarding property division, contribution, and maintenance, as all are related to the issue of property classification. See *Schmitt*, 391 Ill. App. 3d at 1022 (error in property classification requires redetermination of distribution, contribution, and maintenance issues). Obviously, property cannot be properly divided until it is properly classified. Moreover, in evaluating a spouse's request for maintenance or contribution, courts consider the size of the spouse's nonmarital estate and the amount of marital property awarded to her. See 750 ILCS 5/504(a)(1) (West 2010) (factors relevant to maintenance determination include "the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance"); 750 ILCS 5/503(j)(2) (West 2010) ("Any award of contribution to one party from the other party shall be based on the criteria for division of marital property under this Section 503 and, if maintenance has been awarded, on the criteria for an award of maintenance under Section 504.").

¶ 156 As for the reimbursement issues, some of them are mooted by our determination that the trial court erred in granting summary judgment as to the trust's interests in DBI and DRIP. For instance, Lori argues that, if we agree with the trial court's ruling that the trust's interests

DBI and DRIP are nonmarital, then we should at least order reimbursement for the transfers from DBI for the purchase of the trust's interest in DRIP and the 550 additional shares of DBI stock. Because we hold that the trial court erred in determining that the trust's interests in DBI and DRIP are entirely nonmarital, we do not address Lori's alternative argument.

¶ 157 We also do not address Lori's argument that the marital estate is entitled to reimbursement for the $300,000 that Russell received from Armand. This issue might become moot on remand. To explain, we note that we rejected above Lori's contention that there is a question of material fact whether the use of the $300,000 in the purchase of the 550 shares transmuted them into marital property. If, however, the 550 shares were marital property by virtue of the DBI distributions used to purchase them, then Lori's claim for reimbursement of the $300,000 would amount to a claim on the marital estate by the marital estate. Neither common sense nor the law validates such a claim. See 750 ILCS 5/503(c)(2) (West 2010) (allowing for reimbursement for contributions by one estate of property to another estate of property).

¶ 158 Lori does, however, make two arguments independent of the property classification issue on which the trial court erred. First, Lori argues that the trial court ordered an inadequate amount of reimbursement by Russell for the compensation he received in exchange for his noncompete promise that was part of the redemption agreement signed in January 2004. Second, she argues that the court erred in denying her reimbursement for the income that she claims Russell received while working for R. Dann, Inc.

¶ 159 "When one estate of property makes a contribution to another estate of property, *** the contributing estate shall be reimbursed from the estate receiving the contribution notwithstanding any transmutation ***." *Id.* Contributions must be retraceable by clear and convincing evidence. *Id.* We reverse the trial court's determination of reimbursement only if it is against the manifest weight of the evidence. *In re Marriage of Ford*, 377 Ill. App. 3d 181, 185-86 (2007).

¶ 160 On the issue of the compensation paid Russell for the noncompete agreement, the trial court ruled as follows in the dissolution judgment:

> "*Lori has requested reimbursement of $100,000* for monies received for a protective covenant in the sale of [DBI], which was deposited to [Russell's] non-marital investments. Russell's gift of $149,135 of these funds for marital expenses is adequate compensation for reimbursement to the marital estate." (Emphasis added.)

¶ 161 Lori argues that the trial court erred because the allocation memorandum (in her words) "stated the sum being paid was $350,000." The trial court, Lori claims, should have awarded an additional $250,000. We reject this argument for several reasons. First, as the trial court correctly recited in the italicized portion, Lori sought reimbursement of only $100,000. Her claim for an additional $250,000 is, therefore, forfeited. See *In re Marriage of Mather*, 408 Ill. App. 3d 853, 857 (2011) (points not argued below are forfeited for review). Second, the evidence supports reimbursement of only $100,000. The allocation memorandum upon which Lori relies was part of the submissions during the summary judgment proceedings, but was not admitted into evidence at trial. Third, we agree with Russell that Lori has pointed to nothing in the record to indicate that Russell's nonmarital estate actually received

$350,000 in connection with the noncompete agreement. Before Lori can claim reimbursement, she must first prove that Russell's estate received the contribution in question.

¶ 162 As for the income Lori claims Russell received from R. Dann, Inc., the trial court determined as follows:

> "Lori requests reimbursement for Russell's work as a consultant for Russell's non-marital entity, R. Dann, Inc. The Court finds Russell's testimony credible that the company was established solely to minimize taxes from his retirement from [DBI] and [that] the income reflected on the tax return was included as part of the retirement package."

¶ 163 The trial court was referring to the following evidence. Russell testified at trial that he retired from DBI in January 2005. Russell acknowledged that tax documents for 2005 show income to him from R. Dann, Inc. First, R. Dann's 2005 tax return, which designates the company as a subchapter S corporation, shows gross receipts of $224,712 and net income to Russell of $169,965. Also, the parties' 2005 joint tax return shows income of $169,965 to Russell from R. Dann. R. Dann's 2005 return lists the "business activity" of R. Dann as "consulting." The return also claims various business expenses as deductions. Russell testified, however, that he did no work for R. Dann and that the company was created for tax purposes. He stated that the gross receipts listed on R. Dann's 2005 return consisted of the $100,000 payment that he received for the noncompete clause in the January 2004 redemption agreement.

¶ 164 Russell argues that his testimony was credible and supported by the documentary evidence. He further argues that, even if he did receive income from R. Dann for services performed for it, Lori did not prove her claim for reimbursement, because she did not establish that the income was received by Russell's nonmarital estate rather than the marital estate.

¶ 165 We agree with Russell that Lori did not prove that Russell's nonmarital estate received the income from R. Dann reported on its 2005 tax return and the parties' 2005 joint return. Therefore, we reject her claim.

¶ 166 Lastly, our reversal of the trial court's summary judgment ruling moots Lori's argument that the trial court erred in refusing her offers of proof that certain assets purchased with the proceeds of the trust's sale of its interests in DBI, DRIP, and BPA LCC were marital. The trial court refused the offers of proof because they would be redundant of matters that had been decided on summary judgment. We do not decide this issue, because the classification of DBI and DRIP might well impact the classification of the assets purchased with the sale proceeds.

¶ 167 IV. CONCLUSION

¶ 168 For the foregoing reasons, we reverse the trial court's order granting summary judgment. This ruling moots most of the issues that Lori raises regarding the trial court's dissolution judgment. However, we have reached two reimbursement issues that are independent of the property classification issues that were the subject of the summary judgment ruling.

Specifically, we affirm the trial court's ruling on Lori's reimbursement claim for amounts she contends Russell's nonmarital estate received for the noncompete clause in the redemption agreement and for work done for R. Dann.

¶ 169 Affirmed in part and reversed in part; cause remanded.