IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D18-3674

DENISE JOHNSON YON,

Appellant,

vs. L.T. Case No. 2015-DR-1670

TERRELL EDWARD YON,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

WARD & KETCHERSID, P.A.

William Ketchersid
Florida Bar No. 24640
bketchersid@flaattorney.com
1241 Airport Road, Suite H
Destin, Florida 32541
Telephone: (850) 837-5507

CREED & GOWDY, P.A.

Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
Thomas A. Burns (*Of Counsel*)
Florida Bar No. 12535
tburns@appellate-firm.com
865 May Street
Jacksonville, Florida 32204
Telephone: (904) 350-0075

Counsel for Appellee

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STATEMENT OF THE CASE AND FACTS

This divorce appeal arises from a short-term marriage. (R. 630.) Both spouses had been married and divorced before, and each had significant premarital assets. (R. 630.) For example, before the marriage the Wife acquired several pieces of real property, including a "Beach House" in Port St. Joe.[1] (R. 107, 865-66.) Thus, not surprisingly, the Husband thought it advisable for both of them to sign a prenuptial agreement. (*See* R. 834-35, 856-57.) He retained a lawyer to draft the prenuptial agreement, and he presented it to his bride-to-be for her signature, with her accountant present. (*See id.*) The Wife refused to sign, pitched a fit, bragged about her own premarital wealth, and stormed out. (R. 834-835.) As the Husband testified: The Wife "jumped up with one of her tirades and said, I'm not going to sign that. I don't need his money. I have $2 million plus and I have three homes." (R. 834.) Then she "stomped out." (R. 834.) At that point, "every man there" told the Husband, "do not commingle with her ever." (R. 835.)

Carefully heeding that advice, the Husband "made a serious effort" to "preserve the separation of the parties[']' assets." (R. 631, *see* R. 835.) This finding by the trial court was confirmed by, among other things, the testimony of the financial advisor who managed the Husband's accounts; he testified that during the marriage

[1] The Husband made no claim on the Wife's "Beach House," and the trial court correctly held it was nonmarital property not subject to equitable distribution. (R. 632.)

the Husband never withdrew a single penny from his multi-million-dollar premarital trust. (R. 929-30.) The Wife repeatedly demanded the Husband "change her to the beneficiary of [the] trust" (R. 826), "hacked into" the trust online (R. 817, 826), and demanded they commingle their premarital funds to make their marriage "work" (R. 996). The Husband never gave into these demands. (R. 835.) Despite the Husband's resistance to the Wife's efforts to commingle, the Wife argues that the Husband's premarital assets became part of the marital estate. (*See* Initial Br. 12-35.)

Course of the proceedings

The Wife petitioned to dissolve the marriage. (R. 14-16.) The Husband answered (R. 72-74) and later filed an amended answer, which included a counterpetition (R. 116-121, 139-140). The Wife answered the counterpetition. (R. 141-143.)

After discovery, the case proceeded to a two-day bench trial. (R. 630, 673-1074.) The trial court's final order stated that, before it ruled, it reviewed "trial memorandums" and a transcript of the trial. (R. 630.) However, the record on appeal contains only the Husband's trial memorandum. (R. 6-13, 592-602.) In the final order, the Husband's views on what constituted the marital estate generally prevailed. (R. 630-638.) The Wife moved for rehearing, which the trial court denied. (R. 639-647.) This appeal followed. (R. 648-667.)

Disposition in the lower tribunal

A. The final order and the evidence supporting its findings.

To clear up the mischaracterizations in the Wife's statement of the case, it is best to begin with the trial court's *actual* findings of fact and *actual* legal rulings in the order on appeal. The trial court found the parties were married on or about May 30, 2009,[2] separated permanently on or about September 30, 2013,[3] and petitioned for divorce on or about May 30, 2015.[4] (*See* R. 631; R. 14, 72, 116-17, 141, 828, 983.) For that reason, the trial court concluded that the Husband and Wife lived in an "intact marriage" from May 30, 2009 until September 30, 2013. (R. 631.)

The trial court, however, did not rule that the scope of the marital estate was determined only as of September 30, 2013; rather, it used that date to determine whether the Husband had any intent to "gift" certain funds to the marital estate after the parties' permanent separation. (R. 633-34.) For example, the Archstone transaction occurred after September 30, 2013, and the trial court explained it could not have been a gift because, among other things, "the parties had separated by this time, and Mrs. Yon was living with someone else and Wife submitted no evidence of any intended gift." (R. 633 n.1.)

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[2] The Husband alleged the parties married on May 29, 2009 (R. 117), but the Wife disagreed and alleged they were married on the date found by the trial court (R. 141).
[3] The parties agreed they had been separated since October 2013. (R. 117, 141.)
[4] The Wife's divorce petition actually was filed on May 29, 2015. (R. 6, 14.)

As a broad overview, the trial court ruled the Wife was not entitled to an equitable distribution of the following assets either because they were nonmarital or because the Wife's claims to them would be offset by the Husband's claims to assets controlled by the Wife:

- The Terrell E. Yon, Jr. Revocable Trust ("the premarital trust");
- $250,000 from the Archstone transaction;
- Terry Yon & Associates, Inc., including the BP Claim money and revenues from the sale of the Doc Kits;
- the Miramar Beach property at 50 Rue St. Tropez;
- the IRA accounts; and
- the Santa Rosa Beach property in Walton County.

(R. 632-638.) More specifically, the trial court ruled as follows.

1. The Terrell E. Yon, Jr. Revocable Trust.

From "unrefuted evidence," the trial court found the Husband established the premarital trust more than thirteen months before the marriage (*i.e.*, April 2008). (R. 632; *see* R. 459, 736, 1010-11.) It was funded originally with "approximately $5,075,000.00" (R. 632, 1012) and managed by Edward Knowles, a private banker who initially worked for Morgan Keegan, an investment company. (R. 631-32, 926-28.) Mr. Knowles also managed the Wife's separate accounts. (R. 631-32, 928-29.) During the marriage, Mr. Knowles left Morgan Keegan and joined SEI, a different investment company. (R. 631-32, 928.) Because of this change in companies, and

while the marriage was still intact, the Husband and the Wife transferred their separate individual accounts—and the Husband transferred his premarital trust accounts—from Morgan Keegan to SEI. (R. 631-32, 862, 927-28, 952-53.) But the parties never commingled these assets. (R. 632, 835, 928-30, 1013.)

The trial court accepted the Husband's and his financial adviser's testimony that the Husband: (1) never added the Wife to any of the premarital trust accounts; (2) never intended to gift any of the premarital trust funds to the Wife; and (3) did not make any withdrawals from, or deposits into, the premarital trust funds (except the deposit from the Archstone transaction, *see infra* subpart A.2, at 6). (R. 632; *see* R. 730, 817, 831, 834, 835, 929-30, 991-992, 1013.) The financial adviser, Mr. Knowles, unequivocally affirmed that there had been no withdrawals from, or deposits into, the trust during the marriage. (*See* R. 929-30.) Moreover, the Husband gave "exclusive control" to Mr. Knowles and SEI and "default[ed] to their judgment in managing the accounts investing and reinvesting funds and assets during the marriage." (R. 632-633; *see* R. 884, 991-992.) The trial court further found the mere act of transferring the accounts from Morgan Keenan to SEI did "not change the character of the Trust" or its status as separate non-marital property. (R. 633; *see* R. 595-596, 928, 930-931, 952-953.)

2. $250,000 from the Archstone transaction.

One of the premarital trust's investments was with the Archstone hedge fund. (R. 633, 930-31.) During the marriage, but after the permanent separation, Archstone had a liquidation event, which required it to return more than $250,000 to the premarital trust.[5] (R. 563, 633 & n.1, 930-31.) For "reasons only known to Archstone," it refused to "wire the funds directly to SEI as requested." (R. 633; *see* R. 930-31.) Instead, in January 2014, it wired the funds "to a Regions Bank account that was still titled in both the Husband and Wife's names." (R. 633; *see* R. 563, 982-83.) Shortly thereafter, in April 2014, the Husband deposited $250,000 of these funds via check back into the premarital trust accounts managed by SEI. (R. 633; *see* R. 451, 456, 942-943, 982-985.) The trial court found the Husband did not intend to gift these Archstone funds to his Wife because (1) the parties had separated months before this transaction, (2) the marriage was already irretrievably broken, (3) the Husband testified he had no such intent, (4) the Wife was already living with another man, and (5) the Wife "submitted no evidence of any intended gift." (R. 633 & n.1; *see* R. 117, 141, 828-29, 889, 1013.) For those reasons, the trial court ruled "the presumption of a gift to a spouse does not apply." (R. 633.)

[5] Though the testimony was that the amount transferred from Archstone was $250,000 (R. 930-31), the bank statement shows it was $280,561 (R. 563).

3. Terry Yon and Associates, Inc.

The trial court found that the Husband established Terry Yon and Associates, Inc. ("TYA") in 2002, before the marriage, and had always been its sole owner. (R. 633; *see* R. 705, 963.) The trial court accepted the Wife's, Husband's, and office manager's testimony that the Wife "was not involved in the business or employed by the business during the marriage." (R. 634; *see* R. 815-816, 884, 920, 964-65.) The trial court also accepted the Husband's testimony that he never gifted any ownership interest in TYA to the Wife. (R. 633-34; *see* R. 815, 835.) For those reasons, the trial court found TYA was the Husband's nonmarital property. (R. 633-34.)

Nevertheless, the trial court recognized that at least some funds generated by TYA—the BP money and the Doc Kits profits—could have become marital assets, but it found any claims by the Wife to these assets were offset by the Husband's claims to assets held by the Wife. (R. 635-36 ¶ 10.b.)

a. The BP money

The trial court found that TYA's receipt in 2015 of $802,000 from BP related to lost income in 2010 from the notorious oil spill in the Gulf of Mexico and "was an asset of the Company not the Husband." (R. 633; *see* R. 280-89, 718-22, 727, 729, 837.) It also found, however, that "[t]o the extent any of the BP Claim Money was paid to Husband it would be properly classified as marital earnings," and it estimated that based on the evidence "this was approximately $400,000 net." (R. 633;

see R. 327, 329, 513, 766-77, 944-46, 1053-54.) The trial court found that "most of the BP Claim money was spent on debt service, including the debt service related to the marital residence" at Moore Pond in Tallahassee. (R. 633; *see* R. 588, 635, 734, 766-67, 811-12, 836, 993-94, 1009.)

One timing fact, not discussed in the trial court's order, is significant. The notice of TYA's eligibility for the BP payment was dated June 29, 2015 (R. 280, 720-21)—one month after the Wife filed the divorce petition (R. 14). As the Wife concedes (Initial Br. 4, 30), TYA did not receive the BP money until August 4, 2015 (R. 325, 718), more than two months after she filed the divorce petition (R. 14). Though the Wife asserts the BP money was "generated through the Husband's marital efforts" (Initial Br. 30), she cites no evidence to support this statement.

b. The Doc Kits profits

The trial court found as a fact that, in late 2013 and 2014, TYA sold pain relief creams called Doc Kits. (R. 633 ¶ 8g(B).) TYA "had significant post separation income from these sales."[6] (R. 633 ¶ 8g(B); *see* R. 691.) But, this "income was an asset of the Company," not the Husband. (R. 633.) The trial court found that "some Company funds were used to pay marital expenses and also, by the Husband, to purchase a lot in [Santa Rosa Beach in] South Walton County (after the parties

[6] The Wife virtually concedes this fact by asserting the Doc Kits project "was hugely successful sometime in 2015." (Initial Br. 4).

separated but during the marriage).” (R. 633 ¶ 8g(B); *see* R. 457-58, 810, 1029-30.) Yet, the trial court further found, the post-separation timing meant “there was no evidence of an intent to gift the funds to the marriage.” (R. 633 ¶ 8g(B).)

c. The trial court denied the Wife’s claims to the monies received by the Husband from TYA because such claims were offset by the Husband’s claims to assets held by the Wife.

The trial court denied the Wife’s claims to monies received by the Husband from TYA (the BP money and Doc Kits profits), as the amount of such claims was less than the amount of the Husband’s claims to the enhanced values of the Wife’s nonmarital assets. (R. 635-37.) The trial court referred to these competing claims as “coverture claims.” (R. 635-36, ¶ 10.)

The trial court found that the Husband’s “net worth decreased during the marriage” because the Husband had spent “at least $858,672.00 servicing the marital residence [at Moore Pond] without contribution from the Wife” and “spent approximately $2,000,000.00 in premarital certificates of deposit (held in his name alone).”[7] (R. 635-36 ¶ 10b; *see* R. 588-89, 718, 775, 818-20, 822-24, 831, 843, 1009, 1018.) The Wife resided at this marital home until March 2017, well after the parties

[7] The Husband attested to, among other things, an estimated $2.5-$3 million of marital expenses, that $750,000-$800,000 of that amount went to the marital residence, and that he had taken out a loan of $1.1 million, secured by CDs, to pay for marital expenses. (R. 585, 588, 832-33, 843, 1009, 1018.)

separated and the divorce petition was filed. (R. 14, 635, 993-94.) The parties purchased the home before the marriage as co-tenants. (R. 634 ¶ 9a; R. 699, 818-19.)

The Wife's brief asserts: "The [trial] court found that the Wife may owe the Husband $429,336[8] for his payments toward the marital home while the parties were married because they bought the house before the marriage and were thus tenants in common." (Initial Br. 33.) This assertion is flatly contradicted by the trial court's order. The trial court "denie[d] the Husband's contribution claim from the co-tenant Wife in the amount of $429,336.00," as it found "the lack of any prior demand [by the Husband] for contribution is at least laches and possibly evidence of a gift to the marriage." (R. 637 ¶ 4.)

The trial court's observation about the $858,672 spent by the Husband on the marital home served as a predicate for a different judicial finding unrelated to the Husband's denied contribution claim. Below, the Wife claimed entitlement to one half of the distributions taken by the Husband from TYA, which in turn had obtained much of its money from the BP money and the Doc Kits profits. (*See* R. 635-36 ¶ 10b.) The trial court acknowledged these "monies received by the Husband from [TYA] post separation could properly be classified as marital income to the Husband and subject to a coverture claim by the Wife." (*Id*.) Yet, the trial court did not allow

[8] $429,336 is half of $858,672, the amount the Husband spent servicing the marital home. (*See* R. 635-36 ¶ 10b.)

the Wife to claim one half of these monies because the "majority of [this] money" was "spent to pay marital expenses from which the Wife benefited." (R. 635-36 ¶ 10b; *see* R. 588-89, 718, 843, 1018.)

While the Husband's net worth *decreased* during the marriage, the Wife's net worth *increased* during marriage "by approximately $936,269.00,"[9] and this increase was the result of the appreciation of the Wife's retirement and investment accounts and her stock options. (R. 635 ¶ 10a; *see* R. 107, 499, 507, 598, 842, 862-63, 878-82). Thus, the trial court concluded the Wife's increased net worth would be subject to a claim by the Husband in the amount of $468,134.49.[10] (R. 637 ¶ 5.)

On the other hand, the trial court calculated the Wife's claims to the monies received by the Husband from TYA (the BP money and the Doc Kits profits) amounted to $289,287.52. (R. 637 ¶ 5.) It calculated this figure by dividing in half the $578,575.05 that that Husband had taken from TYA,[11] after the parties separated, to purchase the lot in Santa Rosa Beach/Walton County. (R. 636 ¶ 10b; *see* R. 457-58, 584, 599, 637 ¶ 11, 841, 899-900, 999-1001.)

Accordingly, the court found the Wife's claims to the TYA monies were more than offset by the Husband's claims to the enhanced values of the Wife's assets:

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[9] The trial court calculated this amount by comparing the present value of the wife's retirement/investment accounts and stock options (R. 107) with the values of these assets when the parties married in May 2009 (R. 499, 507). (R. 635, ¶ 10a.)
[10] The trial court's math was off by a penny; one half of $936,269 is $468,134.50.
[11] The $578,575.05 figure is the sum of the two checks. (R. 457-58, 999-1001.)

> Based on the evidence presented if the Wife were entitled to one-half of the BP Claim, and half of the Company income from the sale of the "Doc Kits" received post separation by the Company, her coverture claim would amount to less than the increase in both her 40l(k), employee stock option plan and investments accounts manages by SEI.

(R. 636 ¶ 10b.) Nevertheless, the court did not order the Wife to make an equalizer payment, as the Husband did not seek such a payment. (R. 637, ¶ 5; *see* R. 841-42.) Such an equalizer payment would have been $178,846.97.[12]

d. The Wife's reference to the $316,961 in BP money misdirects attention from the trial court's actual rulings, and any oversight would not have affected the ultimate outcome.

The Wife's brief makes a fleeting reference to $316,961 of the BP money spent by the Husband—after the parties' separation—on "his new beachfront home" (Santa Rosa Beach), his lawyers, himself, and his family. (Initial Br. 4.) The Wife further states the trial court "found that the BP money was marital" and suggests the trial court failed to account for this $316,961. (*Id.*) These statements misdirect attention from the trial court's actual rulings, and any oversight by the trial court would not have affected the case's ultimate outcome.

The statements misdirect attention because, in fact, the trial court found, "The BP Claim payment was an asset of [TYA] not the Husband." (R. 633 ¶ 8g(A).) Giving the Wife the benefit of the doubt, however, the court assumed some BP money

[12] This figure is calculated by subtracting $289,287.52 (the value of the Wife's claim to the BP money and the Doc Kits profits) from $468,134.49 (the value of the Husband's claim to the Wife's increased net worth).

"would be properly classified as marital earnings." (*Id.*) The trial court's assumption that some BP money was marital was quite generous to the Wife. TYA indisputably received the BP money in August 2015 (two plus months after the divorce petition). *See supra* Statement, Part A.3.a, at 8. Thus, under the "bright line rule" urged by the Wife in her brief (Initial Br. 12-13), none of the BP money could have constituted marital earnings. *See infra* Argument III,C., at 44-46.

Regardless, even if this $316,961 were added to the marital assets subject to the Wife's coverture claims, it would not have affected the case's ultimate outcome. One half of this amount, $158,480.5, still would be less than the outstanding $178,846.97 for which the Husband did not seek an equalizer payment from the Wife. *See supra* at 9 & n. 12.

4. The Miramar Beach property (St. Tropez).

The trial court found the Husband purchased the property in Miramar Beach (St. Tropez) in 2004, five years before the marriage, and that it was "encumbered by a $500,000 line of credit mortgage." (R. 634 ¶8h; *see* R. 585, 818, 997-98, 1033.) The Husband never added the Wife to the deed, and the Wife never testified she contributed to that property in any way. (R. 634 ¶8h; *see* R. 593-94, 818, 921.) As such, the property was the Husband's nonmarital property, and the debt was the Husband's nonmarital debt. (R. 634 ¶8h.)

The Wife cites the trial court's finding that most of the BP money "was spent on debt service" to misleadingly suggest that the Husband was using the BP money to build his equity in the nonmarital property at Miramar Beach (Initial Br. 31 (citing R. 633 ¶ 8g(A)).) In fact, the Husband testified that he had a line of credit—not a mortgage—on the nonmarital Miramar Beach/St. Tropez property and that he had used that line of credit to pay for general marital living expenses. (R. 766.) The fact that the Husband in September 2015 used $431,438.25 of the BP money to pay down this line of credit (R. 329, 766-67; Initial Br. 4)—which, in turn, he was using to pay living expenses (R. 766)—is consistent with the trial court's finding that the Husband used the "majority of the money" he received from TYA to pay marital expenses (R. 635-36 ¶ 10b). This fact also negates any inference that the Husband used the BP money to build his equity in the Miramar Beach property.

5. The Husband's IRA account.

Before the marriage, the Husband had funded an IRA account, which is now managed by SEI. (R. 634; *see* R. 933-34, 987-88, 991.) According to the Husband's financial adviser (Mr. Knowles), he made no voluntary contributions or withdrawals during the marriage. (R. 634; *see* R. 922, 934-35, 988, 991.) Accordingly, the trial court ruled that the SEI IRA, with its current balance of approximately one million dollars, was the Husband's nonmarital property. (R. 634; *see* R. 584, 827.)

6. Santa Rosa Beach property in Walton County.

After the parties had separated, the Husband purchased in 2014 a lot in Santa Rosa Beach in Walton County. (R. 636 ¶ 11; *see* R. 999.) The Husband used $578,575.05 from TYA to purchase this lot, which the trial court called the "South Walton lot" and the Husband called the "30A lot" in his affidavit. (R. 636 ¶ 10b; *see* R. 457-58, 585, 999-1001.) The Husband encumbered the lot with a $1.5 million line of credit to fund the construction of a residence on the lot. (R. 636 ¶ 11; *see* R. 585, 1017.) The purchase and construction were done in the name of the Husband's premarital trust. (R. 755, 769, 770.) The Husband was building the house—which the Wife calls the "$2,000,000 mansion" (Initial Br. 4)—for "[his] kids to inherit upon [his] death." (R. 688.)

The Husband asked to be awarded both the property and the liability for the debt on the property. (R. 1017.) The trial court granted his request in a fashion that allowed it to avoid deciding whether the property and its debt were marital or non-marital. (R. 636-37 ¶¶ 10b, 11, 5.) Because the court found the Husband purchased the property with $578,575.05 of TYA money that was subject to the Wife's coverture claims (*id.* ¶10b), the Court concluded it could award the property to the Husband for the same reasons that it denied the Wife's coverture claims to the TYA money (*id.* ¶ 11). That is, because the Wife's claims to TYA money (used to purchase the Santa Rosa Beach property) were less than the Husband's claims to the

enhanced values of the Wife's nonmarital assets. (R. 636-37 ¶ 10b, 5.) *See supra* Statement A.3.c., at 9-12.

Citing record pages 766-69, the Wife's brief asserts: "The Husband testified that he used marital funds (from the BP Claim) to pay for the design of the improvements he was building on the property." (Initial Br. 32.) This assertion is misleading. Pages 766-67 are discussing the BP money the Husband used to pay the line of credit on the property in Miramar Beach (not Santa Rosa Beach), which this brief address *supra* at 13-14. On pages 768-69, the Husband did testify that he used some BP money to pay the designer, MEA, for his new house at Santa Rosa Beach. (R. 768-69.) These payments came from a TYA account, amounted to $12,500, and were made in late 2015, after the divorce petition was filed. (R. 329, 336, 768-70; Initial Br. 4.) Even if this $12,500 were added to the $578,575.05 discussed above, it would not change the fact that the Husband's claims to the Wife's assets exceed the Wife's claims to the TYA money used to purchase the Santa Rosa Beach property.

B. The Wife's motion for rehearing.

The Wife's motion for rehearing was denied. (R. 639-647.) That motion raised some arguments for the first time and did not raise certain arguments that now have been raised on this appeal for the first time. (*See* R. 639-646.) The non-preserved arguments are discussed *infra* in the argument section of this brief.

C. The Wife's misstatements and irrelevant assertions.

The Wife's statement of the case makes several false or irrelevant assertions.

First, she asserts the trial court "ruled" that the cutoff date for determining the scope of the marital estate was September 30, 2013. (Initial Br. 2.) But the trial court made no such ruling; rather, it used the separation date as an indication whether the Husband intended to gift various nonmarital property (*e.g.*, the $250,000 from the Archstone transaction) to his then-estranged Wife. (*See* R. 631, 633-34, 1013.)

Second, the Wife asserts the Husband established a "new" trust during the marriage. (Initial Br. 6.) In fact, the Husband merely restated his preexisting premarital trust. (R. 459-83, 844-46.)

Third, the Wife asserts the Husband "presented no proof" that "he did not contribute" to his SEI IRA "during the marriage." (Initial Br. 6.) In fact, the Husband and his financial adviser testified he made no contributions to the SEI IRA during the marriage. (R. 934, 987-988.)

Fourth, the Wife asserts the Husband "continued to fund" and "deposit monies into" his premarital trust "[t]hroughout the marriage." (Initial Br. 9.) In fact, the Husband testified he funded the trust with assets acquired before the marriage. (R. 830, 1012.) He and his financial advisor testified no deposits were made into the trust during the marriage, other than the Archstone transaction. (R. 929-30, 1013.)

Fifth, the Wife asserts that, due to the $250,000 Archstone transaction, the approximately $5 million in the premarital trusts were "commingled." (Initial Br. 28.) In fact, the trial court found that the Husband made a "serious effort" to "preserve the separation of the parties[']' assets" and that he had not commingled his premarital assets with marital assets. (R. 631, 633; *see* R. 835, 928-30, 1013.) The Wife does not cite where below she made this "commingling" argument.[13]

Sixth, the Wife emphasizes the Husband's shortcomings—early in the litigation when represented by his first trial counsel—with respect to his financial disclosures that were later corrected by his presented trial counsel. (*See* Initial Br. 2-3.) The trial court took the appropriate action against the Husband to remedy his first counsel's failure to make full disclosures; it ordered the Husband to pay the Wife's attorney's fees. (R. 636 ¶ 12.) The court's observations on the discovery issues were not germane to its findings on the marital/nonmarital character of the parties' assets or on the equitable distribution of the marital assets. Notably, the Wife does not argue on appeal that the Husband's third, final disclosure was inadequate.

SUMMARY OF ARGUMENT

The Wife mischaracterizes the trial court's actual rulings. She mis-frames the issues on appeal. She argues unpreserved points. She leaves unchallenged—and thus

[13] While the Wife made commingling arguments as to TYA (R. 636 ¶ 10b), those commingling arguments did not relate to the premarital trust.

has abandoned any claim of error to—certain rulings. She misstates the standards of review. She argues red herrings and knocks down straw-man arguments. She fails to acknowledge the competent, substantial evidence supporting the trial court's ruling. Above all, she cannot show that the trial court's carefully considered order on equitable distribution was an abuse of discretion.

1. The Wife's "incorrect valuation date" argument is a red herring. The trial court did not use the parties' separation date as a cutoff date for determining the scope of the marital estate. Instead, the court properly used the separation date, along with other facts, to determine the Husband's donative intent. Under *Hooker v. Hooker*, 220 So. 3d 397 (Fla. 2017), the trial court had to determine whether the Husband had gifted certain premarital assets to the marital estate. The fact that certain transactions occurred after the parties had permanently separated was highly relevant to this determination, and the trial court did not abuse its discretion in considering the timing of the transactions.

2. The Wife is not entitled to invade the Husband's premarital trust. The Husband segregated the trust from marital assets. During the marriage, he did <u>not</u>: use the trust to pay for marital expenses; withdraw trust funds; or deposit funds into the trust (with the exception of the unusual, post-separation Archstone transaction). Faced with these insurmountable facts, the Wife's arguments are meritless distractions. The fact that creditors could reach the trust is irrelevant. The trial court's

factual findings were more than enough under section 61.075(3) to allow for meaningful appellate review. The evidence supporting those findings was substantial and competent, and no requirement exists in the law that the supporting evidence be "documentary." Finally, *Heinrich v. Heinrich*, 609 So. 2d 94 (Fla. 3d DCA 1992) is distinguishable because there, unlike here, the trust was established, and the assets were acquired, during the marriage.

3. The Wife's assorted other arguments for invading the Husband's nonmarital assets fare no better. The transfer of the Husband's segregated, premarital accounts to SEI when his investment adviser switched firms did not transform them into marital assets. The $250,000 deposited by Archstone into the parties' joint account (against the Husband's instructions and after the parties had separated) did not become a marital asset; these funds were never treated, used, or relied on by the parties as marital funds. The trial court's findings on other nonmarital properties (the TYA funds and the Miramar and Santa Rosa Beach properties) were supported by competent, substantial evidence. Indeed, the Husband could have demanded that the Wife pay him an equalizer payment due to the enhanced marital value of her assets.

4. The Wife's final argument fails because it rests on a false premise. The trial court did not find that the Wife owed the Husband $429, 336 for his payments toward the marital home. In fact, the court denied this claim. (R. 637 ¶ 4.)

ARGUMENT

Preservation and abandonment

Before discussing the merits, the Husband notes that several of the Wife's arguments were not preserved, and that her failure to raise certain arguments on appeal means the judgment must be affirmed under the doctrine of abandonment.

To be preserved for appellate review, "'an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation.'" *Quinnell v. Platt*, 23 So. 3d 746, 747 (Fla. 1st DCA 2009) (quoting *Tillman v. State*, 471 So.2d 32, 35 (Fla.1985)). Also, generally, raising an issue for the first time in a rehearing motion filed in the trial court does not preserve the issue for appeal. A trial court is not required to consider such an argument. *Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, 88 So. 3d 269, 278 (Fla. 1st DCA 2012). Normally, an appellate court is not allowed to consider an argument raised for the first time in a rehearing motion filed in the trial court. *E.g., Best v. Educ. Affiliates, Inc.*, 82 So. 3d 143, 146 (Fla. 4th DCA 2012). There is an exception to this rule. When an error appears for the first time on the face of the final judgment, the losing party may challenge that error in a rehearing motion, and in fact, the party must raise that challenge in the rehearing motion to preserve the issue for appeal. *See, e.g. Owens v. Owens*, 973 So. 2d 1169, 1170 (Fla. 1st DCA 2007).

In addition, "[w]hen an appellant fails to challenge properly on appeal one of the grounds on which the [trial] court based its judgment, [she] is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Transp. Eng'g, Inc. v. Cruz*, 152 So. 3d 37, 47 (Fla. 5th DCA 2014) (internal quotes omitted). Moreover, "an argument not raised in an initial brief is waived and may not be raised for the first time in a reply brief." *Tillery v. Fla. Dept. of Juvenile Justice*, 104 So. 3d 1253, 1255-56 (Fla. 1st DCA 2013).

In the ensuing argument, the Husband will refer to these preservation and abandonment principles to note specifically the Wife's arguments not preserved for appellate review or why the judgment must be affirmed because of the Wife's failure to challenge a basis for the trial court's ruling.

I. Issue 1 (restated): Was the trial court's finding of fact that the Husband did not intend to gift various nonmarital assets to the marital estate supported by competent, substantial evidence?

Mischaracterizing the trial court's ruling, the Wife argues it was a legal error subject to de novo review to treat September 30, 2013 (the date of permanent separation) rather than May 30, 2015 (the date the Wife filed for divorce) as a cutoff date to determine the marital estate's scope. (*See* Initial Br. 12-15.) Following from that mistaken premise, the Wife argues the trial court should have concluded that various assets (funds from the Archstone transaction, Doc Kits profits, and BP money) were marital assets. (*See* Initial Br. 15-16.) This brief refers to this argument, located at

pages 12-16 of the Wife's brief, as the "incorrect valuation date" argument.

In fact, the trial court did not use the separation date as the valuation date, or as the cutoff date to determine the scope of the marital estate. Instead, it used the separation date merely as a marker to gauge the Husband's *donative intent*—that is, after the parties had permanently separated and after the Wife started living with her new boyfriend, did the Husband really intend to make gifts from his nonmarital property to the marital estate? In other words, the trial court used the separation date to find, as a matter of fact, that the Husband did not intend to make gifts from his nonmarital property to the marital estate. These findings were amply supported by competent, substantial evidence.

Standard of review. By mis-framing the issue on appeal, the Wife also has misstated the standard of review. She incorrectly asserts "the issue of characterization of assets as marital or non-marital as of the date of valuation is de novo." (Initial Br. 12.) In fact, the issue on appeal (which incorporates the standard of review) is whether the trial court's findings of fact that the Husband had no donative intent to gift to the marital estate various nonmarital assets were supported by competent, substantial evidence. *See Hooker v. Hooker*, 220 So. 3d 397, 404 (Fla.), *reh'g denied*, 2017 WL 2609606 (Fla. June 16, 2017). In making this assessment, an appellate court must construe all reasonable inferences in favor of the judgment. *E.g., Horatio Enters., Inc. v. Rabin*, 614 So. 2d 555, 556 (Fla. 3d DCA 1993).

Merits.

A. The Wife's argument on an "incorrect valuation date" raises a red herring because the trial court did not rule that the scope of the marital estate must be determined as of the separation date.

The Wife's "incorrect valuation date" argument—that the trial court's cutoff date for determining the scope of the marital estate was error—is divorced from the facts and the trial court's ruling. In short, the argument is a red herring. The trial court relied on the separation date, as well as other facts, to determine the Husband's donative intent, not to set a cutoff date for determining the scope of the marital estate.

1. The trial court properly relied on the separation date and other facts to find the Husband did not intend to gift any nonmarital assets to the marital estate.

The major premise of the Wife's "incorrect valuation date" argument is that Florida law required the trial court to determine the scope of the marital estate as of the date of the filing of the Wife's divorce petition (May 30, 2015), not the date of the parties' permanent separation (September 30, 2013). (Initial Br. 12-15.) The minor premise is that the trial court failed to do that. (Initial Br. 15-16.) The conclusion is that she is entitled to appellate relief. (Initial Br. 16.) The Wife's premises and conclusion are flawed.

Starting with the major premise, the Wife argues that, unless the parties have a "valid separation agreement" within the meaning of section 61.075(7), Florida

Statutes (2014),[14] the scope of the marital estate must be determined as of the date that the divorce petition was filed. (Initial Br. 12-15.) This statement of law is correct. But it is irrelevant to this appeal.

The trial court did not ground its ruling on when the marriage ended (*i.e.*, the date of separation versus the date on which the divorce petition was filed). Rather, the trial court used the separation date merely as a marker to determine the Husband's *donative intent* and to determine whether premarital assets became marital assets by way of purported gifts to the marital estate allegedly made after the parties had permanently separated. (R. 632-34.) As the supreme court has held, to establish an interspousal gift, a party must show, among other things, "donative intent." *Hooker*, 220 So. 3d at 403.

In accordance with the supreme court's case law, the trial court expressly made multiple findings of fact on the Husband's lack of donative intent. (R. 632 (noting the Husband's testimony that "he never intended to gift any of the Trust funds to the Wife"); R. 633 (noting the Husband's testimony that "he had no intention of gifting half of the $250,000 to his estranged Wife" and that "there was no evidence of an intent to gift the funds to the marriage")).

[14] This brief cites to the 2014 version in effect when the divorce petition was filed. *See* § Ch. 2015-1, § 5, Laws of Fla. The statute was not amended from 2008 to 2018.

Take, for instance, the Archstone transaction. The premarital trust was funded with the Husband's premarital assets, and the premarital trust invested some of its funds with Archstone. (R. 459, 930-31, 1012.) When Archstone had a liquidation event, the premarital trust instructed Archstone to return those funds to an account held by the premarital trust. (R. 930-31, 982-85.) For reasons known only to Archstone, it refused to comply with that instruction and wired approximately $250,000 to an account jointly held by the Husband and the Wife. (R. 633; *see* R. 563, 930-931, 982-985.) The Husband promptly redeposited $250,000 of these funds in the premarital trust's account. (R. 633; *see* R. 451, 456.)

The question, then, for the trial court was not what the cutoff date was for determining the scope of the marital estate. Rather, the question for the trial court was whether the Archstone transaction transformed any of the Husband's premarital assets into the couple's marital assets. That question, in turn, depended on whether the Husband intended to gift the funds from the Archstone transaction to the Wife or the marriage. *See Hooker*, 220 So. 3d at 403.

The trial court here properly focused on donative intent. The court found the Husband did not intend to gift the $250,000 of Archstone funds to his Wife because when the Archstone transactions occurred (1) the parties were separated, (2) the marriage was irretrievably broken, (3) the Wife was living with another man, (4) the Husband testified he had no such intent, and (5) the Wife "submitted no evidence of

any intended gift." (R. 633 & n.1; *see* R. 982-985, 1013-1014, 1060-1061.) Stated another way, because all the facts surrounding the Archstone transactions occurred after the parties were separated and after the Wife was living with her boyfriend, competent and substantial evidence supported the court's finding that the Husband did not intend to gift the Archstone funds to the marital estate or the Wife.

In sum, the trial court's actual findings had nothing to do with a valuation or cutoff date. Rather, they had to do with the Husband's donative intent, something the Wife was required to prove to establish that the Husband had gifted nonmarital property to the marital estate. *See Hooker*, 220 So. 3d at 403. The parties' separation date was relevant to the question of the Husband's donative intent, and the trial court did not err in considering that date, along with other facts, to find as a matter of fact that the Husband lacked donative intent.

2. Because the Wife has not challenged the bases for the trial court's ruling, the judgment must be affirmed.

Regardless of the merits (if any) of the Wife's arguments under her first issue, the judgment must be affirmed because, in two respects, the Wife has mis-framed the issue and not challenged the actual bases for the order on appeal. *See supra* at 22 (citing *Cruz*, 152 So. 3d at 47). First, the Wife has not challenged any of the five bases for the trial court's ruling on the Archstone transaction. *See supra* at 6 (listing five bases). Second, the Wife has not challenged the bases for the trial court's rejection of her claims against the BP money and the Doc Kits profits. In short, the trial

court denied the Wife's claim to the BP money and the Doc Kits profits because the amount of such a claim was less than the amount of the Husband's claim to the enhanced values of the Wife's assets. (R. 635-37); *see supra* at 9.

B. The trial court's finding of fact that the Husband had no donative intent to gift assets to the marital estate was supported by competent, substantial evidence.

Had the Wife raised the only appellate argument available to her (*i.e.*, no competent, substantial evidence to support the finding of fact that the Husband lacked donative intent), it would fail. That's because the trial court's finding that the Husband had no donative intent to gift assets to the marital estate was supported by competent, substantial evidence. *See Hooker*, 220 So. 3d at 403. In fact, this Court has reversed a trial court for subjecting a spouse's distribution from a nonmarital asset where, as here, there is no evidence that the funds from such a distribution "were treated, used, or relied on by the parties as a marital asset." *McMullen v. McMullen*, 148 So. 3d 830, 830 (Fla. 1st DCA 2014).

Here, there was competent, substantial evidence for the trial court to find that the Husband did not intend to gift his assets to the marital estate and to find the parties never treated, used, or relied on the Husband's premarital assets as marital assets. *See Hooker*, 220 So. 3d at 403; *McMullen*, 148 So. 3d at 830. For instance, on the premarital trust, the trial court accepted the Husband's and his financial adviser's testimony that he: (1) never added the Wife to any of the premarital trust

accounts; (2) never intended to gift any of the premarital trust funds to the Wife; and (3) did not make withdrawals from, or deposits into, the premarital trust funds (except the Archstone deposit). (R. 632; *see, e.g.* R. 730, 817, 834, 835, 929-30, 991-992, 1013.) The evidence supporting the trial court's finding on the Archstone transaction is discussed *supra* at 6. Finally, on TYA, the trial court also accepted the Husband's testimony that he never gifted any ownership interest in TYA to the Wife. (R. 634; *see* R. 815, 835.)

II. Issue 2 (restated): Did the trial court correctly treat the Husband's premarital trust as a nonmarital asset not subject to equitable distribution?

The trial court correctly treated the Husband's premarital trust as a nonmarital asset not subject to equitable distribution.

Standard of review. The standard of review is a mixed one. "The initial determination as to whether an asset is marital or non-marital is a fact-finding process." *Demont v. Demont*, 67 So. 3d 1096, 1104 (Fla. 1st DCA 2011). An "appellate panel should not disturb the fact-finder's determinations regarding witness credibility and the weight of any conflicting evidence." *Id.* at 1105. If some record support exists for the trial court's findings of fact, the appellate panel should not disturb those findings. *See id*. "The ultimate conclusion that an asset is marital and therefore subject to equitable distribution is a question of law, subject to de novo review." *Id.* at 1104.

Yet, the trial court's court equitable distribution ruling is reviewed for an abuse of discretion. *Sarazin v. Sarazin*, 263 So. 3d 273, 274 (Fla. 1st DCA 2019).

To support her argument for a pure de novo standard, the Wife mistakenly relies on *Jordan v. Jordan*, 127 So. 3d 794, 796 (Fla. 4th DCA 2013), and *Landrum v. Landrum*, 212 So. 3d 486, 487 (Fla. 1st DCA 2017)). (Initial Br. 16, 21.) Unlike *Demont*, *Jordan* is not a decision of this Court. *Landrum* cited this Court's decision in *Smith v. Smith*, 971 So. 2d 191, 193-94 (Fla. 1st DCA 2007), which, like *Demont*, recognizes a mixed standard of review.

Merits. The Wife offers several reasons why the premarital trust funds were purportedly marital assets. First, she argues that because the premarital trust was revocable and self-settled, a creditor could reach those assets. (Initial Br. 17.) Second, the Wife argues that the findings of fact regarding the premarital trust's assets were inadequate. (Initial Br. 17-18.) Third, she argues that because the premarital trust's accounts and the Husband's IRA accounts with SEI were "created during the marriage," and the Husband provided "no documentary evidence" to trace the premarital funds from the premarital accounts to the new accounts, all those SEI accounts actually held marital assets. (Initial Br. 19.) Fourth, relying on *Heinrich v. Heinrich*, 609 So. 2d 94, 96 (Fla. 3d DCA 1992) and other authorities, the Wife

argues the couple had relied on the premarital trust for marital purchases, so it is therefore a marital asset. (Initial Br. 19-21.) All her arguments are wrong.

A. Whether creditors could reach the assets of a revocable, self-settled trust is of no relevance.

The Wife again raises a red herring. It makes no difference whether a creditor could reach the assets of a revocable, self-settled trust. That is because, whether the Husband's premarital assets remained untouched in a personal account or segregated in a trust's account, their character would remain nonmarital. *See* § 61.075(6)(b)(1)-(3), Fla. Stat. (2014) (defining nonmarital assets as those acquired "prior to the marriage" or "derived from nonmarital assets during the marriage"); *Robinson v. Robinson*, 10 So. 3d 196, 196-97 (Fla. 1st DCA 2009) (holding that five shares of stock acquired before the marriage were nonmarital).

Nor does the Wife cite any case law to support this red herring. (Initial Br. 17.) Instead, she cites a federal, non-divorce case that merely recites Florida law on spendthrift trusts. (Initial Br. 16 (citing *In re Brown*, 303 F.3d 1261, 1266 (11th Cir. 2002).) Then, she cites two Florida cases that make the unremarkable observation that, if one spouse fails to make a payment required by a court-ordered equitable distribution, then the other spouse's remedies are not contempt but rather the same remedies available to all creditors. (*Id.* (citing *Stufft v. Stufft*, 238 So. 3d 419, 420 (Fla. 5th DCA 2018); *Kadanec v. Kadanec*, 765 So. 2d 884, 886 (Fla. 2d DCA 2000).) This rule on remedies had no bearing on the task faced by the trial court

below—that is, to determine whether the Husband's premarital trust was transformed to marital property.

B. The trial court's findings of fact were more than adequate.

For her next red herring, the Wife cites cases in which trial courts have been reversed for failing to make adequate factual findings to enable meaningful appellate review. (Initial Br. 17-18). Here, the trial court's factual findings were more than adequate to allow this Court to conduct its appellate review. Section 61.075(3), Florida Statutes (2014) provides that the distribution of marital assets and liabilities "shall be supported by factual findings in the judgment or order based on competent substantial evidence" and "shall include specific written findings of fact as to":

> (a) Clear identification of nonmarital assets and ownership interests;
>
> (b) Identification of marital assets, including the individual valuation of significant assets, and designation of which spouse shall be entitled to each asset;
>
> (c) Identification of the marital liabilities and designation of which spouse shall be responsible for each liability;
>
> (d) Any other findings necessary to advise the parties or the reviewing court of the trial court's rationale for the distribution of marital assets and allocation of liabilities.

The trial court's order complies with these statutory directives. (R. 630-638.)

C. There is no requirement that only documentary evidence can establish the tracing of funds; the evidence on which the trial court relied was competent and substantial for its findings.

The Wife complains the Husband provided "no documentary evidence" tracing the premarital funds originally deposited in the trust and IRA accounts with Morgan Keegan to the later accounts with SEI. (Initial Br. 19.) But she cites no authority for any such requirement for documentary evidence. Moreover, the Husband did provide some documentary evidence. (*E.g.*, R. 459, 560-62, 569-71.)

Competent, substantial evidence may be direct, circumstantial, testimonial, or documentary. *See Lonergan v. Estate of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996). Here, the trial court accepted testimony—including testimony from the financial advisor who managed the accounts—that the Husband transferred the premarital trust and IRA accounts from Morgan Keegan to SEI when his advisor switched companies. (R. 631-32, 862, 927-28, 952-53.) The Husband attested to the amount of money originally put into the trust. (R. 1012.) He provided a copy of the trust instrument (R. 459) and a current statement of the trust and the IRA accounts (R. 560-62, 569-71). The court also heard testimony—including from the financial advisor—that the Husband made no withdrawals from, or non-Archstone deposits into, the trust during the marriage. (R. 632, 634; *see* R. 831, 835, 929-30, 1013.) The financial advisor also testified as to the IRA accounts' origins and that the Husband had made no contributions to those accounts during the marriage. (R. 934.)

No further evidence was required. This testimonial and documentary evidence was competent and substantial to establish the fact that the SEI accounts held the same nonmarital money that Morgan Keegan had held.

D. The Wife's reliance on *Heinrich v. Heinrich* and other authorities is misplaced, as the assets in the premarital trust were acquired before the marriage and the Husband did not commingle funds.

Citing primarily *Heinrich v. Heinrich*, 609 So. 2d 94 (Fla. 3d DCA 1992), the Wife argues the couple had relied on the premarital trust for marital purchases, so it is therefore a marital asset. (Initial Br. 19-21, *see also id.* 23-24.) *Heinrich* is distinguishable, and the Wife's reliance on that case is misplaced.

In *Heinrich*, unlike here, the husband's trust was "established *during* the parties' marriage." *Id.* at 95 (emphasis added). There, unlike here, both the husband and the wife "placed most of their assets in the trust." *Id.* There, unlike here, the trust acquired all its assets "during the course of the parties' marriage." *Id.* at 95-96. For all those reasons (none of which exist here), the *Heinrich* court explained the trust's assets were "presumptively marital." *Id.* at 96.

Despite this "presumptively marital" finding, the *Heinrich* court agreed with the husband there that he had a special equity in the premarital assets he had transferred to the trust. *Id.* But the court "reach[ed] a different conclusion . . . with respect to trust assets purchased out of the husband's income during the marriage." *Id.* The husband had received $60,000 in income from his preexisting family trusts by his

mother and aunt. *Id.* The couple had "relied on" that income, which was commingled with the couple's checking account, to make purchases for family purposes. *Id.* For these reasons (none of which exist here), the *Heinrich* court concluded that the assets purchased with the Husband's trust income were marital. *Id.*

In contrast, here, the Husband and Wife did not rely on the premarital trust for income, commingle the premarital trust's assets with marital assets, or even make purchases for family purposes with that income. Instead, the Husband and Wife did not use income from the premarital trust at all. (R. 835.) Indeed, the parties' financial advisor swore under oath there had been no withdrawals from, or non-Archstone deposits into, the trust during the marriage. (R. 929-30.) The fact that Archstone wired funds to the couple's joint account—after the couple had separated and after the Wife was living with her boyfriend—did not mean nonmarital funds had been commingled with marital funds such that they lost their marital character. *See McMullen*, 148 So. 3d at 830 (holding non-marital distribution transferred into the husband's checking account was not subject to equitable distribution because those funds were not "treated, used, or relied on by the parties as a marital asset").

The other authorities on which the Wife relies are equally unpersuasive because they also concern situations where, unlike here, assets were *acquired during the marriage*. (Initial Br. 18-19 (citing § 61.075(8), Fla. Stat. (2014); *Smith v. Smith*, 971 So. 2d 191 (Fla. 1st DCA 2007); *Abdnour v. Abdnour*, 19 So. 3d 357 (Fla. 2d

DCA 2009))). For example, the statute on which the Wife relies plainly states: "All assets acquired . . . by either spouse *subsequent to the date of the marriage* and not specifically established as nonmarital assets . . . are presumed to be marital assets . . ." § 61.075(8), Fla. Stat. (2014) (emphasis added). Here, however, the record establishes that that the assets in the pre-marital trust were *acquired before the marriage* and never commingled with marital assets. (R. 736, 816-817, 830-831, 835, 929-30, 1013). Thus, the trial court's determination that these assets were non-marital must be affirmed. *See* § 61.075(6)(b)1., Fla. Stat. (2014) (defining nonmarital assets to include assets acquired "prior to the marriage"); *Robinson*, 10 So. 3d at 197 (stating that "[a]n asset acquired prior to the marriage is, by definition, nonmarital").

III. Issue 3 (restated): Did the trial court correctly determine various assets were nonmarital and not subject to equitable distribution?

While the Wife's arguments on issue 2 concern the premarital trust, her arguments on issue 3 concern a wide range of the Husband's nonmarital assets. The trial court correctly determined that various assets (the SEI investment accounts, TYA (including the BP money and Doc Kits profits), and the Miramar Beach and Santa Rosa Beach properties) were nonmarital and not subject to equitable distribution.

Standard of review. This issue is subject to the same mixed standard of review stated above under issue 2. *See supra* Argument II, at 29-30.

Merits. Broadly speaking, the Wife complains the Husband did not provide the values of his premarital assets as of the date of the marriage and the date of

dissolution. (Initial Br. 24-25.) Such valuations, the Wife argues, are necessary to determine whether "there is a marital component to a premarital asset." (*Id.* 24.) The Wife also makes confusing arguments on which party bears the burden of proof. (*Id.* 21-25.) The Wife's general arguments are wrong for primarily three reasons.

First, while section 61.075 requires a court to *identify* both marital and non-marital assets, it requires a court to *value* only the marital assets:

> . . . . The distribution of all marital assets . . . shall include specific written findings of fact as to the following:
> (a) Clear *identification of nonmarital assets* and ownership interests;
> (b) *Identification of marital assets, including the individual valuation of significant assets*, and designation of which spouse shall be entitled to each asset;

§ 61.075(3)(a)&(b), Fla. Stat. (2014) (emphasis added). Contrary to the Wife's argument, the statute does not require a court to value nonmarital assets.

Second, while "marital assets" include "[t]he enhancement in value and appreciation of nonmarital assets," *id.* § 61.075(6)(a)1.b, not all enhancements in value to a nonmarital asset occurring during a marriage become marital assets. Rather, as the statute expressly states, only certain enhancements become marital assets — those that "result[] either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both." *Id.*; *accord Wilson*, 992 So. 2d at 398 (noting that only the enhanced value "attributable to marital funds and labor" becomes a marital asset).

Third, the Wife, as the party asserting entitlement to enhanced values in non-marital properties, bore the initial burden of establishing "that *marital labor or funds were used* to enhance the nonmarital property's value." *Higgins v. Higgins*, 226 So. 3d 901, 906 (Fla. 4th DCA 2017) (emphasis added); *accord Pereboom v. Pereboom*, 959 So. 2d 1205, 1206 (Fla. 4th DCA 2007) (cited by *Robertson v. Robertson*, 78 So. 3d 76, 77 (Fla. 5th DCA 2012)). The Wife failed to meet this burden for each of the nonmarital assets to which she claimed an entitlement.

A. The premarital trust's SEI investment accounts and the Husband's SEI IRA accounts were nonmarital assets.

The trial court found the premarital trust's SEI investment accounts and the Husband's SEI IRA accounts were nonmarital. (R. 632-34 ¶ 8e,f,&i.) These findings were supported by competent, substantial evidence and were legally correct.

1. The SEI accounts were not presumptively marital, and even if they were, the evidence overcame the presumption.

To negate the trial court's findings, the Wife argues the SEI account held by the premarital trust and the SEI IRA account held by the Husband's name are "presumptively marital assets" because they were "opened during the marriage." (Initial Br. 26.) She is incorrect.

At the outset, this is an unpreserved argument. Though the Wife raised this argument in her motion for rehearing (R. 641), this alleged error does not qualify for

the exception that permits an issue to be raised for the first time in a motion for rehearing. *See supra* at 21 (discussing preservation principles in rehearing context).

The Wife's argument, if preserved, is flawed because of the statutory text and the Wife's factual concession on appeal.[15] Section 61.075(8), Florida Statutes (2014) states, "All *assets acquired* . . . by either spouse *subsequent to the date of the marriage* and not specifically established as nonmarital assets or liabilities are presumed to be marital assets and liabilities." § 61.075(8), Fla. Stat. (2014) (emphases added). The factual concession is the Wife's appellate admission that "the testimony was clear that the SEI accounts were opened using the assets from the parties' previous accounts with a different company." (Initial Br. 26.)

The SEI accounts do not qualify as "assets" that were "acquired" within the meaning of section 61.075(8). That is because the *assets* themselves (*i.e.*, the premarital money and securities held in the accounts) were owned by the Husband before the marriage. They were merely *transferred*—not *acquired*—after the parties married, from the Morgan Keegan accounts to the SEI accounts. (R. 631-32, 862, 927-28, 952-53.) An "asset" is "[a]n item that is owned and has value." BLACK'S LAW DICTIONARY (10th ed. 2014). To "acquire" means "[t]o gain possession or control of; to get or obtain." *Id.* To "transfer" means "[t]o convey or remove from one

[15] Even where a record might otherwise be inadequate to establish a factual proposition, appellate courts can rely on factual concessions in briefs. *E.g.*, *State v. Finno*, 643 So. 2d 1166, 1167 (Fla. 4th DCA 1994).

place or one person to another; to pass or hand over from one to another, esp. to change over the possession or control of." *Id.* By those definitions, and reading the plain statutory text, the opening of a new account and transferring the assets held in an old account to a new account does not mean any "assets" have been "acquired." The Husband owned and acquired the assets before the marriage and merely transferred them between accounts after the marriage.

This plain-language interpretation of the statute is consistent with case law. Marital assets acquired during the marriage are those "created or produced by the work efforts, services, or earnings of one or both spouses.'" *Witowski v. Witowski*, 758 So. 2d 1181, 1185 (Fla. 2d DCA 2000) (quoting *Steiner v. Steiner*, 746 So. 2d 1149, 1150 (Fla. 2d DCA 1999)); *see also Puskar v. Puskar*, 29 So. 3d 1201 (Fla. 1st DCA 2010) (holding the wife did not destroy the nonmarital character of real estate by depositing proceeds of its sale into a personal checking account).

Furthermore, even if the marital presumption did come into play, it was overcome by the evidence. Section 61.075(8) provides that the presumption that assets are marital "is overcome by a showing that the assets . . . are nonmarital." In this respect, the Wife argues the Husband cannot make that showing because he supposedly needed to provide "documentary evidence" to trace the funds from the premarital trust's accounts with Morgan Keegan to its accounts with SEI. (*Id.*) As explained above, however, there is no requirement to present documentary evidence for

evidence to qualify as both competent and substantial. *See supra* Argument II.C, at 33-34. To the contrary, given the Wife's factual concession in her brief and the evidence at trial, any presumption was overcome.

2. The Archstone transaction did not convert the $250,000 from nonmarital to marital, nor did it transform the SEI accounts from nonmarital to marital.

The Wife also complains, again, about the Archstone transaction. (Initial Br. 28.) This time, the argument is that the Archstone transaction caused the Husband to commingle a nonmarital asset ($250,000 from Archstone) with marital assets (the joint checking account). (Initial Br. 28.) And because money is fungible, she argues the $250,000 lost its nonmarital character. (Initial Br. 28.) The Wife relies on cases from the Second District for the proposition that money is fungible and loses its nonmarital character when it is deposited in a marital account. (Initial Br. 28 (citing, among others, *Abdnour*, 19 So. 3d at 364).

As an initial matter, this argument was not preserved. *See supra* at 21. The Wife did not make this "commingling" argument below. In contrast, the Husband argued below there was no substantial evidence of commingling. (R. 595.) He submitted affidavits and sworn testimony at trial to support this argument. (R. 179, 242, 351, 835.) The Wife failed to respond to the Husband's argument and evidence. In its final judgment, the trial court found, as matter of fact, that no commingling

occurred. (R. 632.) Though the Wife moved for rehearing, her motion failed to contest the trial court's finding that no commingling occurred. (R. 639-45.)

Even if it is preserved, the "commingling" argument is meritless. The key difference between the instant case and the cases cited by the Wife is that, in each of the Wife's cases, the spouse had actively deposited the nonmarital funds in a marital account and had engaged in extensive commingling. For example, in *Abdnour*, the husband had deposited marital funds into the account, withdrew funds from the account, and then commingled the withdrawn funds with funds in marital accounts. *See* 19 So. 3d at 363-64. The appellate court affirmed the trial court, concluding it had not erred in finding that the husband had failed to prove a nonmarital portion of the account. *Id.* at 364. The trial court's findings here—the Husband did not commingle assets (R. 632)—deserves the same level of deference and should be upheld.

Additionally, this case is more akin to this Court's decision in *McMullen*. There, this Court held that $250,000 received by a husband from a nonmarital joint venture and transferred into his checking account was not subject to equitable distribution because there was no evidence "funds were treated, used, or relied on by the parties as a marital asset." *McMullen*, 148 So. 3d at 830. The same is true here.

B. The trial court's findings on TYA should be affirmed.

For the first time on appeal, the Wife argues that because TYA had stopped making money in 2010, but started making money again by 2013 with Doc Kits,

those facts "would support a finding the entire value" of TYA "was attributable to Husband's efforts during the marriage, making Husband's entire interest a marital asset." (Initial Br. 29-30.) The Wife did not argue this in her rehearing motion (R. 639-646) or any point below. Thus, the argument is not preserved. *See supra* at 21.

Moreover, the Wife's "would support a finding" argument misapprehends the standard of review and the Wife's status as the appellant. The mere fact that the trial court could have made a factual finding in the Wife's favor, but failed to do so, does not merit a reversal. This Court must defer to the trial court's fact-finding and may not disturb its "determinations regarding witness credibility and the weight of any conflicting evidence." *Demont*, 67 So. 3d at 1104-05.

Regardless, the Wife cites no evidence to support, or explain, what "marital efforts" were made by the Husband before the filing of the divorce petition with respect to the BP money. To the contrary, she concedes this money was received by TYA *after* the divorce petition was filed. (Initial Br. 4, 30.)

Lastly, the Wife ignores that the trial court acknowledged the BP money and Doc Kits profits, to the extent distributed to the Husband, could in part be considered marital income subject to the Wife's coverture claims. (R. 635-636.) But the trial court offset the Wife's coverture claims against the Husband's coverture claims. (R. 636-637.) The trial court had discretion to make such an offset. *See Parry v. Parry*, 933 So. 2d 9, 15 (Fla. 2d DCA 2006) (holding courts have "numerous" methods "to

effect distribution of the parties' interests"). The trial court's discretionary decision to allow this offset, and all its findings and rulings on TYA, should be affirmed.

C. The trial court's award of the Miramar Beach property, and its associated debt, to the Husband should be affirmed.

The Wife argues the purported increase in the equity of the nonmarital Miramar Beach property—allegedly created by the Husband spending "most of the BP Claim money on debt service"—is a marital asset subject to equitable distribution. (Initial Br. 31-32.) The Wife argued this point only in her rehearing motion. (R. 642-643.) The only alleged errors that may be raised for this first time in a rehearing motion are those that appear for the first time on the face of the judgment. *See supra* at 21 (discussing preservation). The Wife's alleged error here does not qualify for that rule and thus it is not preserved.

Even if preserved, the Wife's argument lacks merit. The Miramar Beach property unquestionably was nonmarital; it was acquired five years before the marriage. (R. 634 ¶8h; *see* R. 585, 818, 997-98, 1033.) As such, the Wife—not the Husband—bore the burden of establishing that: (i) marital labor or funds were used (ii) to enhance the property's value. *E.g., Higgins*, 226 So. 3d at 906. For both these elements, the Wife's argument hinges on the trial court's finding that most the BP money "was spent on debt service," and it implies that the Husband was using the BP money to build his equity in the nonmarital property at Miramar Beach (Initial Br. 31 (citing R. 633 ¶ 8g(A)).) Two flaws exist with this argument.

First, the argument is misleading and not grounded in the evidence. The Husband had a line of credit—not a mortgage—on his Miramar Beach property, and he used funds drawn on that premarital line of credit to pay for marital living expenses. (R. 766-67.) The Husband's use of the BP money in September 2015 (after the divorce petition) to pay down this line of credit lowered the parties' marital liabilities that had been incurred during the marriage to pay for marital expenses. *See supra* Statement of Fact, Part A.4, at 13-14. The trial court correctly recognized it would be inequitable to award the Wife one half of the monies already spent by the Husband to pay down a nonmarital debt incurred for marital expenses. (*See* R. 636 ¶ 10b (finding "the majority of the money received by the Husband from [TYA]" had "been spent to pay marital expenses from which the Wife benefited").) This equitable finding was not an abuse of discretion. *See Pietras v. Pietras*, 842 So. 2d 956, 959 (Fla. 4th DCA 2003) (holding the husband should not have been charged for funds he withdrew post-petition to pay the parties' debts incurred pre-petition); *see also Fashingbauer v. Fashingbauer*, 19 So. 3d 401, 402 (Fla. 1st DCA 2009) (holding premarital real property did not become a marital asset merely because the husband took out a line of credit on the property to pay for the marital home).

Second, the trial court's assumption that the BP money had a marital character was generous to the Wife. The court assumed this because, even if was the BP money was marital, it would not affect the overall equitable distribution in light of the

increased marital value attributable to the Wife's premarital assets. (*See* R. 635-37 ¶10, ¶5.) But the BP money was not marital.[16] TYA did not receive the BP money until August 4, 2015 (Initial Br. 4; R. 325, 718), *more than two months after the Wife filed the divorce petition* (R. 14). Thus, under the "bright line rule" argued by the Wife (Initial Br. 12-13), the BP money could not have been marital. To circumvent her own bright-line rule, the Wife argues there was a "marital component" to TYA, which the Husband established seven years before the marriage (R. 633, 705, 963), and she then insinuates that the BP money should be dated at the time of the BP oil spill in 2010 (when the parties were married) rather than when TYA received the BP money post-petition in August 2015. (Initial Br. 3, 30.) Yet, the Wife bore the burden of proving this "marital component" by presenting evidence of marital labor or funds used to enhance TYA's value. *Higgins*, 226 So. 3d at 906. Her proof for her convoluted argument is lacking, and under the deferential standard of review, the trial court did not err in rejecting whatever proof, if any, she did proffer. (R. 633-34.)

D. The trial court's award to the Husband of the Santa Rosa Beach property, and its associated debt, should be affirmed.

Post-separation, the Husband purchased, through his trust, an unfinished lot in Santa Rosa Beach (Walton County) by using $578,575.05 in funds from TYA,

[16] The Wife's cited case is inapplicable because it recognized that "[w]hen *marital* assets are used . . . to reduce the mortgage on non-marital property, the increase in equity is a marital asset subject to equitable distribution." *Ballard v. Ballard*, 158 So. 3d 641, 643 (Fla. 1st DCA 2014) (emphasis added) (cited at Initial Br. 31).

and he encumbered it with a $1.5 million line of credit to fund the construction of a residence on the lot that he hopes someday to devise to his adult children. (R. 636 ¶¶10b, 11; *see* R. 457-58, 585, 688, 999-1001, 1017.) The Wife's attorneys have referred to the residence being a "$2 million" mansion or home. (Initial Br. 4; R. 679, 688, 717, 755, 762, 769, 774.) The trial court awarded the Husband both the property and the debt on it. (R. 636 ¶ 11.)

So, what is it the Wife wants out of this debt-laden property? She seems to complain about the "unequal distribution" that awarded the Husband real property bought for less than $600,000 and subject to a $1.5 million line of credit. (Initial Br. 32.) One might think that she would thank the trial court for relieving her from whatever debt the Husband has managed to rack up on this property.

The Wife insists she is entitled to a share of the property because, she suggests, it is a marital asset. (Initial Br. 32.) (The Wife, however, is silent about whether the debt on the property is a marital liability.) At first blush, the Wife has a point because—unlike all the other assets in this case—the Santa Rosa Beach property was acquired by the Husband's trust during the marriage, albeit after the parties had separated. *See* § 61.075(6)(a)1.a, Fla. Stat. (2014) (stating marital assets include "[a]ssets acquired . . . during the marriage").

But, like so many other arguments on this appeal, once one looks under the hood, it becomes obvious this argument won't go anywhere either. That's because

the purchase of this property is inextricably intertwined with the TYA money. The trial court found that the Husband purchased this lot with $578,575.05 of the TYA money. (R. 636 ¶10b; *see* R. 457-58, 999-1001.) The Wife does not challenge this finding. In fact, she embraces it. (Initial Br. 6-7, 15-16.)

Without deducting the amount of the property's debt, the trial court assumed the Wife was entitled to one half of this $578,575.05 used to purchase the property. (R. 636 ¶ 10b.) This, of course, was proper because ordinarily equitable distribution of a marital asset "should be equal." *E.g., Davis v. Davis*, 32 So. 3d 743, 744 (Fla. 1st DCA 2010). The Wife has not argued for an unequal distribution.

So, if no other property were in play (and ignoring the property's debt), the Wife would be entitled to $289,287.52 (one half of $578,575.05). The Wife's problem, however, is that other properties are in play—namely, the marital enhancements to her premarital assets. Those enhancements exceed $578,575.05. They amount to $936,269.00, according to the trial court's finding, which the Wife has not challenged on this appeal. (R. 635 ¶ 10a.) Thus, the trial court concluded the Husband's claims to the $936,269.00 would exceed any claims the Wife may have on the $578,575.05 used by the Husband to purchase the Santa Rosa Beach property. (R. 637 ¶ 5.) Simply put, even if the Wife is right that the Santa Rosa Beach property is marital, she would not get a penny because of the Husband's offsetting claims.

In short, the trial court dispensed with the Wife's arguments on the Santa Rosa Beach property by determining the Wife's claim to the property would be offset by the Husband's claims to the Wife's assets. (*See* R. 636-37 ¶¶ 10b, 11, 5.) This is the basis for the trial court's ruling. Because the Wife on appeal has not challenged this basis, she has abandoned any claim of error related to the property. *See supra* at 21.

Finally, though property acquired during the marriage is presumed to be marital, that presumption can be rebutted. *E.g., Nelson v. Nelson*, 206 So. 3d 818, 820 (Fla. 2d DCA 2016); § 61.075(8), Fla. Stat. (2014). The Husband's argument below—the presumption was rebutted (R. 599-601)—had force because: he purchased the lot after the parties separated; the TYA and BP monies used were nonmarital assets; and the lot was purchased through the premarital trust for the benefit of the Husband's adult children. *See supra* at 15-16. The trial court, however, avoided deciding this more difficult factual question by its use of the offsetting claims. (R. 636-37, ¶¶ 10b, 11, 5.) Accordingly, its judgment awarding to the Husband the Santa Rosa Beach property, and the accompanying debt, should be affirmed.

IV. Issue 4 (restated): Did the trial court abuse its discretion when it offset the Wife's and the Husband's competing claims to each other's assets?

Similar to the first argument, the Wife's fourth argument rests on a fundamental misunderstanding of the trial court's order. Specifically, the predicate of her argument is that the trial court purportedly "found that the Wife may owe the Husband $429,336 for his payments toward the marital home while the parties were married

because they bought the house before the marriage and were thus tenants in common." (Initial Br. 33.) In fact, the trial court did not find this. Instead, it expressly "denie[d] the Husband's contribution claim from the co-tenant Wife in the amount of $429,336.00," as it found "the lack of any prior demand for contribution is at least laches and possibly evidence of a gift to the marriage." (R. 637 ¶ 4.)

This foundational flaw renders the Wife's fourth argument nonsensical. It is a straw-man argument that knocks down a non-existent finding. The Wife's exposition on the law governing tenancies in common in the marital context is not germane to the appeal. (Initial Br. 33-34.) Thus, it is difficult to salvage anything out of her fourth (misstated) issue. That said, we have re-framed the issue as stated above. The ***standard of review*** is abuse of discretion, and the trial court did not abuse its discretion by offsetting the Husband's and Wife's competing claims to each other's assets. *See Parry*, 933 So. 2d at 15 (holding courts have "numerous" methods "to effect distribution of the parties' interests").

CONCLUSION

This Court should affirm the judgment in all respects.

Respectfully submitted,

CREED & GOWDY, P.A.

/s/ Bryan S. Gowdy
Bryan S. Gowdy
Florida Bar No. 0176631
bgowdy@appellate-firm.com
filings@appellate-firm.com
Thomas A. Burns (*Of Counsel*)
Fla. Bar. No. 12535
tburns@appellate-firm.com
865 May Street
Jacksonville, FL 32204
Telephone: (904) 350-0075

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed with the Clerk of Court on May 22, 2019, via the Florida Courts E-Filing Portal and that a true and correct copy of the foregoing has been furnished via email to:

William Ketchersid
bketchersid@flaattorney.com
WARD & KETCHERSID, P.A.
1241 Airport Rd. Ste. H
Destin, Florida 32541
Attorney for Appellee

Kristin Adamson, Esq.
kristinadamson@kadamsonlaw.com
1319 Thomaswood Dr., Ste. B
Tallahassee, Florida 32308
Attorney for Appellant

Robert Trammell
Roberttrammell45@gmail.com
ROBERT D. TRAMMELL, ATTORNEY AT LAW
P.O. Box 1799
Tallahassee, Florida 32302
Attorney for Appellee

James Heath
james@floridacoastlaw.com
service@floridacoastlaw.com
HEATH LAW FIRM, P.A.
4100 Legendary Dr. Ste. 265
Destin, Florida 32541
Attorney for Appellee

James M. Durant, Jr., Esq.
Jd@boydlaw.net
BOYD & DURANT, P.L.
1407 Piedmont Dr. E
Tallahassee, Florida 32308
Attorney for Appellant

/s/ Bryan S. Gowdy
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

May 22, 2019

/s/ Bryan S. Gowdy
Bryan S. Gowdy