2011 IL App (2d) 110049-U
No. 2-11-0049
Order filed December 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF SAM GEHANT,	)	Appeal from the Circuit Court
	)	of Kendall County.
Petitioner/Counter-Respondent-Appellee,	)	
	)	
and	)	No. 08-D-0003
	)	
KENNETH GEHANT ,	)	
	)	Honorable
Respondent/Counter-Petitioner-Appellant.	)	Linda S. Abrahamson,
	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Zenoff concurred in the judgment.

RULE 23 ORDER

Held: The trial court's judgment was affirmed because its findings that respondent had dissipated marital funds and that the Lee County farm was marital property were not against the manifest weight of the evidence.

¶ 1 Respondent, Kenneth Gehant, appeals two aspects of the trial court's judgment of dissolution in favor of petitioner, Sam Sammoura Gehant: first, that he had dissipated funds and, second, that the Lee County Farm was marital property. We affirm.

¶ 2 I. BACKGROUND

¶ 3 Respondent and petitioner were married in 1990. They had two children: a girl, Malika, born in 1995, and a boy, Joseph, born in 1996. Respondent worked in farming, carpentry, and eventually building and selling homes. Petitioner stayed at home with the children and babysat other children occasionally. After some incident occurred in the family on or around January 1, 2008, the specifics of which are in dispute, the parties separated. Sometime in the middle of January, Joseph made allegations that petitioner had sexually abused him. Petitioner filed a petition for dissolution of marriage, which she later withdrew, and respondent filed a counter-petition. During the proceedings, petitioner was given temporary custody of Malika and respondent was given temporary custody of Joseph.

¶ 4 In September 2008, petitioner moved to enjoin respondent from dissipating and transferring the marital assets. In September 2009, petitioner filed a claim of dissipation alleging that respondent had sold three spec homes for over $900,000 during the pendency of the divorce proceedings. She alleged that instead of paying down marital debt or paying support, respondent had diverted the money to his brother, his parents, and a friend who had been described as a "job superintendent." Petitioner charged respondent with at least $50,000 in dissipation of the marrital estate.

¶ 5 A. Trial Testimony

¶ 6 The trial spanned approximately 19 days in this case. We summarize the relevant testimony as follows.

¶ 7 Attorney Mark Zumdahl met with respondent in 1999 for estate planning purposes. The concerns were who would manage the finances for the children if something happened to the parents, and minimizing estate taxes. To avoid the estate tax consequences of leaving all of the assets to the surviving spouse, two living trusts were created for each spouse. An inventory of assets revealed

that most assets were owned in respondent's name, and the plan was to create an equal division of the real estate by conveying one-half of the property to his trust and one-half to her trust. Respondent understood that by implementing this estate plan, he was creating for petitioner a present ownership interest in his assets.

¶ 8 Bradley Erlinger testified that he met respondent in March 2002 and that they worked at the same company for five years. Respondent had a supervisory role over Erlinger, who worked as a carpenter. After that, respondent began his own business constructing homes, and he hired Erlinger to do carpentry work. Erlinger worked on the construction of respondent's home, respondent's neighbor's home, and some homes in Plainfield. Payment was estimated by the hour and determined before the work was started, and Erlinger knew his job responsibilities and what he would be paid prior to the projects. The two never used written contracts until this last project, which entailed the construction of four houses in Aurora. Erlinger prepared four contracts, one for each Aurora house, which they both signed. The contracts were dated December 11, 2007. The Aurora project started out fairly routine, in that respondent was hiring him as a carpenter to do the frame work. However, Erlinger's duties expanded, and he and respondent entered into additional contracts in 2008. Erlinger was surprised at these extra assignments, but he welcomed the work and completed all of it.

¶ 9 Erlinger gave conflicting testimony as to when he learned about respondent's divorce and the alleged abuse against Joseph. At first, Erlinger testified that he had learned of petitioner's alleged abuse of Joseph at the time he prepared the December 11, 2007, contracts. When questioned how he knew of the abuse and the divorce as early as December 11, 2007, Erlinger testified that he could not recall "the exact date" he learned this information. Erlinger then clarified that as of

December 11, 2007, he was not yet aware of any divorce or sexual abuse; he had confused the time line. Erlinger could not recall the date that respondent told Erlinger that petitioner had sexually abused Joseph, but it was after he learned this information that his workload on the Aurora homes significantly increased.

¶ 10 Erlinger's 2008 tax return showed income from respondent of approximately $260,000. Erlinger kept the money and did not kick it back to respondent. Erlinger's responsibilities for the Aurora homes far exceeded his responsibilities on the other projects; he acted as a general contractor on the project. Erlinger agreed that much of the work he performed on the Aurora homes was work that respondent had done himself on the Plainfield homes in 2005 or 2006. Erlinger understood that he was given more responsibility for the Aurora homes due to "the stress of [respondent's] divorce and what [petitioner] was doing to [their] son." Erlinger knew he "was going to have to step up and help him out." Respondent also had some tendinitis in his shoulder at that time. Respondent, who would show up on site once in awhile, was dealing with his divorce, which required numerous counseling sessions and court dates.

¶ 11 Gary Kemnitz was tendered as an expert certified accountant and fraud examiner. He was hired by respondent to do an accounting of his finances in response to petitioner's claim of dissipation. Kemnitz met with respondent on October 6, 2009, and learned that respondent kept no accounting records or ledger system; essentially, he had a checkbook. Kemnitz analyzed respondent's checkbook activity and all of his loan activity from July 2007 through September 30, 2009. During that 27-month period, Kemnitz reviewed every single deposit and disbursement in respondent's two business checking accounts, referred to as inflow and outflow. Overall, Kemnitz

reviewed approximately 2,000 documents, which included roughly 1,000 transactions. This analysis then culminated in a report dated October 28, 2009, as well as a supplemental report.

¶ 12 Respondent had loans and checking accounts at two banks, Centrue Bank and H.F. Gehant Bank.[1] At Centrue Bank, respondent had a commercial loan that was tied to his Centrue checking account. When respondent borrowed money from the Centrue loan account, it was transferred into the Centrue checking account. For the relevant period, about $949,000 was deposited from the Centrue loan account into the Centrue checking account. At the end, the outstanding loan balance was $1,001,000, including interest. Like at Centrue Bank, respondent had a loan at H.F. Gehant Bank that he would borrow from and then deposit into his H.F. Gehant checking account. At H.F. Gehant Bank, respondent borrowed $397,486, paid back $278,752, and had a resulting balance of approximately $120,000. Respondent also opened a home equity loan at Centrue Bank that was secured by the principal residence.

¶ 13 Kemnitz's analysis included summarizing where the money went from the various accounts, and he did so by tracking all of the deposits and disbursements. Sometimes, respondent would take money from one account and deposit it into another account. Respondent also deposited credit card cash advances into his accounts. For each check written, Kemnitz obtained a copy of the canceled check and noted what type of expense it was. Kemnitz opined that in the end, "[e]verything always tied out." This meant that the "exhibits account for 100% of the transactions; that we started with the beginning balances in July 2007, analyzed all the activity, categorized it, and agree to the ending statements as of September 30, 2009." According to Kemnitz, all of the inflow and outflow balanced, and respondent's debt "was being serviced" during this period.

[1]There was no connection between respondent's immediate family and H.F. Gehant Bank.

¶ 14 Kemnitz testified regarding respondent's purchase and construction of the Aurora property. In July 2007, respondent took an advance of $293,000 from the home equity line and $85,000 on another loan account to purchase six lots for $378,000. Respondent had constructed homes on four of the lots, two of which had sold and two of which were still for sale. The cost of each constructed home, including the cost of the lot, was about $255,000 per house. In this calculation, Kemnitz did not include the real estate taxes, association fees, insurance, or utility expenses. Kemnitz represented other home builders and opined that a typical price for building a custom home was $110 to $120 per square foot. Respondent's cost per square foot was slightly under that range and in line with what typical contractors would spend on a residential property. Respondent advised Kemnitz that he hoped to sell the Aurora homes for around $170 per square foot, which translated into a sales price of about $350,000 to $375,000 per home. Based on the market place at the time, Kemnitz thought that respondent's expectation was "very reasonable." The fact that the future did not hold what a lot of builders hoped for was not at all attributable to respondent' actions. Kemnitz also believed that respondent's payments to Erlinger were in line with typical costs. Kemnitz received various construction waivers and invoices that Erlinger had submitted to respondent's business. Kemnitz was "able to tie those up, take the invoices, tie them out to the waivers and in total tie them out within a few thousand dollars of the total checks written to Mr. Erlinger."

¶ 15 Kemnitz admitted that he did not do a full analysis of respondent's personal checking accounts, which were at Amcore Bank and Harris Bank. If, however, there was a significant transfer into a personal account, Kemnitz looked for "payments leaving the personal account to see where the money went." Kemnitz attempted to track where the "bigger dollars" or "significant amounts" went after a transfer to a personal account was made. If there were no significant payments

following a transfer to a personal account, Kemnitz assumed that respondent used the money for personal expenses. At the end, a little less than $100,000 was not categorized, which included $85,404.80 going to respondent and $13,900 deposited into the home safe. Kemnitz admitted that he assumed that this money totaling nearly $100,000 was for personal expenses.

¶ 16 During the 27-month period, respondent paid $440,000 to credit card companies and took $84,899 in cash advances. Kemnitz admitted that he did not categorize the expenditures on the credit cards. Kemnitz was not aware if respondent was able to negotiate down his credit card balances in order to settle the accounts.

¶ 17 John Coffey, a certified public accountant, was retained by petitioner in response to concerns of asset dissipation. Coffey described respondent's record keeping as "very poor." In preparing a balance sheet, Coffey reviewed bank statements, credit card statements, and loan histories of respondent's business and personal accounts back to January 2004. For every credit card, loan account, and bank account, Coffey inputted the beginning balance, charges, payments, and ending balance for each month. His goal was to get an overview of where the assets had gone. Coffey reviewed Kemnitz's report and used some of Kemnitz's figures, although he categorized them differently. He testified that he was not able to complete his assignment because he needed more documents.

¶ 18 In reviewing credit card statements from January 2004 through October 2008, Coffey noticed "an awful lot of" balance transfers between the accounts and cash advances. According to Coffey, respondent's credit card balance in July 2007 was $130,000. After that, there were credit card advances of $104,000, and then payments to the credit card companies of approximately $313,000 and $127,000. This showed Coffey that respondent's credit card payments exceeded the balance by

$206,000, which could mean that there were charges and/or debt forgiveness or possibly interest that was not shown on Kemnitz's report. On the bank account statements, Coffey limited his focus to transactions not lower than $2,000 or $3,000. According to Coffey, Kemnitz's report did not include substantial transactions through respondent's personal Amcore Bank account.

¶ 19 Using Kemnitz's report, Coffey also tried to determine what costs related to the construction of the homes in Aurora. Unlike Kemnitz, Coffey included miscellaneous expenses, utilities, insurance, real estate taxes, and association fees. Coffey explained that when a builder constructs a home, the costs related to holding the property, from an accounting perspective, are capitalized into the cost of the property. In addition, Coffey considered eight bank accounts whereas Kemnitz considered only respondent's two business accounts. Coffey calculated building costs for each home to be $227,000, plus the lot purchase of six lots for $378,000, which totaled a cost of about $290,000 per home. In reviewing respondent's payments to Erlinger from 2005 to 2008, the payments accelerated in 2008.

¶ 20 On cross-examination, Coffey admitted that in his calculation of miscellaneous expenses, he included the full-price value of some equipment that could be used on future construction projects. He also admitted that, even under his analysis, respondent's expectation of selling the homes between $350,000 and $375,000 would result in a profit of between $60,000 and $80,000 per home.

¶ 21 Respondent testified that he became an independent builder in 2005, and Erlinger worked for him. Erlinger helped respondent build two homes in Sugar Grove and two homes in Plainfield. They shared the work 50/50 on the "carpentry end of it or siding or interior trim," and Erlinger did some plumbing and painting on his own. When Erlinger first started working for respondent, he was paid on an hourly basis. Respondent suffered a shoulder injury in 2006, when they were constructing

the Plainfield homes. It took about one year to recuperate. Erlinger's participation increased during the construction of the Plainfield homes; there were three months that respondent sat in a chair and did nothing. At this point, respondent changed the way he paid Erlinger in that they would come up with an estimate for the hours and the money needed to complete the job.

¶ 22 Respondent testified that he purchased the six lots in Aurora in July 2007 for $381,000. He expected to receive at least $170 per square foot for the Aurora homes. When asked if he was aware of the economic conditions in the summer of July 2007, respondent replied that he was always concerned about the market, but that he had had a lot of encouragement from the bank. In his 23 years of building homes, respondent had "only seen the market bad one time *** for a stretch of maybe a year and-a-half or two years in the 80's. And it seemed to pick back up."

¶ 23 Respondent approached Erlinger to perform work on the Aurora homes in the fall of 2007. Erlinger began the framing work on the Aurora homes in December 2007, but respondent did not do any physical work on the Aurora homes due to the "same problem" of tendinitis with his shoulder. From the beginning, Erlinger was contracted to do more work on the Aurora homes than he had on the other homes. Respondent explained that on the Sugar Grove and Plainfield homes, Erlinger did not act as a general contractor. But Erlinger began doing more general contracting on the Aurora homes because respondent could not "do the physical part anyway, and [he] could not do a lot of the mental part because [he] was just in a very bad emotional state." Respondent was "hit pretty hard" with petitioner's alleged sexual abuse of Joseph, which caused him to lay low for about three months.

¶ 24 Respondent had a few conversations with Erlinger about taking on more responsibility, and Erlinger "pretty much stepped up to the plate and ran things for" respondent. Respondent gave

Erlinger the opportunity to do anything that could save him money. Specifically, Erlinger began purchasing materials, paying vendors, hiring his own plumbers, doing the HVAC, meeting with inspectors, paying inspection fees, and delivering permits. In 2008, the ratio of general contractor work that Erlinger was doing compared to what respondent was doing was 90/10. Respondent had lots of things he was managing, such as frequent appointments with therapists and court experts, caring for Joseph full-time, regular court appearances, and meetings with lawyers. In addition, respondent had another surgery on his shoulder in 2008.

¶ 25 At the time of trial, three of the homes had sold and the fourth was nearly ready for sale. The third home was sold for $258,000, which respondent used to pay off a $300,000 line of credit at H.F. Gehant Bank. In addition, evidence was introduced showing that respondent had settled with various credit card companies to pay a reduced balance when closing out the accounts.

¶ 26 Regarding the Lee County farm, respondent testified that it was separate, nonmarital property. In 1984, respondent entered into a "private contract" with his cousins, Anthony and Catherine Gehant, to acquire an interest in the property. The terms consisted of a 30-year amortization in which respondent would make two payments a year. He completed paying off the contract in 1989. Respondent identified a warranty deed, dated June 24, 1989, with a recording date of August 26, 1992. He did not know why the recording date was in August 1992. Respondent was aware that in working with attorney Zumdahl on his estate plan, the interest he had in the Lee County farm was transferred partially into petitioner's name. When asked why he did that, respondent answered that he "really wasn't aware that it was going to be transferred as far as deeded." He thought that "it was set up as a one-half interest trust." Respondent did not intend, at that time, to

make a gift of an interest in that farm to petitioner. The parties stipulated that the value of the Lee County farm was $594,400.

¶ 27 B. Trial Court's Decision

¶ 28 The trial court entered a judgment for dissolution of marriage on October 27, 2010, which incorporated the court's 33-page oral ruling. We summarize the court's findings regarding the two issues relevant on appeal: respondent's dissipation and the classification of the Lee County farm as marital property.

¶ 29 Regarding petitioner's allegation of dissipation, respondent brought in witness Kemnitz to show by clear and convincing evidence what he did with his money. Kemnitz testified that the family had many bank accounts. He did not summarize the personal accounts at Amcore Bank or Harris Bank, but he did note that significant monies were paid out of those accounts towards credit card bills. The bulk of the business activity involved the Centrue and Gehant checking accounts.

¶ 30 At the time of the parties' separation, the parties had purchased six lots in Aurora and had just undertaken building on four of them. At the time of Kemnitz's evaluation, two of the homes had been constructed and sold, and by the time of the court's ruling, all four homes had been constructed and sold, with two lots remaining. Kemnitz opined that respondent's hope in 2007 of receiving $170 per square foot was reasonable, as was his "cost basis" of $100 to $110 per square foot." However, Kemnitz did not include real estate taxes or association fees in developing his cost basis. Petitioner's witness, Coffey, faulted Kemnitz's cost basis for excluding those costs. Coffey's cost basis for each home was $290,000, which meant that all four homes were sold at a loss, yet the homes were the only source of income during the course of this litigation. Moreover, Kemnitz's

testimony that respondent's debt had been "served" ignored the fact that the commercial loan at Centrue Bank had been foreclosed on during the pendency of the divorce proceedings.

¶ 31 The court further noted that Kemnitz's report included a "gap filler" of about $100,000, which was based on respondent's statements of approximately $14,000 being deposited into the home safe and $85,000 spent on personal living expenses. Respondent's expenditure of $85,000 for personal expenses was not supported. In regard to both the $14,000 and $85,000 sums, the trial court found respondent's explanation "unsatisfactory" because the court had "previously found [respondent] incredible overall." In tracing the "ins and outs" of the Gehant and Amcore accounts, the gaps did not amount to clear and convincing evidence.

¶ 32 Additional evidence of dissipation was respondent's payment of $260,000 for Erlinger's work on the four Aurora homes when respondent himself took zero. On past building projects in Sugar Grove and Plainfield, respondent had shared work "fifty-fifty" with Erlinger, yet only paid him a few thousand dollars. Regarding respondent's shoulder injury, the initial injury occurred in the spring of 2006. Still, respondent was able to close on the Sugar Grove and Plainfield homes after that injury without paying significant sums of money Erlinger. Although respondent's shoulder underwent revision surgery in 2008, there was no testimony regarding how that surgery affected his ability to do physical work. Also, though there were many appointments regarding the children during these proceedings, the court had no idea how respondent spent his time. By the end of 2007, respondent knew that the market was softening, but there was no evidence that he did anything to control his costs. While Kemnitz did account for all of the monies paid to Erlinger, which comprised 41% of all payments to contractors on the Aurora project, Kemnitz did not consider the propriety of paying Erlinger for this work. Even assuming that the $260,000 paid to Erlinger was a fair price for

the work he did, the fact that respondent delegated all of this work without specific evidence of his physical or time limitations also constituted dissipation.

¶ 33 Finally, an evaluation of the credit card statements also revealed dissipation. Although Kemnitz testified that respondent's accounting balanced in the end, he did not " 'drill down' " on the credit card statements like Coffey did. During the 27-month period, $440,000 was paid to credit card companies, but there was no evidence of what was purchased on the cards "or what this was for." While some of it was likely interest, as respondent claimed, this did not satisfy his burden of clear and convincing evidence. Overall, the court found respondent's dissipation "to be in the tens and maybe even in the hundreds of thousands of dollars."

¶ 34 On the issue of the Lee County farm, the trial court classified it as marital property and awarded it to petitioner in its entirety. In explaining its ruling, the court found that respondent acquired a right to possess the Lee County farm in 1984 when he entered into an "Agreement for Warranty Deed" (Agreement) with his cousins, Anthony and Catherine Gehant. However, he did not obtain a fee simple or right to title. Pursuant to the Agreement, respondent was responsible for contract payments, taxes, and maintenance. If he defaulted, his payments would be forfeited as rent. "Therefore, prior to the marriage, [respondent] had certainly acquired certain of the stick in the bundle of sticks, but he had no right to a fee simple or title. Whatever rights he acquired in 1984 would have been non-marital."

¶ 35 In 1989, a portion of the Lee County farm was subdivided and sold to other individuals, Mr. and Mrs. Lindenmeier. At this time, respondent claimed to have made all scheduled contract payments but still owed $96,000. Respondent believed that the Gehants had gifted him the value of the parcel sold to the Lindenmeiers, which was $50,000. According to respondent, the $50,000,

gift, plus his own cash, was used to pay off the balance of the contract in 1989, even though the deed was not recorded until August 1992, which was during the marriage. Respondent had no explanation for why the deed was not recorded until 1992. The court stated:

¶ 36 "When confronted on cross-examination with [petitioner's] Exhibit 29, which is a note indicating that on 7/21 of 1992 [respondent] borrowed $80,000 from the Gehant Bank, the purpose for which was farm refinance, [respondent] incredibly claimed that he did not know if he had borrowed $80,000 in 1992 using the Lee County farm as security. On cross-examination by his own attorney, [respondent] testified that the $80,000 was probably for farm expenses."

¶ 37 The court noted that paragraph 16 of the Agreement indicated that a deed from the Gehant cousins to respondent was prepared at the time but to be held in escrow and then delivered to respondent upon full compliance with all terms of the contract. The trial court did not find credible respondent's testimony that he paid off the full contract of $96,000 in 1989; no documentation supported that claim. Because respondent did not acquire title or a fee simple to the property until 1992, the Lee County farm was marital property. Though respondent's non-marital contribution prior to marriage could have been reimbursed, his position was that the title transferred in 1989, and he presented no specific evidence of his non-marital contribution.

¶ 38 Alternatively, the trial court reasoned that even if the Lee County farm was not marital property, the transfer of the property to petitioner in the estate plan raised the presumption that it was a gift. The court noted that the parties created an estate plan in 1999 to protect the children if respondent died and to save on taxes. Though respondent was aware that the Lee County farm was placed into trust in petitioner's name, he claims that he did not intend the transfer to be a gift to

petitioner. Attorney Zumdahl testified that he created two living trusts, one for respondent and one for petitioner, which was a fairly typical plan to equalize assets for the best tax result. In meeting with the parties, attorney Zumdahl made it clear to respondent that the transfer created a present ownership interest for petitioner. Thus, respondent failed to rebut the presumption that the Lee County farm was a gift to petitioner.

¶ 39 Respondent's posttrial motion was denied.

¶ 40 II. ANALYSIS

¶ 41 A. Dissipation

¶ 42 Respondent first challenges the trial court's finding of dissipation. In allocating property under section 503 of the Illinois Marriage and Dissolution of Marriage Act (Act), the trial court must consider any dissipation by each party. 750 ILCS 5/503(d)(2) (West 2008); *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 652 (2009). Dissipation refers to a party's use of marital property for his or her sole benefit for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown. *In re Marriage of Awan*, 388 Ill. App. 3d 204, 215 (2009). Whether dissipation has occurred is a question of fact to be determined by the trial court, and such a determination will be not be disturbed on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 374 (2008). A factual finding is against the manifest weight of the evidence when the opposite conclusion is clearly evidence or the finding is arbitrary, unreasonable, or not based on the evidence. *Id.*

¶ 43 The spouse charged with dissipation of marital funds has the burden of demonstrating, by clear and convincing evidence, how the martial funds were spent. *In re Marriage of Awan*, 388 Ill. App. 3d at 215. If expenditures are not documented adequately by the spouse charged with

dissipation, the reviewing court will affirm a finding of dissipation. *Id.* The use of the marital funds at issue for legitimate living expenses is not a dissipation of assets. *In re Marriage of Zweig*, 343 Ill. App. 3d 590, 596 (2003). However, general and vague statements to account for how marital funds are spent are insufficient to defeat a charge of dissipation. *In re Marriage of Sanfratello*, 393 Ill. App. 3d at 653.

¶ 44 A trial court is not required to list what conduct constituted dissipation and how it arrived at a specific dollar amount. *In re Marriage of Tabassum and Younis*, 377 Ill. App. 3d 761, 779 (2007). In addition, the trial court is not required to award the other spouse cash or property equal to half of the amount dissipated or charge the dissipated amount against the offending party's share of the estate. *Id.* at 780.

¶ 45 As the trial court found in this case, respondent's financial records were voluminous, complicated, and poorly documented. Overall, the court found that respondent had dissipated "tens and maybe even hundreds of thousands of dollars." See *In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d at 780 (given the facts of the case, it was not error for the trial court to not list a more specific amount of dissipation). The court's finding of dissipation was based on respondent's payments to Erlinger for his work on the Aurora homes; the credit card statements; and the money used for personal expenses.

¶ 46 At the outset, we note that the court's finding of dissipation rested in part on its finding that respondent was not credible. See *In re Marriage of Zweig*, 343 Ill. App. 3d at 596 (the explanation provided by the spouse charged with dissipation requires the trial court to make a credibility determination). While respondent argues that the trial court's finding of dissipation was against the manifest weight of the evidence, we note that respondent has not included the full set of transcripts

in the record on appeal. As petitioner points out, missing from the record are the transcripts from respondent's adverse examination, as well as much of the transcripts from petitioner's presentation of evidence. Respondent's explanation for not including these transcripts is that they pertained only to custody issues.

¶ 47 It is the appellant's duty to present the reviewing court with a proper record on appeal, so that the court has an adequate basis for reviewing the decision below. *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007). When there is a gap in the record that could have a material impact on the outcome of the case, the reviewing court will presume that the missing evidence supported the trial court's judgement and resolve any doubts against the appellant. *Id.* In this case, it is unclear whether the missing transcripts contained any evidence pertinent to the dissipation issue. At the very least, it is evident that respondent's testimony regarding the custody issue affected the trial court's assessment of his credibility overall. In the court's written decision on custody, the court assessed respondent's credibility and made certain findings, which presumably led the court to later comment on respondent's credibility regarding the dissipation issue. In particular, the court found respondent's "explanation [as to his personal expenses] unsatisfactory because [it had] previously found respondent incredible overall." We also note that none of the transcripts included in the record on appeal contain respondent's testimony explaining his personal expenses. Accordingly, we use the record we have to review respondent's challenges to the dissipation finding, yet resolve any doubts against respondent.

¶ 48 Turning now to the court's finding of dissipation for payments made to Erlinger for the construction of the Aurora homes, respondent argues that petitioner introduced no evidence that the wages paid to Erlinger were inconsistent with the compensation generally paid to individuals

performing similar work; the $260,000 paid to Erlinger encompassed not just his salary, but payments for materials and supplies; and Kemnitz was able to reconcile Erlinger's invoices within a few thousand dollars of the total monies paid to Erlinger. In addition, respondent argues that he offered credible evidence of why he increased Erlinger's responsibilities. According to respondent, he could not do physical work because his shoulder was injured, and he was recuperating from two surgeries in 2006 and 2008. Also, he argues that he could not handle the mental element of constructing the Aurora homes because of his bad emotional state, which was caused by the divorce and his belief that petitioner had abused Joseph, and because he was busy caring for his son full-time, attending appointments with therapists, making court appearances, and meeting with his attorneys.

¶ 49 The trial court's finding of dissipation in this regard was not against the manifest weight of the evidence. On previous projects in Sugar Grove and Plainfield, respondent shared the work 50/50 with Erlinger, paid him only a few thousand dollars, and operated without written contracts. In contrast, on the Aurora project, respondent paid Erlinger $260,000, "took zero," and entered multiple written contracts. We note that respondent devotes much of his argument to the legitimacy of the payments to Erlinger, pointing out that Kemnitz concluded that the payments to Erlinger matched up within a few thousand dollars. However, Kemnitz did not analyze the propriety of having Erlinger perform such work, and the court considered this possibility. The court said that even assuming Erlinger was paid a fair price, the fact that respondent delegated all of this work without specific evidence of his physical or time limitations constituted dissipation.

¶ 50 In reviewing the transcripts before this court, respondent made only general and vague statements that his shoulder injury prevented him from performing physical work on the Aurora

project. However, as the trial court found, respondent's initial injury in 2006 did not prevent him from working on the Sugar Grove and Plainfield homes after that injury, and he did so without paying significant sums to Erlinger. Similarly, the trial court noted that there was "no testimony at all regarding how that [second revision] surgery [in 2008] affected his physical ability." While the court recognized that respondent spent a lot of time attending appointments for the children during the proceedings, the court still had "no idea how [respondent] spent his time." The bottom line is that, even assuming that the payments to Erlinger were legitimate, respondent failed to show by clear and convincing evidence that he was not dissipating funds by delegating so much work to Erlinger.

¶ 51 Relying on Kemnitz's report and testimony, respondent next makes the general argument that this "met the standard of proof of clear, specific evidence as how [respondent] spent his funds." We disagree. As stated, the other two bases for the court's finding of dissipation were respondent's credit card statements and his personal expenses.

¶ 52 At trial, Kemnitz admitted that he did not do a full analysis of respondent's personal checking accounts or credit card accounts, and he did not categorize what type of expenses were on the credit cards. Kemnitz testified that over the 27-month period analyzed, $440,000 was paid to credit cards, yet there was no evidence what was purchased or how the money was spent. Coffey testified that payments to credit card companies exceeded the balance, meaning that there may have been debt forgiveness or credit cards of which he was not aware, which was not explained by Kemnitz's report. Therefore, the court correctly found that Kemnitz did not drill down on the credit card statements as did Coffey, despite respondent's burden to do so. Likewise, Kemnitz's report included a "gap filler of about $100,000," which was based on respondent's statements to Kemnitz that $13,900 was deposited into the home safe and the other $85,000 was used for personal expenses. According to

the court, respondent provided no evidence that this money was used for personal expenses, and respondent lacked credibility overall. See *In re Marriage of Sanfratello*, 393 Ill. App. 3d at 653 (although the husband's complaints that he used the funds on legitimate expenses were not without some merit, he failed to carry the burden to defeat the dissipation claim because he provided no documentary support of his "legitimate" living expenses). Morever, as stated, none of the transcripts before this court contain respondent's explanation of the $85,000.

¶ 53 Given the trial court's credibility findings regarding respondent, the lack of documentation supporting how he spent the marital funds, and the lack of medical evidence as to his shoulder injury, the trial court's finding of dissipation was not against the manifest weight of the evidence.

¶ 54 B. Marital or Nonmarital Property

¶ 55 Respondent's other contention on appeal is that the trial court erred by classifying the Lee County farm as marital property. According to respondent, he acquired an interest in that property in 1984 when he entered into the Agreement with his cousins to purchase the property. Then, he paid off the property in 1989, and his cousins executed a deed for the property on June 24, 1989. Because the parties did not get married until 1990, respondent argues that it is nonmarital property.

¶ 56 Prior to dividing the parties' property upon dissolution of marriage, the trial court classifies the property as either marital or nonmarital. *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 154 (2005). The trial court's classification will not be disturbed on appeal unless it is contrary to the manifest weight of the evidence. *Id.* at 154. A decision is against the manifest weight of the evidence only where the opposite conclusion is clearly evident or where it is unreasonable, arbitrary, and not based on the evidence. *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 669 (2008).

¶ 57 Section 503(a) of the Act defines "marital property" as "all property acquired by either spouse subsequent to the marriage." 750 ILCS 5/503(a) (West 2008). Conversely, section 503(a)(6) of the Act excepts certain property referred to as "nonmarital property" where the property was acquired *before* the marriage. 750 ILCS 5/503(a)(6) (West 2008). The party claiming that the property is nonmarital has the burden of proof, and any doubts regarding the nature of the property are resolved in favor of finding that the property is marital. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009).

¶ 58 The trial court's finding that the Lee County farm was marital property was not against the manifest weight of the evidence. In making its ruling, the court relied on testimony and evidence elicited during the cross-examination of respondent, but, as mentioned previously, respondent has not included these transcripts in the record on appeal. See *Cutler v. Northwest Suburban Community Hospital, Inc.*, 405 Ill. App. 3d 1052, 1062 (2010) (the appellant bears the burden of presenting an adequate record on appeal to support his contention of error and any doubts arising from the incompleteness of the record will be resolved against him). Again, we review the record we have while resolving any doubts arising from the lack of record against respondent.

¶ 59 The following evidence is undisputed. Respondent entered into the Agreement to purchase the property for $180,000 from his cousins on August 28, 1984; the cousins executed a warranty deed on June 24, 1989, which was not recorded until August 26, 1992; and a portion of the property was subdivided and sold to the Lindenmeiers for $50,000 in 1989. The Agreement stated that a "Warranty Deed in accordance with this contract has been executed by Seller in due form of law," and the deed "is to be held by said attorneys in escrow and delivered to Buyer upon full compliance by said Buyer with the provisions of this Agreement." The Agreement further provided that

respondent was responsible for semi-annual payments, taxes, and maintenance of the property. In the event he defaulted, his payments would be forfeited as rent.

¶ 60 Relying on the 1989 warranty deed executed by his cousins, respondent testified on direct examination that that was the year he completed paying off the property, which was before the parties married in 1990. Based on the trial court's ruling, we are able to glean that respondent testified on cross-examination that in 1989, respondent still owed $96,000 on the property. According to respondent, his cousins had gifted him the value of the parcel sold to the Lindenmeiers, which was $50,000. He used this $50,000, plus his own cash, to pay off the $96,000 balance in 1989. However, as the trial court noted, respondent introduced no supporting documentation for this claim. Moreover, on cross-examination, petitioner confronted respondent with a "note" showing that he had borrowed $80,000 from the Gehant Bank on July 21, 1992. The trial court found it "incredible" that respondent did not know whether he borrowed $80,000 using the Lee County farm as security. In petitioner's closing memorandum, she argued that $80,000 was the balance due on the property, which explained why the deed was not recorded until August 26, 1992, only 27 days after he borrowed the money. Given this evidence and the terms of the Agreement, which provided that the deed executed by the cousins was to be held in escrow until full compliance with all terms of the Agreement, the trial court concluded that respondent had not met his burden of showing that the property was nonmarital. We reach the same result on appeal, especially due to the incompleteness of the record. As the trial court found, whatever rights respondent acquired prior to the marriage, it did not amount to a fee simple or title to the property.

¶ 61 Our decision is further supported by respondent's decision to enter into an estate plan that created an equal division of the property. Indeed, the trial court emphasized this act by respondent

created an alternative basis for classifying the Lee County farm as marital property. Property that was originally in respondent's name was conveyed 50/50 to each of the parties' living trusts. See *In re Marriage of Gattone*, 317 Ill. App. 3d 346, 352 (2000) (nonmarital property may still be presumptively transmuted into marital property by an affirmative act of the contributing spouse, such as placing the nonmarital property into some form of co-ownership with the spouse; this raises the presumption that the contributing spouse made a gift of the property to the marital estate). Though respondent testified that he was not aware of the ramifications of this decision, attorney Zumdahl advised respondent that the transfer of the property into living trusts created a present ownership interest for petitioner.

¶ 62 Finally, we reject respondent's argument in his reply brief that he is entitled to reimbursement for his contribution of nonmarital funds to the purchase of the Lee County farm. In its decision, the trial court specifically noted that although respondent would be entitled to such reimbursement, he proceeded on the theory that title to the property transferred in 1989 and provided no specific evidence of his non-marital contribution. Though respondent now claims that "[a]ll of the information regarding this farm was in evidence," his purported payments and percentage of contribution contain no record citations. Moreover, this argument was raised for the first time in the reply brief. Accordingly, it is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Mar. 16, 2007) (the argument portion of the brief shall contain citation to the pages of the record relied on, and points not argued are forfeited and shall not be raised in the reply brief); see also *Menard v. Illinois Worker's Compensation Commission*, 405 Ill. App. 3d 235, 238 (2010) (a party's failure to abide by Rule 341 may result in forfeiture).

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, the judgment of the Kendall County circuit court is affirmed.

¶ 65 Affirmed.