2019 IL App (2d) 180712-U
No. 2-18-0712
Order filed September 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF LORI MARIE GILDERSLEEVE, Petitioner-Appellee, and WALTER L. JOHNSON, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 16-D-371 Honorable Timothy J. McJoynt, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The Appellate Court held that certain of the respondent's investment accounts and his Motorola Solutions 401(k) account were marital property where the respondent's testimony did not support his theories that those accounts were nonmarital; the Appellate Court reversed the trial court's ruling that the respondent's Northeast Investors Trust account was marital property; the Appellate Court also held that the trial court abused its discretion in awarding certain personal property to petitioner; the Appellate Court vacated the trial court's award of attorney fees to petitioner and remanded for a hearing as to the reasonableness of such an award.

¶ 2 Respondent, Walter L. Johnson, appeals the order of the circuit court of Du Page County dissolving the parties' marriage. At issue is the trial court's classification and division of property as well as its award of attorney fees. We affirm in part, reverse in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 We will summarize the facts most pertinent to this appeal, reserving a discussion of additional facts for the analysis section. Walter, age 50, and petitioner, Lori Marie Gildersleeve (Marie), age 41, were married on April 18, 2007. Irreconcilable differences led to the dissolution of the marriage. Two minor children, Alivia and Elyse, were born to the parties. The parties entered into a parental allocation agreement on June 20, 2017. Neither party sought maintenance from the other. The three-day trial in June 2018 involved contested issues over certain of Walter's financial accounts that he acquired before the marriage and which he asserted remained his nonmarital property.

¶ 5 The evidence at trial showed the following. Prior to the marriage, Walter established a 401(k) plan while he was employed by Motorola Solutions, Inc. as an engineer. He continued to contribute to that plan during the marriage. The trial court found that Walter earned $199,000 annually from his present job with Ericsson and that his passive income from investments increased his yearly income to $219,000. Marie is a sales representative who earned $163,000 annually.

¶ 6 Walter owned a home in Hoffman Estates. After the marriage, he sold that home and purchased a home on Lowell Avenue in Glen Ellyn. Walter used some of the proceeds of the Hoffman Estates sale to remodel the Lowell Avenue house. Walter placed Marie on the title to the Lowell Avenue property, and, according to Marie, both parties contributed to that home

during the marriage. Also during the marriage, but after the parties' separation, Marie purchased a home on Park Boulevard in Glen Ellyn, in part with a loan from Walter. She used $65,000 of marital funds for the down payment. The court found that both residences were marital property. The court awarded Walter the Lowell Avenue home and Marie the Park Boulevard home.

¶ 7 The parties maintained college accounts for both children, with Marie managing one account and Walter the other. In the judgment order (JDOM), the court provided that Marie was to maintain both college accounts. The parties, though separated, opened a joint charge account that they used for purchases for the children. Walter closed that account when, according to Walter, Marie failed to pay her half of the credit card charges. Both parties testified that they were aggressive savers. Marie testified that they split the household expenses. The parties did not have a joint checking account. They each maintained separate accounts and paid bills from those accounts.

¶ 8 Over two days at trial, Walter presented his claim that many of his financial accounts, which he acquired before the marriage, remained his nonmarital property. In 2004, Walter received numerous investment accounts (the inheritance accounts) as a result of his father's death in 2003. The court found that no activity occurred in those accounts during the marriage, and Marie conceded that those were Walter's nonmarital property. Her concession included the Northeast Investors Trust account. The court found all of the inheritance accounts, except the Northeast Investors Trust account, to be Walter's nonmarital property. The court gave Walter the balance that existed in the Northeast Investors Trust account at the time of the marriage but divided the remainder between the parties.

¶ 9 The evidence showed that Walter acquired other investment and bank accounts before the marriage that he actively used during the marriage to help pay household expenses. With respect

to these accounts, the parties agreed that the balances before the marriage were Walter's nonmarital property. The court found that Walter's testimony as to those balances was the only clear testimony that he gave during the trial, and the court awarded him said balances.

¶ 10 The parties stipulated to the introduction into evidence of over 2000 pages of Walter's financial documents. The documents were mainly monthly account statements for each of the pre-marriage accounts spanning the 11-year marriage. The court cautioned that it would require testimony regarding those transactions that were at issue. Nevertheless, Walter particularly identified only 79 transactions that he made using the following accounts (collectively Walter's pre-marriage accounts) (not part of the inheritance): (1) Andigo checking, savings,[1] and money market; (2) Capital One savings; (3) Emigrant Direct savings; (4) E-Loan/Banco Popular; and (5) TD Ameritrade brokerage account.[2]

¶ 11 Walter conceded during trial that the Andigo checking account was marital. He testified that he deposited his paychecks into that account and that he used it as the "hub" to pay household bills and to "transfer money in and out to multiple money market accounts." Walter testified that when his checking account was low, he transferred money from the other pre-marriage accounts into it to cover checks that he had written or to meet routine family expenses. As to the transactions that Walter specifically identified during his testimony, he either did not recall the purpose for the transactions or he testified that he used the money to cover household and family expenses.

[1] Other than maintaining a minimal balance, Walter did not actively use the savings account. The court awarded this savings account to Walter as his nonmarital property.

[2] Walter also had a retirement account with TD Ameritrade.

¶ 12 Walter believed that the pre-marriage accounts remained his nonmarital property because he replaced withdrawals with matching, or near-matching, marital funds. Walter prepared his Exhibit 1.12 containing charts purporting to substantiate his theory, but the court found that exhibit incomplete and misleading and did not allow it into evidence. The exhibit is not part of the record on appeal. The court rejected Walter's theory, stating: "[I]t was undiscernible to the court how the amounts came in and out with marital money and then somehow became nonmarital money again." The court found that "substantial amounts" of marital money "went in and out" of these pre-marriage accounts "hundreds of times." The court also found that "nonmarital money periodically put into the marriage were [*sic*] shown to be gifts to the marriage."

¶ 13 The second half of Walter's testimony concerned his Motorola Solutions 401(k) account. Walter opined that 80%[3] of that asset was his nonmarital property. He attempted to introduce into evidence a self-made exhibit containing his calculations, but the court excluded it because Walter was not a CPA capable of showing by generally accepted accounting principles that his calculations were correct. Walter's attorney then made an offer of proof. However, the proposed exhibit is not part of the record for this court's review.

¶ 14 Calculator in hand, Walter spent the third day of trial futilely attempting to demonstrate his 80% theory. At one point, Walter's counsel said, "Walter, can you check in with us?" Walter then admitted that his math was wrong. He tried his calculations again, but he was unable to correct his errors. He even asked his counsel if his calculations had to be accurate. To help speed things up, Marie stipulated to the formula (though not to its accuracy) that Walter used. The

[3] In his written closing argument, Walter argued that his nonmarital percentage was 79.5839%. In its analysis, the court rounded the figure down to 79%.

court characterized Walter's testimony as "unintelligible." As only one example of Walter's verbal calculations, he explained his computation of the nonmarital portion of the account as follows: "Well, that would be the inverse of the 96 percent, which is basically 0356—actually, I can just do the delta 481.95. I just want to do a quick general sanity check. Yeah. So, I got $694.18."

¶ 15 The parties submitted written closing arguments. Walter's closing argument did not specifically address the Northeast Investors Trust account, the children's college accounts, or the disposition of personal property, such as automobiles. With respect to the Lowell Avenue home, Walter asserted that because it was purchased with nonmarital funds and Marie lived there less than two years, he was entitled to no less than 80% of its value. With respect to his pre-marriage accounts, Walter argued that he made a gift to the marital estate of "more than $256,494.17" and that the "marital estate is certainly not entitled to any further reimbursement." With respect to the Motorola Solutions 401(k), Walter included calculations in summary form. In her closing argument, Marie requested that Walter contribute $20,000 toward her attorney fees because he unnecessarily increased the cost of litigation by pursuing his unsubstantiated theories concerning his pre-marriage property.

¶ 16 On August 3, 2018, the court orally delivered its decision. It then incorporated its oral rulings into the written JDOM, where it divided the marital estate 50-50. The court orally noted that the documents that were stipulated into evidence were done so "without concern for the rules of evidence." The court stated that it was "left to sift through hundreds of pages [with] little direction," as neither party brought to the court's attention "the importance of parts *** of these voluminous exhibits."

¶ 17 In its oral ruling, the court found that the Lowell Avenue home was purchased during the marriage and that both parties contributed to that home, making it a marital asset. The court found that the nonmarital money that Walter put into the Lowell Avenue home transmuted the money's character into a marital asset. The court also found that the Park Boulevard home was a marital asset, as it was purchased using marital money. The court ruled that the proceeds of the sale of the Hoffman Estates home were comingled with marital assets and lost their identity as nonmarital funds. The court ordered Marie to repay to Walter the money that he loaned her for the down payment on the Park Boulevard home.

¶ 18 The court rejected Walter's testimony that the pre-marriage accounts were nonmarital. The court stated that Walter's "routine" of using nonmarital money for marital purposes and then putting "the same or similar amount back in the nonmarital account with marital money" did not "aid [Walter] in his burden of tracing nonmarital money." The court concluded that "[t]his activity did clearly cause the money going in and out of these accounts to lose its identity." The court explained that the wall that Walter thought that he erected to keep his pre-marriage accounts nonmarital was "basically broken down by the money going in and out of these accounts during the marriage literally hundreds of times." The court further stated that Walter's inability to recall what a lot of the money going in and out of the accounts was used for "[harmed] his attempt to convince the court that he traced all of the monies specifically."

¶ 19 The court opined that Walter "offered an unintelligible theory of calculations" as to the Motorola Solutions 401(k) account, "which was not accepted by the court." "[Walter's] calculations," the court said, "were virtually undiscernible to the court." The court noted that Walter was not an expert and was unable to testify to the necessary evidence to support his position. The court concluded that it "rejects the 79 percent theory." The court also rejected

Marie's stipulation as to Walter's methodology during his testimony as "not helpful to the court."

¶ 20 In addition to those oral rulings detailed above, in the JDOM the court awarded Marie a 2006 Honda Accord and ordered Walter to contribute $25,000 toward Marie's attorney fees. Walter filed a timely appeal.

¶ 21 II. ANALYSIS

¶ 22 Walter's first contention is that the court "*sua sponte*" awarded Marie certain assets that she agreed should be awarded to Walter: (1) one-half of the Northeast Investors Trust account; (2) the 2006 Honda Accord; and (3) both of the children's college fund accounts.

¶ 23 Marie argues that Walter forfeited these arguments by failing to address the disposition of those assets to the trial court. Walter initially replies that Marie's brief should be stricken because it violates Illinois Supreme Court Rule 341 (eff. May 25, 2018). Specifically, Walter asserts that Marie fails to cite to the record as required by Rule 341(h)(6) and (7) and that she misstates the facts and ignores the cases that he cited in his opening brief.

¶ 24 A party's brief that fails to substantially conform to pertinent supreme court rules may be stricken. *Gruby v. Department of Public Health*, 2015 IL App (2d) 140790, ¶ 12. The purpose of the rules governing briefs is to require parties to present clear and orderly arguments, supported by citations to the record and authority, so that the reviewing court can ascertain and dispose of the issues. *Gruby*, 2015 IL App (2d) 140790, ¶ 12. Because striking a brief is a harsh sanction, we will do so only when the violations hinder our review. *Gruby*, 2015 IL App (2d) 140790, ¶ 12. Marie's brief does not include necessary citations to the record and to authorities in many of her points and arguments. Although her effort to comply with the rules was minimal, we do not believe that these deficiencies, severe as they are, warrant the sanction of striking the brief.

¶ 25 The trial court's classification of property will not be disturbed unless it is against the manifest weight of the evidence. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44. A decision is against the manifest weight of the evidence only where the opposite conclusion is clearly apparent or when the court's findings appear to be unreasonable, arbitrary, or not based on the evidence. *Romano*, 2012 IL App (2d) 091339, ¶ 44. While the standard of review for classification of property as marital or nonmarital is manifest weight of the evidence, the court's decision regarding the division of property is reviewed for abuse of discretion. *In re Marriage of Dunlap*, 294 Ill. App. 3d 768, 777 (1998).

¶ 26 We first address the Northeast Investors Trust account. We disagree that Walter failed to address this asset at trial. Walter testified that he inherited that account upon his father's death. Walter's Exhibit 1.17, which he specifically identified at trial, contained the account statements from December 2007 through February 13, 2018. The exhibit consists of only 10 pages. It shows that Walter did not conduct any activity in that account during the marriage. The record does not reflect why the court treated this account differently from Walter's other inheritance accounts. Indeed, Marie agreed in her closing argument that the account should be awarded to Walter as his nonmarital property. We take that agreement to be akin to a stipulation. A stipulation is a voluntary agreement between opposing parties concerning some relevant point. Black's Law Dictionary 1455 (8th ed. 2004). When the parties to a dissolution proceeding stipulate to the value and division of the marital estate, that agreement is binding upon the court. *Dunlap*, 294 Ill. App. 3d at 776-77. Accordingly, we hold that the court's classification of the account as marital property was against the manifest weight of the evidence and its division between the parties was an abuse of discretion.

¶ 27 Regarding the Honda and the children's college accounts, Marie is correct that Walter did not specifically argue to the trial court that he should be awarded those assets. Walter now asserts that to have raised an argument as to their disposition would have been "premature" because he could not predict what the court would do. Alternatively, Walter argues that he was so prejudiced that we should apply the plain-error doctrine. We reject these arguments. Walter knew that the court would classify and then divide all of the assets. To that end, he stipulated to Marie's Exhibit B, which listed every asset of the parties, including the Honda and the college funds. We note that the court gave both parties fair warning that they could not swamp the court with documents without offering testimony thereto and raising appropriate arguments. Nevertheless, with respect to the Honda, we determine that it would be unfair to say that Walter is guilty of forfeiture. Marie agreed in her closing argument that Walter should be awarded the Honda, although she claimed one-half its value. Quite naturally, Walter would have seen no reason to address that asset in his argument. Consequently, we hold that the court abused its discretion in awarding the Honda to Marie. At oral argument, Marie disclosed that the Honda no longer exists. In the JDOM, the court valued the Honda at $4,150. We, therefore, order Marie to pay Walter one-half its value, $2075.

¶ 28 That leaves the college funds. Marie's Exhibit B shows that Marie maintained Alivia's fund and Walter maintained Elyse's fund. At trial, Marie agreed that arrangement should continue. Again, we take that to be akin to a stipulation. Accordingly, we hold that the court abused its discretion in awarding Marie both funds. Therefore, we award the children's accounts to the parent in whose name those account were prior to the dissolution.

¶ 29 Next, Walter contends that he proved by clear and convincing evidence that his pre-marriage accounts retained their nonmarital identity. Section 503 of the Illinois Marriage and

Dissolution of Marriage Act (Act) (750 ILCS 5/503 (West 2018)) governs the disposition of property in a dissolution proceeding. All property of the parties to a marriage belongs to one of three estates: (1) the estate of the husband, (2) the estate of the wife, or (3) the marital estate. *In re Marriage of Werries*, 247 Ill. App. 3d 639, 641-42 (1993). Property brought to the marriage belongs to the party who brings it. *Werries*, 247 Ill. App. 3d at 642. Section 503 of the Act creates a rebuttable presumption that all property acquired during the marriage is marital property regardless of the manner in which title is held. 750 ILCS 5/503(a), (b)(1) (West 2018); *Romano*, 2012 IL App (2d) 091339, ¶ 45. This presumption can be overcome by a showing of clear and convincing evidence that the property was acquired by a method listed in section 503(a) of the Act. 750 ILCS 5/503(a) (West 2018); *Romano*, 2012 IL App (2d) 091339, ¶ 45. The applicable exceptions listed in section 503(a) include: (1) property acquired by gift, legacy, or descent, and (2) property acquired before the marriage, except as it relates to retirement plans that have both marital and nonmarital characteristics. 750 ILCS 5/503(a)(1), (6) (West 2018).

¶ 30 Before a court can distribute property upon a dissolution of marriage, it must first classify that property as either marital or nonmarital. *Romano*, 2012 IL App (2d) 091339, ¶ 44. The burden of proof is on the party claiming that the property is nonmarital, and any doubts as to the classification of property will be resolved in favor of finding that the property is marital property. *In re Marriage of Stuhr*, 2016 IL App (1st) 152370, ¶ 51.

¶ 31 Property can be transferred between estates, either intentionally or unintentionally by gift or commingling. *Werries*, 247 Ill. App. 3d at 642. Notwithstanding any transmutation, section 503(c)(2) of the Act provides that the contributing estate shall be reimbursed from the receiving estate, unless the contribution cannot be retraced by clear and convincing evidence *or* was a gift. 750 ILCS 5/503(c)(2) (West 2018); *In re Marriage of Henke*, 313 Ill. App. 3d 159, 167 (2000).

The determination of all issues regarding the credibility of the parties or the weight to be given the evidence lies with the trier of fact. *Werries*, 247 Ill. App. 3d at 642. As noted, the court's classification of an asset as marital or nonmarital will not be disturbed unless it is contrary to the manifest weight of the evidence. *Stuhr*, 2016 IL App (1st) 152370, ¶ 49.

¶ 32 Walter first isolates the TD Ameritrade brokerage account and argues that it is nonmarital in its entirety. Walter maintains that he "identified all money that went in and out" of the account during the marriage and that he demonstrated that perhaps only $5,000 was marital money. The record shows that Walter identified his Exhibit 1.16, which consisted of 377 pages of unnumbered financial records pertaining to the TD Ameritrade brokerage account. In his written closing argument, Walter listed the TD Ameritrade transactions on a chart covering two pages that purported to list every transaction in all of the pre-marriage accounts.[4] In his written closing argument, Walter did not single out the TD Ameritrade transactions for argument. As noted, the only argument that Walter raised was that he gifted over $256,000 to the marital estate and should not have to "reimburse" it further. "It is well-settled law in Illinois that issues, theories, or arguments not raised in the trial court are forfeited and may not be raised for the first time on appeal." *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8. Accordingly, this argument is forfeited.

¶ 33 Next, Walter maintains that the funds in his pre-marriage accounts never lost their identity as his nonmarital property because he traced the source of those funds from his pre-marriage accounts. He also argues that he made contributions to the marital estate totaling

[4] At oral argument, Walter stated that the chart contained in his closing argument was the same as the exhibit that the court excluded from evidence and was, therefore, part of the record. However, argument of counsel is not evidence. *Johnson v. Lynch*, 66 Ill. 2d 242, 246 (1977).

$255,965.03 more than Marie contributed to the marital estate and that the marital estate is not entitled to further "reimbursement." Walter includes several pages of charts in his opening brief purporting to trace the funds. Marie objects to those charts on the ground that they were excluded from evidence. We have no way of knowing whether the charts in the brief are the same as those excluded from evidence because Walter did not include his excluded exhibit in the appellate record for our review. We take the charts to be part of Walter's argument on appeal, not evidence.

¶ 34 Walter's argument and case law regarding tracing misses the mark, because the court found that Walter, over an 11-year marriage, so repeatedly placed funds into the marital checking account and used that money for marital purposes that the money lost its identity and was transmuted into marital property. The court stated that Walter's activity in these accounts, spanning "hundreds" of transactions, caused "the money going in and out of these accounts to lose its identity." "Transmutation is based on the presumption that the owner of the nonmarital property intended to make a gift of it to the marital estate." *In re Marriage of Vondra*, 2016 IL App (1st) 150793, ¶ 14. Here, the trial court specifically found that the transmutation resulted in a gift. There is no right to reimbursement when a gift is made. *In re Marriage of Dann*, 2012 IL App (2d) 100343, ¶ 126; *Werries*, 247 Ill. App. 3d at 642.

¶ 35 The record supports the court's findings. As to each transaction to which Walter testified, beginning in August 2007 and ending in April 2018, he either had no recollection of where the money went or he testified that it was used to pay family expenses, from routine expenses to taxes to the down payment for and remodeling of the Lowell Avenue home to babysitting expenses. As the trial court remarked: "[T]here was no evidence *** that these transactions were loans or were intended to be [paid] back." Walter did not testify that he told Marie at the time of

the transactions that he did not intend to make a gift to the marital estate. Walter relies on the fact that his Andigo checking account, though marital, was not joint with Marie and argues that there is no *presumption* of gift. See *In re Marriage of Foster*, 2014 IL App (1st) 123078, ¶ 74 (where account is not a joint account, no gift presumption may arise when nonmarital funds are deposited into it). However, the court did not find that Walter made a gift by applying any presumption. Rather, the court looked at the "hundreds" of transactions in and out of the checking account and the pre-marriage accounts over 11 years.

¶ 36 Walter also argues that his nonmarital funds were traceable and that he used the Andigo checking account as a conduit to make the payments that he described. That argument is not persuasive because Walter did not use the nonmarital funds to purchase nonmarital property but to pay family expenses. In *Vondra*, the appellate court rejected an identical argument where the wife used nonmarital funds to pay the mortgage on jointly held property. *Vondra*, 2016 IL App (1st) 150793, ¶ 17. Moreover, here the court found that Walter was not able to trace his nonmarital funds: "This routine (putting the same or similar amount back into the nonmarital accounts with marital money) did not *** aid [Walter] in his burden of tracing nonmarital money as he attempted to do." The court found that Walter's theory of "how the amounts came in and out with marital money and somehow then became nonmarital money again" was "undiscernible to the court." In saying that Walter's testimony was "undiscernible," the court made a finding that Walter's testimony was not credible. "This type of credibility determination lies squarely within the province of the trial court, and we will not disturb it on appeal." *Stuhr*, 2016 IL App (1st) 152370, ¶ 69.

¶ 37 The trial court relied on this court's opinion in *In re Marriage of Henke*, 313 Ill. App. 3d 159 (2000). Despite Walter's attempt to distinguish *Henke* based on some minor differences, we

believe that it is apposite. In *Henke*, as in the instant case, the parties did not have a joint checking account. *Henke*, 313 Ill. App. 3d at 167. Instead, the husband used a checking account that he had prior to the marriage to pay all of the household and family expenses over the course of the 16-year marriage. *Henke*, 313 Ill. App. 3d at 166-67. Marital funds were deposited into that checking account during the marriage. *Henke*, 313 Ill. App. 3d at 167-68. We noted that "funds were deposited and withdrawn from the checking account throughout 16 years of marriage and were used to pay all family, household, and farming expenses during that time." *Henke*, 313 Ill. App. 3d at 169. From those facts, we concluded that the trial court's finding that the checking account was marital property was not against the manifest weight of the evidence. *Henke*, 313 Ill. App. 3d at 169. Here, over the course of the 11-year marriage, Walter used his pre-marriage accounts to funnel money into the marital Andigo checking account from which he paid family and household expenses. Accordingly, we cannot say that the trial court's finding that Walter's pre-marriage accounts were marital property was against the manifest weight of the evidence.

¶ 38 Nevertheless, Walter asserts that, even if his transactions resulted in a transmutation of his nonmarital accounts to the marital estate, he "over compensated" the marital estate by $255,965.03,[5] thus not entitling the marital estate to further "reimbursement." Walter relies on *In re Marriage of Crook*, 211 Ill. 2d 437 (2004). However, *Crook* is not relevant to our facts.

¶ 39 In *Crook*, a case involving a 33-year marriage, Robert farmed land owned by Patricia's family. *Crook*, 211 Ill. 2d at 439. Patricia's nonmarital property consisted of five acres, a farmhouse, machine shed, barn, crib, shop, and bin, all of which were used as part of the farming

[5] Before the trial court, Walter argued that he over compensated the marital estate by $256,494.17. The discrepancy in numbers is not significant to our analysis.

operation. *Crook*, 211 Ill. 2d at 440. The parties jointly borrowed money to build a new shed on the property. *Crook*, 211 Ill. 2d at 440. After Robert filed for a divorce, Patricia took $42,000 from their joint bank account and applied $40,000 to the construction loan. *Crook*, 211 Ill. 2d at 440. The trial court found that the marital estate was entitled to be reimbursed for the $40,000 that Patricia withdrew from the joint account. *Crook*, 211 Ill. 2d at 441. Our supreme court held that the construction loan was a marital debt and the $42,000 that Patricia used from marital funds toward that marital debt did not transmute to her nonmarital estate. *Crook*, 211 Ill. 2d at 454-55. The supreme court then stated that, even if the $42,000 had transmuted to Patricia's nonmarital estate, the marital estate was not entitled to reimbursement because it had "reaped the benefit of Patricia's nonmarital contributions in providing the marital estate with a free home and the buildings necessary to sustain a successful farming operation for most of the marriage." *Crook*, 211 Ill. 2d at 455. The court further stated that "this farming operation provided substantial income to the marital estate." *Crook*, 211 Ill. 2d at 455.

¶ 40 In *Crook*, it was clear how the marital estate benefitted from Patricia's nonmarital contributions over the 33-year marriage. Her homestead and farm buildings were necessary to the farming operation. *Crook*, 211 Ill. 2d at 455. Here, it is impossible to discern to what degree the marital estate benefitted because Walter testified that he either did not recall what the nonmarital money was used for or that he used it to pay household and family bills. Also, one easily traceable transaction was at issue in *Crook*; whereas, in our case, money went in and out of the accounts in what the court found were hundreds of transactions. Consequently, we reject Walter's contention that he "over compensated" the marital estate.

¶ 41 Walter further asserts that, if this court holds that his pre-marriage accounts are marital, his nonmarital estate should be reimbursed for the sale proceeds of the Hoffman Estates home

that he deposited into those accounts. The court rejected this theory on the basis that the proceeds were commingled with marital assets and lost their identity. In his brief, Walter does not flesh out this argument or cite any authority in support of it, so we deem it forfeited. See *In re Marriage of LaRocque*, 2018 IL App (2d) 160973, ¶ 62 (failure to cite relevant authority results in forfeiture of the argument; it is not the appellate court's role to research issues on the appellant's behalf).

¶ 42 Next, Walter argues that the court's determination that the Motorola Solutions 401(k) account, except for the balance before the marriage, was marital property was against the manifest weight of the evidence. We first address Walter's contention that the court erred in not admitting into evidence his summary containing his math calculations. Admissibility of demonstrative exhibits is a matter within the trial court's discretion and will be disturbed only upon a showing of a clear abuse of that discretion. *Burke v. Toledo, Peoria & Western R. Co.*, 148 Ill. App. 3d 208, 213 (1986). Here, Walter failed to include the disputed exhibit in the record on appeal and has therefore forfeited any argument regarding its admissibility. See *Redlin v. Village of Hanover Park*, 278 Ill. App. 3d 183, 193 (1996) (it is the appellant's burden to affirmatively show error from the record on appeal; where the appellant fails to include disputed exhibits in the record on appeal, the appellate court presumes that the trial court did not commit error, and the appellant forfeits the argument on appeal).

¶ 43 After the court ruled the summary inadmissible, it allowed Walter to testify to his theory. Walter began his calculations at page 387 of the report of proceedings and gave up at page 403 when he said, "I am still trying to figure out my math." Near the end of Walter's testimony, Marie's counsel stipulated to the formula that Walter was using (though not to its accuracy), but the court ultimately rejected the stipulation, stating that it was not helpful because Walter's

testimony was "undiscernible." The court found that Walter "offered an unintelligible theory of calculations."

¶ 44 The record bears out that characterization of Walter's testimony. We gave an example of that testimony above. As another example: Walter's counsel asked him to state the total premarital and postmarital values in the account at the end of 2007. Walter answered: "It's $374,858.09. And that should equal—just as a double check—$374,585.09 (sic), if I subtract out what we—the portion of the gains and losses of 694 which was postmarital *** gains/losses, I subtract out 18,787.77, that takes me down to 355,103. I guess my numbers are off there slightly." Then Walter's counsel asked him to calculate the premarital and postmarital values for 2008 when there was a loss. Walter testified: "So, this one is a little less math. So, you have the beginning balance of 374—I will need my math from earlier, though. I am not sure it's accurate, though. I mean, should I make sure it's accurate?" All 16 pages of Walter's testimony concerning his calculations were in a similar vein.

¶ 45 Section 503(a)(6) of the Act provides that property acquired before the marriage is nonmarital property. 750 ILCS 5/503(a)(6) (West 2018). Generally, any increase in the value of nonmarital property is also considered to be nonmarital property. 750 ILCS 5/503(a)(7) (West 2018). As noted, Walter claimed that approximately 79% of the balance in his 401(k) account at the time of trial represented the increase in value of his nonmarital portion. Evidence regarding the earnings of nonmarital funds in a 401(k) account is the proper subject of expert testimony. *In re Marriage of Faber*, 2016 IL App (2d) 131083, ¶ 12. The court refused to admit Walter's self-made summaries into evidence because he lacked the expertise to make those calculations. Nevertheless, the court permitted Walter to testify to his calculations. Over many pages of trial testimony, Walter tried to articulate how he arrived at his figures. Finally, he admitted that his

math was wrong and that his calculations were inaccurate. In short, there is no evidence in the record which the court deemed credible to support Walter's contention that approximately 79% of the 401(k) account was his nonmarital property. Consequently, we determine that the court's classification of the 401(k) as marital property after the date of the marriage was not against the manifest weight of the evidence.

¶ 46 Next, Walter challenges the court's (1) denial of his request for Marie to pay one-half of the children's expenses, (2) denial of his request to be awarded 265 shares of Motorola stock rather than a lump sum representing its value, (3) apportionment of his Motorola pension 50-50, and (4) order requiring Walter to maintain twice as much life insurance on the children as Marie was ordered to maintain. Some of these arguments are only one paragraph, and in none does Walter cite any authority in support of them. Consequently, we deem those arguments forfeited. See *LaRocque*, 2018 IL App (2d) 160973, ¶ 62 (failure to cite relevant authority results in forfeiture of the argument; it is not the appellate court's role to research issues on the appellant's behalf).

¶ 47 Next, Walter asserts that the court abused its discretion in not awarding him a greater share than 50% of the Lowell Avenue house. In addition to the 50%, the court awarded Walter all of the itemized tax deductions from 2017 going forward. Walter purchased the house during the marriage, and shortly thereafter he put Marie on the title. Walter acknowledges that the home is a marital asset. Walter contends that he is entitled to a greater share than Marie because his contribution to the asset was greater. He relies on section 503(d)(1) of the Act, which provides that the court, when disposing of property, shall consider "each party's contribution to the acquisition, preservation, or increase or decrease" in its value. 750 ILCS 5/503(d)(1) (West 2018). Walter argues that he paid the entire down payment from his nonmarital money, and that

he paid for the majority of the renovations. Walter claims that Marie contributed toward paying the mortgage, taxes, insurance, and some of the utilities for only two years before she purchased her own home and filed for divorce. According to Walter, splitting this asset 50-50 gave Marie a "windfall." Walter cites *In re Marriage of Demar*, 385 Ill. App. 3d 837, 854 (2008), where the husband was awarded 60% of a Smith Barney account (but only 50% of the other assets) due in part to his using his pre-distribution of marital property to retire the margin debt in that account. What Walter fails to point out is that the husband in *Demar* argued on appeal that he was entitled to even more than 60%, a position rejected by the appellate court based on the abuse-of-discretion standard of review. *Demar*, 385 Ill. App. 3d at 854. Also, the appellate court in *Demar* noted that the trial court, in making its division of property, considered all of the factors enumerated in section 503(d), whereas Walter focuses only on the first factor.

¶ 48 We do not believe that the court abused its discretion in splitting the Lowell Avenue house 50-50. In addition to the 50-50 split, the court awarded Walter all of the itemized tax deductions on the home from 2017 onward. The evidence showed that the funds used for the down payment were marital property, as were the funds used for the renovations. Though Walter claims that he contributed vastly more to the marital estate than Marie, the trial court made no such finding. Indeed, Walter's claim is based on his theories that the court found to be "undiscernible."

¶ 49 Next, Walter argues that the court erred by excluding Marie's 2017 tax refund from the division of the marital estate. At trial, Marie testified that she had not yet filed her 2017 taxes. In his closing argument, Walter claimed that he was entitled to half of the value of any refund. In the JDOM, the court presumed that the "2017 and earlier tax obligations are resolved due to lack of evidence as to this issue at trial." Walter argues that the "lack of evidence" was occasioned by

Marie's postponing filing her tax return until after the trial. Walter cites *In re Marriage of Ormiston*, 168 Ill. App. 3d 1016 (1988), for the proposition that any tax refund should have been divided as marital property. Marie argues that Walter forfeited this issue by not raising it below. We disagree that it was not raised. Marie testified that she had not filed a 2017 tax return, and Walter requested in his closing argument that he be awarded one-half of any refund.

¶ 50 Where the right to a tax refund accrues during the parties' marriage, the refund is treated as marital property subject to division. *Ormiston*, 168 Ill. App. 3d at 1018. "The fact the refund [is] not received until after the marriage [is] dissolved does not change or detract from its characterization as marital property." *Ormiston*, 168 Ill. App. 3d at 1019. While we do not impute any ill motives to Marie in having sought an extension to file her taxes, we agree with Walter that any refund should have been divided 50-50, as with the other assets. Accordingly, pursuant to our authority under Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we award Walter 50% of any 2017 tax refund that Marie may have received.

¶ 51 Lastly, Walter argues that the court abused its discretion when it ordered him to pay $25,000 of Marie's attorney fees. Specifically, Walter asserts that there was insufficient evidence at trial to justify that award and the court incorrectly faulted him for the length of the trial. At trial, Marie testified that she had paid $50,000 in attorney fees and that she still owed her attorney $22,000. In her closing argument, Marie argued that Walter was overly litigious in forcing the matter to trial when he did not have evidence to substantiate his claims that many of his assets remained his nonmarital property. Marie asked for an award of $20,000 toward her fees pursuant to section 508 of the Act (750 ILCS 5/508 (West 2018)). Marie did not articulate the basis on which she calculated the $20,000 figure.

¶ 52 In his "Respondent's Response to Petitioner's Closing Argument," Walter requested that the issue of attorney fees be reserved. On May 31, 2018, Marie filed a petition for contribution to her attorney fees pursuant to section 508(a) and (b) of the Act. Her petition requested fees under section 508(b) for Walter's alleged litigiousness in pursuing his theories regarding his premarital property. Walter issued a subpoena to Marie's counsel for his billing records, and counsel filed a motion to quash the subpoena. The court postponed ruling on those matters until after the proofs closed. Walter, thus, suggested that the court reserve providing for attorney fees until it ruled on the pending motions. However, in the JDOM, the court disposed of the issue of attorney fees by ordering each party to pay his or her own fees and costs. Additionally, the court ordered Walter to pay Marie $25,000. The court stated in the JDOM that it considered the following factors: (1) an interim fee award of $3000; (2) both parties' incomes and assets; (3) Walter's nonmarital estate; (4) the duration of the trial, in relation to Walter's efforts to have the court find "a substantially large sum of assets" as his nonmarital property; (5) Marie's fee petition that was still "undetermined"; and (6) the fact that Walter presented no evidence at trial relating to fees.

¶ 53 Walter argues that Marie presented no credible evidence at trial as to how much she paid her attorney because she listed an incorrect amount on her financial affidavit and that she initially misspoke at trial, saying that she paid $72,000 and owed $22,000. She then corrected herself and testified that she paid $50,000 and still owed $22,000. Walter also asserts that Marie's testimony was insufficient because she did not introduce into evidence a retainer agreement or any billing statements that would allow the court to determine the reasonableness of the fees. Walter further asserts that he did not present a defense to Marie's petition for fees at trial because he relied on the court's position that the matter of fees would be addressed after

trial. Regarding his litigiousness lengthening the trial, Walter claims that the court did not acknowledge that it delayed the trial when it recessed early one morning.

¶ 54 The court did two things in ruling on the issue of attorney fees in the JDOM. First, in determining that each party was responsible for his or her own fees and costs, the court denied that part of Marie's pending petition for contribution that was brought pursuant to section 508(a) of the Act (750 ILCS 5/508(a) (West 2018)). Under section 508(a), a court may order a party to contribute a reasonable amount of the opposing party's attorney fees. *In re Marriage of Patel & Sines-Patel*, 2013 IL App (1st) 112571, ¶ 113. A contribution award is based on the criteria for the division of marital property. *Patel*, 2013 IL App (1st) 112571, ¶ 113. In the JDOM, the court recited that it considered an interim fee award of $3000, both parties' incomes and assets, and Walter's nonmarital estate. In addition, the spouse seeking contribution must establish his or her inability to pay and the other spouse's ability to pay. *Patel*, 2013 IL App (1st) 112571, ¶ 113. The evidence showed that Marie earned $163,000 annually and had the ability to pay her own fees. Thus, Walter cannot complain on appeal that the court denied her petition for contribution brought under section 508(a), because the decision was in his favor. See *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 386 (1983) (a party cannot complain of error which does not prejudicially affect it).

¶ 55 The second thing that the court did in the JDOM was presumably grant that part of Marie's pending petition for contribution brought pursuant to section 508(b) of the Act (750 ILCS 5/508(b) (West 2018)). Under section 508(b), if the court finds that a party needlessly increases the cost of litigation, it shall "allocate all fees and costs" of all parties to the party or counsel found to have acted improperly. 750 ILCS 5/508(b) (West 2018); *In re Marriage of Harrison*, 388 Ill. App. 3d 115, 120 (2009). Section 508(b) is mandatory, not discretionary. *In re*

Marriage of Walters, 238 Ill. App. 3d 1086, 1098 (1992). Here, the court ordered Walter to pay $25,000 to Marie for increasing the cost of litigation. In its oral ruling after trial, the court stated: "[Walter's] position [regarding the 401(k)] was a lengthy part of the trial and, frankly, to some extent made the trial go longer than it should have."

¶ 56 As noted, evidence regarding the earnings of nonmarital funds in a 401(k) account is the proper subject of expert testimony. *Faber*, 2016 IL App (2d) 131083, ¶ 12. The court found that Walter was not a CPA and was "unable in his testimony to show by accepted accounting principles the necessary evidence to support his position." The record supports this finding. However, the record does not disclose on what basis the court awarded $25,000, which was $5,000 more than Marie requested and nearly one-third of Marie's total fees.

¶ 57 The court stated in the JDOM that it considered Marie's pending petition for contribution. In that petition, she included her retainer agreement. The agreement disclosed that her trial attorney, Brett Williamson, billed at the rate of $335 per hour for court time. Even assuming that Walter's testimony relating to his 401(k) theory took 8 hours of court time, Marie's fees would have been only $2680. While an award under section 508(b) does not depend on a party's inability to pay the fees or the other party's ability to pay, it must be *reasonable* based on, *inter alia*, the time spent, the ability of the lawyers, and the complexity of the work. *Walters*, 238 Ill. App. 3d at 1098. Here, the record does not reflect that the court considered any of those factors. Accordingly, we vacate the award of $25,000 and remand this cause to the trial court with directions to conduct a proper hearing to determine the amount of reasonable fees to be awarded using the *Walters* criteria.

¶ 58 III. CONCLUSION

¶ 59 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed in part, reversed in part, vacated in part, and remanded with directions.

¶ 60 Affirmed in part; reversed in part; vacated in part; remanded with directions.