NOTICE
Decision filed 10/12/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110577-U

NO. 5-11-0577

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

JAMES W. MERIDITH and MARY LOU MERIDITH,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellants,	)	
v.	)	No. 03-MR-485
ROBERT PARRISH and WILMA PARRISH, Individually, and ROBERT PARRISH AS TRUSTEE OF THE HARRIS LAND TRUST,	)	Honorable Thomas W. Chapman,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Donovan and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Where the arguments raised on appeal were not raised before the circuit court or in the opening brief on appeal, but were raised for the first time in the reply brief, they are waived and the judgment of the circuit court is affirmed.

¶ 2 This is an appeal from a judgment of the circuit court of Madison County on the cross-claims of the parties, James W. Meridith and Mary Lou Meridith (Meridith), and Robert Parrish and Wilma Parrish, and Robert Parrish as trustee of the Harris Land Trust (Parrish), for an accounting and dissolution of partnership and business interests. The underlying facts are voluminous and confusing. Indeed, after three days of testimony, including that of experts, neither the circuit court nor, it seemed, the parties, could understand all of the financial dealings between the parties. We will set forth only those facts necessary for our disposition and, to the extent possible, simplify them.

¶ 3 James Meridith and Wilma Parrish are brother and sister; James Meridith and Robert Parrish are therefore brothers-in-law. The parties had become partners in the ownership and operation of a farm when the father of James Meridith and Wilma Parrish deeded ownership of the farm to the parties in equal proportions.

¶ 4 Parrish was actively engaged in, and managed, the farming operation. Meridith was a mortician and licensed funeral director who owned and operated a funeral home in Highland.

¶ 5 In addition to the farm partnership, Meridith and Parrish entered into a partnership to acquire a second funeral home in Lebanon, which Meridith was to operate. This was the Meridith-Parrish Funeral Home partnership. Monies were transferred between the two funeral homes as needed to pay bills, although the Highland home was owned by Meridith alone, while the Lebanon home was owned in partnership.

¶ 6 Both partnerships were informal in formation and in the conduct of their financial affairs. The finances of the two partnerships and Meridith's funeral home were all interrelated and intertwined.

¶ 7 Because Parrish was actively engaged in, and managed, the farming operation, the parties agreed that Meridith would pay 70% of a loan on the farm and that the other 30% would come out of the farm's proceeds. When Meridith became unable to make the 70% payments due on the farm loan, the shortfall was paid out of the farm proceeds, a portion of which belonged to Parrish. Parrish asked Meridith to deliver to him a deed to some of the farm land. Over the years, Meridith quitclaimed to Parrish all but 5.5% of his interest in the farm land. Meridith took the position that these deeds were only given as security for the money he owed Parrish for Parrish's payment out of the farm's proceeds of a portion of what Meridith owed on the farm loan. Parrish took the position that the deeds were given in repayment of a portion of Meridith's debt. Eventually, the farm loan was paid in full but

Parrish refused to convey the farm land back to Meridith.

¶ 8 At one point, the balance on the farm loan was combined with the balance of a loan which was used to save Meridith's Highland funeral home from foreclosure, and the combined balance was transferred to a loan collateralized in part by Parrish's home. In return, Meridith conveyed ownership of the Harris Land Trust, which owned the real estate belonging to the Highland funeral home, to Parrish as trustee. Again, Meridith believed this transfer was only as security for the debt; Parrish believed it was an outright transfer.

¶ 9 Animosity between the parties grew until they were no longer able to function as partners in business. Accordingly, on September 30, 2003, Meridith filed a complaint against Parrish seeking "a full accounting of all transactions between the parties," a declaration that "all transactions involving real estate between the parties constituted the providing of security for loans from [Parrish] to [Meridith] and not a transfer of both legal and equitable ownership of the property," a determination of the amounts, if any, owed between the parties, and that "the Court order a reconveyance and retransfer of all of the real estate formerly transferred by [Meridith] to [Parrish] back to [Meridith] subject to a security interest," if appropriate.

¶ 10 Parrish filed a counterclaim for dissolution of the Meridith-Parrish Funeral Partners (the Lebanon funeral home), a partnership between the parties. It sought an award of lost profits, the dissolution of the partnership, and the sale of all of its assets and disposition of the proceeds in accordance with an accounting.

¶ 11 At the conclusion of the three-day trial, the circuit court entered an order in which it held that Meridith had demonstrated joint ownership and partnership relationships between the parties sufficient to be entitled to an accounting under sections 403 and 405(b) of the Uniform Partnership Act (1997) (805 ILCS 206/403, 405(b) (West 2010)) and pursuant to the court's equity jurisdiction. The court further found that Parrish had been the managing partner of these partnership relationships and therefore had the burden to produce the

accounting.

¶ 12 After discussing the law and the facts, the court held that the conveyances by Meridith to Parrish of the farm land and the Harris Land Trust were, as Meridith contended, intended only as security interests, or equitable mortgages, against the debts and obligations owed by Meridith to Parrish. The court further held that the debt underlying the equitable mortgage on the farm land had been paid in full.

¶ 13 The court then proceeded to discuss certain disputed financial transactions between the parties and to credit the parties with amounts it found appropriate to fairly and appropriately adjust the parties' respective accounts. The court thereupon declared the farm partnership and the Meridith-Parrish Funeral Home partnership dissolved. The court declared that Meridith no longer had any ownership interest in the farm partnership and ordered Meridith to quitclaim to Parrish all interest in the farm. The order further declared that Parrish had no ownership interest in the funeral home in Highland, and ordered Parrish to disclaim any interest therein and convey the Harris Land Trust to Meridith. Finally, the court ordered the assets of the Meridith-Parrish Funeral Home partnership (the Lebanon funeral home) sold and directed that the proceeds be used to pay partnership debts to third parties and then divided equally between the parties. The court retained jurisdiction "to oversee the sale and other incidents of dissolution."

¶ 14 Meridith filed a motion for modification of the judgment asserting that, in light of the court's findings that the deeds to Parrish of Meridith's interest in the farm land were given only as security for a loan, and that the loan had been paid in full, the circuit court erred in declaring Parrish the owner of the farm and ordering Meridith to quitclaim his interest in the farm to Parrish. Meridith argued that, because the loan had been paid in full, the court should have ordered Parrish to convey back to Meridith his interest in the farm.

¶ 15 Meridith also asserted that the court erred in ordering the Lebanon funeral home to

be sold and the assets divided equally. Meridith argued that he should have been given the opportunity to purchase the funeral home from the partnership. Parrish also filed a posttrial motion and both parties filed memoranda of law.

¶ 16 The circuit court denied both posttrial motions. With respect to Meridith's motion, the court pointed out that both parties had asked for broad relief. Both parties wanted a complete resolution of their financial relationship. The court explained that it had ordered transfer of Meridith's interest in the farm land to Parrish as part of the dissolution and disposition of assets of the partnership, not as a foreclosure of an equitable mortgage or as a partition of real estate.

¶ 17 Meridith appeals, presenting a single issue for our review: whether the circuit court erred in holding that title to the farm land passed to Parrish, given its holding that the deeds from Meridith to Parrish were merely an equitable mortgage and the underlying debt had been paid. Meridith argues that the circuit court's order is erroneous because it is self-contradictory, that is, the judgment is inconsistent with the factual findings. Meridith argues that it was inconsistent for the circuit court to find that Meridith's deeds were merely a mortgage and that the underlying debt had been paid, but then to order Meridith to quitclaim any interest in the farm to Parrish. Meridith argues that judgments which are inconsistent with factual findings must be reversed.

¶ 18 Meridith also argues that the circuit court's order violates real property and mortgage law because, where the debt underlying a mortgage is paid in full, title must vest in the mortgagor, not the mortgagee. Because Meridith's deeds constitute an equitable mortgage, upon payment of the underlying debt, Meridith is entitled to a deed from Parrish conveying the property back. The circuit court's order did the opposite.

¶ 19 Finally, Meridith argues that the circuit court's order is erroneous because it ordered Meridith to quitclaim *all* of his interest in the farm, not just that portion which had been the

subject of the equitable mortgage.

¶ 20 We believe Meridith has misapprehended the circuit court's order. As the circuit court itself explained in its order denying posttrial motions, Meridith was ordered to convey his farm land to Parrish as part of the dissolution of the partnerships and commingled business interests of the parties. The circuit court's judgment is not inconsistent with its factual findings, nor is the order self-contradictory.

¶ 21 The circuit court found that Meridith's deeds to Parrish were an equitable mortgage and not an outright conveyance. Nevertheless, regardless of how the farm land was actually owned, in its dissolution of the parties' partnerships, the circuit court ordered that the assets of the farm be given to Parrish. In this regard, the circuit court's order does not violate real property or mortgage law because the conveyance was not ordered pursuant to real property or mortgage law, but as part of the dissolution of the partnership. This is precisely why the circuit court ordered Meridith to convey *all* of his interest in the farm to Parrish, not just that portion which had been the subject of the equitable mortgage. Accordingly, we reject Meridith's argument on appeal.

¶ 22 Neither in the circuit court nor in his opening brief on appeal does Meridith argue that the circuit court's disposition of partnership assets is inequitable or that the partnership dissolution and division of assets was otherwise improper. Only in his reply brief does Meridith challenge the circuit court's dissolution judgment and division of assets. However, it is well settled that any points not raised in the opening brief are waived and may not be raised for the first time in the reply brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 23 Furthermore, the arguments made in the reply brief were never raised before the circuit court. It is well settled that issues not raised in the circuit court are deemed waived and may not be raised for the first time on appeal. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007). One of the purposes of the waiver

rule is to create an incentive for litigants to bring to the circuit court's attention alleged errors, thereby giving circuit courts an opportunity to correct their mistakes. Meridith may not now complain of alleged errors by the circuit court well after that court has lost any opportunity to correct those mistakes.

¶ 24 A second purpose of the waiver rule is to prevent unfair prejudice to an opposing party. *Cambridge Engineering*, 378 Ill. App. 3d at 453. If one party neglects to raise an argument at the trial level, the adversary may be forestalled from presenting evidence in rebuttal, and thus it is proper to bar the first party from springing the argument at the appellate level where the presentation of evidence is no longer possible. *Cambridge Engineering*, 378 Ill. App. 3d at 453. This is particularly true where the argument is raised for the first time in the appellant's reply brief, thereby forestalling the appellee from even presenting argument, much less evidence, in response. Accordingly, we hold that any such issues raised for the first time in the reply brief have been waived, and we will not address them.

¶ 25 Finally, we must address an issue of jurisdiction which Parrish has raised. Parrish argues that because the circuit court's judgment retained jurisdiction to oversee the sale and other incidents of dissolution, the judgment is not final and this court has no jurisdiction to hear this appeal. We do not agree.

¶ 26 Illinois courts have long held that a judgment that disposes of the merits of the case but retains jurisdiction for resolution of incidental issues is a final judgment within the meaning of Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). *Impey v. City of Wheaton*, 60 Ill. App. 2d 99, 103 (1965). The test is whether the decree terminates the litigation on the merits, or whether it retains jurisdiction for future determination of matters of substantial controversy. *Impey*, 60 Ill. App. 2d at 103. A final and appealable order is one that terminates the litigation between the parties on the merits, so that if it is affirmed, the circuit

court has only to proceed with its execution. *Impey*, 60 Ill. App. 2d at 104. Such is the case at bar.

¶ 27 In the case at bar, the circuit court retained jurisdiction merely in aid of execution, but not for the purpose of determining what relief will be given. See *Impey*, 60 Ill. App. 2d at 104. The court had completed its accounting and had finally divided the assets of the partnerships. The only thing remaining to be done was execution of the judgment through sale of the partnership assets. The judgment appealed from is final within the meaning of Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994), and this court properly exercises its jurisdiction.

¶ 28 For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed.

¶ 29 Affirmed.