

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).

2013 IL App (4th) 121006-U

NO. 4-12-1006

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 13, 2013
Carla Bender
4th District Appellate
Court, IL

In re: the Marriage of)	Appeal from
SARAH DRAPER-MAYES,)	Circuit Court of
Petitioner-Appellee,)	Sangamon County
and)	No. 10D978
JAMES A. MAYES,)	
Respondent-Appellant.)	Honorable
)	Rudolph M. Braud,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in (a) denying the ex-husband's motion to vacate the temporary order, (b) ordering supervised visitation, (c) setting child support, and (d) awarding the marital residence to the ex-wife.

(2) The manifest weight of the evidence supported the trial court's (a) valuation of the ex-husband's SERS pension and (b) finding the husband dissipated the marital estate.

¶ 2 In April 2012, the trial court granted the petitioner, Sarah Draper-Mayes, and respondent, James Mayes, a dissolution of marriage. James appeals the dissolution judgment, arguing the trial court erred in (1) denying his motion to vacate the temporary order entered on December 15, 2010, (2) entering a plenary order of protection and ordering his supervised visitation with the minor children, (3) ordering him to pay \$965 per month in child support, (4) dividing the marital assets and awarding Sarah the marital residence, and (5) finding he

dissipated the marital estate. We affirm.

¶ 3

I. BACKGROUND

¶ 4

On December 26, 1992, Sarah and James married. During their marriage, the parties had two children, Elizabeth C. Mayes (born July 12, 2002) and Andrew Mayes (born July 30, 2007). In November 2010, the parties separated. On December 8, 2010, Sarah filed a petition for dissolution of marriage and a petition for emergency relief. Sarah requested she be awarded temporary custody of the children, exclusive possession of the marital home, and temporary child support.

¶ 5

On December 13, 2010, the trial court entered a temporary order, requiring James to pay child support in the amount of \$965 per month. The order stated child support was set "by agreement of the parties." The court's docket entry shows both parties appeared before the court with counsel.

¶ 6

On December 15, 2010, the parties again appeared with counsel. The trial court entered a temporary order, granting Sarah custody of the minor children and setting temporary child support at \$965 per month, granting Sarah exclusive possession of the marital residence, allowing James visitation from 7:30 a.m. to 7 p.m. on Mondays and Tuesdays, and ordering James to make timely mortgage payments on the marital residence. The court also allowed James' counsel to withdraw and advised him of his right to obtain new counsel within 21 days.

¶ 7

On December 17, 2010, the parties presented a signed agreed temporary order to the trial court. The order incorporated all the provision of the December 15, 2010, order and modified James' visitation to Sundays and Mondays. The court approved and signed the order.

¶ 8

On December 20, 2010, Sarah filed a petition for an order of protection and the

trial court entered an *ex parte* order of protection the same day, in Sangamon County case No. 10-OP-1932. On January 13, 2011, the court consolidated case No. 10-OP-1932 with Sangamon County case No. 10-D-978, which is the subject of this appeal. The record does not contain a copy of the *ex parte* order of protection.

¶ 9 On December 21, 2010, James filed a motion to vacate the temporary order entered on December 15, 2010, alleging (1) the order was assigned to Judge Braud but was signed by Judge Otwell, (2) he was not notified the temporary order was going to be entered, (3) he did not agree to the order's term, (4) he did not sign the order, and (5) and the trial court did not receive evidence or testimony concerning the order. The trial court did not rule on the motion until the April 16, 2012, final dissolution judgment.

¶ 10 On January 31, 2011, James filed a motion to establish a provider for supervised visitation.

¶ 11 On January 24, 2011, the State charged James in Sangamon County case No. 11-CM-86 with violation of an order of protection (720 ILCS 5/12-30(a) (West 2010)). On July 12, 2011, James pleaded guilty to the charge and was sentenced to one year of court supervision.

¶ 12 On February 25, 2011, James filed a petition to terminate and/or abate child support, alleging (1) his motion to vacate the December 15, 2010, temporary order was still pending, and (2) he received notice he was being placed on unpaid disability leave. The trial court finally denied James' motion to vacate in its April 16, 2012, dissolution judgment.

¶ 13 On March 9 and 24, 2011, the trial court held hearings on James' motion to establish a provider for supervised visitation. On March 29, 2011, the court granted James' motion and ordered Jane Dodson to supervise visitation between James and the minor children.

¶ 14 On June 10, 2011, the trial court held a hearing on the dissolution petition. The court's docket entry reflects witnesses were sworn and evidence was heard. At the hearing, Sarah admitted the parties' joint 2008 tax return as petitioner's exhibit No. 3, the parties' joint 2009 tax return as petitioner's exhibit No. 6, and the parties' joint 2010 tax return as petitioner's exhibit No. 9 into evidence. These returns reflected an adjusted gross income of \$52,257 for 2008, \$70,395 for 2009, and \$48,933 for 2010. The transcript from those proceedings were not part of the record on appeal.

¶ 15 On September 30, 2011, the trial court heard more evidence. James testified he is a tactical support officer for the Illinois Department of Corrections. James also serves as a section leader in the United States Army Reserves, Military Peace Corps. On June 26, 2010, James was bit by a spider on the toe at Fort Hunter Liggott, California. In July 2010, James began treatment for the spider bite. James had nine surgeries on his toe for the spider bite, and eventually had it amputated. James testified he had a forthcoming hearing with the military medical review board to determine if he would be medically retired from the army or honorably discharged because he was "unfit for duty." James testified he was unemployed in February, March, and April 2011 due to the spider bite and only received income from the military in April and May 2011.

¶ 16 James testified Sarah was self-employed as a massage therapist and operated her business out of the marital residence. James testified Sarah received approximately \$200 to \$400 per month in cash payments. James said Sarah did not keep track of her income and expenses for the business. To calculate tax liability, the parties referenced the deposits made into their checking account.

¶ 17 James presented evidence he had a net income of \$40,081 from the State of Illinois and \$8,927 from the military for 2010, for a total net income of \$49,008 in 2010. Prior to the September hearing, James filed an amended financial affidavit, reporting a *gross* income of \$29,709 from the State for January to September 2011. His affidavit reported a *net monthly* income of \$3,519 from the State through September 2011. He testified his military pay was not reflected on the financial affidavit. Respondent's exhibit No. 82 showed a military *gross* income of \$4,152 and a *net* income of \$3,749 through September 2011. James total gross income through September 2011, from the State and military combined, was \$33,861.

¶ 18 James testified to the parties' 2010 federal income tax return. James testified he filed a joint married 2010 tax return for him and Sarah "by accident." James claimed both minor children as exemptions and did not include Sarah's income from her massage business in the tax return. The 2010 joint return, entered into evidence as petitioner's exhibit No. 9, reflects a refund amount of \$6,018. James testified he received \$5,946 from the return after fees were taken out.

¶ 19 James' counsel questioned James on how he spent the 2010 tax refund. James testified he used the refund to pay "marital bills," including "some credit cards," but James could not remember which credit cards. On cross-examination, James testified he used the refund to pay \$1,500 to his attorney, \$390.58 for medical insurance, \$203 for his cell phone, \$158.57 for dental insurance, a "couple of small loans," his truck payment, and "American Home Shelter." Finally, James testified he paid \$1,910 to "Marketplace EDI payments." James thought it was a loan, but could not "recall."

¶ 20 James also testified to the value of his State Employee Retirement Systems (SERS) pension. Since 1996, James has contributed \$46,796 to his SERS pension. James

admitted respondent's exhibit No. 7 into evidence, reflecting James' contributions to his SERS pension totaled \$46,796.

¶ 21 James' counsel called Sergeant Anthony Castellano, James' military supervisor, to testify as a character witness on James' behalf at the September 2011 hearing. Castellano said James has "outstanding moral conduct" and has never "become violent" or "los[t] his temper." On cross-examination, Castellano admitted he has never witnessed James interact with his children.

¶ 22 On November 22, 2011, the trial court held a final hearing on the dissolution proceedings. James testified he was on medical leave with the State, was not receiving income from the State, and had been on medical leave since mid September 2011. James testified the military was treating his spider bite as a workers' compensation issue. James would receive back pay from the military if the medical review board determined his spider bite was an injury in the line of duty, but he would not receive any back pay from the State. James did not file an additional financial affidavit with the trial court before the November 2011 hearing.

¶ 23 Sarah's counsel questioned James about the 2010 tax refund. James testified he used the tax refund to pay "American Express, the Star Card," his Jeep payment, and auto insurance. He paid \$45 to "American Home Shield," \$297 for health insurance, "90-some dollars for dental" insurance, \$780 for rent, and \$120 for utilities.

¶ 24 James also testified he transferred \$3,000 from the parties' joint account to his personal account on December 3, 2010, and paid \$2,000 of that money to his attorney. James also admitted transferring \$100 out of the joint account on December 1, 2010, \$200 on December 3, 2010, \$300 on December 9, 2010, and \$50 on December 10, 2010. James alleged Sarah

removed \$375 from the joint account.

¶ 25 Sarah testified she left the marital residence on November 22, 2010, and on November 30, 2010, she withdrew \$300 from the marital account.

¶ 26 Sarah testified James did not consult with her before filing the 2010 tax return. Sarah filed a "married filing separate" tax return, and as a result of James filing the joint return, Sarah owed \$81 in federal taxes. Sarah could not remember the state tax liability for 2010 but knew it was under \$300. Sarah filed a report of fraud with the Internal Revenue Service (IRS) and is awaiting a determination on that issue.

¶ 27 Several exhibits were admitted into evidence at the November 22, 2011, hearing. Among these was Sarah's financial affidavit, admitted as petitioner's exhibit No. 1. In her affidavit, Sarah listed the value of James' SERS pension at \$146,078.

¶ 28 Sarah called Dodson to testify concerning the supervised visitations between James and the children. Dodson testified James would get "mad" over where the parties ate during the supervised visitation. On one occasion James got "mad" because someone other than Sarah was driving her van when the children arrived for visitation. James spoke of the divorce during visitations, "raise[d] his voice" to Sarah, talked about his health conditions in front of the children, called his daughter a "liar" on several occasions, and threatened to call the Department of Children and Family Services. James discussed calling the police in the children's presence. This caused the parties' son to cry and "go[] ballistic." During one visitation in the park, James gave his daughter a "Nook" (electronic book). James insisted Sarah join them so he could demonstrate how to operate the Nook. When she refused, James withheld the Nook from his daughter. On four or five occasions James has "talked poorly" about Sarah in front of the

children, saying, for example, "your mom is going to lose the house." Dodson feels James is "controlling." Dodson testified Sarah remains parked outside in her vehicle during visitations but it is not disruptive to the children.

¶ 29 James testified Sarah is always present during his supervised visitations with the children and it is disruptive to the children. James did not threaten to call the police on Sarah in front of the children. James has "never called [his daughter] to her face a liar [*sic*]." James testified he never told the children their mother would lose the home.

¶ 30 James testified he did not give his daughter a Nook and then take it away. James explained he put the Nook back in his Jeep "for security reasons." James said it was not him who wanted Sarah to come over to their table at the park; it was the parties' son who wanted Sarah involved in his birthday celebration.

¶ 31 James admitted he pleaded guilty to violation of the order of protection and was placed on court supervision. James explained he violated the order in January 2011 because he had a "bad gut feeling" something was wrong at the marital residence. James sat in the backyard of the marital residence, covered with a blanket. James has not violated the order since the January incident.

¶ 32 On November 22, 2011, the trial court granted a plenary order of protection in case No. 10-OP-1932.

¶ 33 On March 2, 2012, the trial court issued its memorandum of opinion. In relevant part, the court awarded Sarah full custody of the minor children, finding "this [wa]s not an appropriate case for an award of joint custody as such an award would not be in the best interests of the children." In regard to visitation, the court "recognize[d] the need for [James] to spend

quality co-parenting time with the children and certainly d[id] not want to create a case of parental alienation." However, the court found there were "some instances of [James] behavior that cause[d] some concern," and the court was not willing to grant James unsupervised visitation without counseling and proof of ongoing sessions. The court order supervised visitation between James and the children from 12 to 3 p.m. every Saturday and 5 to 7 p.m. every Wednesday. The court would review the issue of supervised visitation on April 27, 2012.

¶ 34 On April 6, 2012, the trial court entered a dissolution judgment, awarding Sarah full custody of the minor children and ordering supervised visitation between James and the children, to be reviewed on April 27, 2012. The court denied James' motion to vacate the temporary order of December 15, 2010, and denied James' February 25, 2011, motion to abate child support. The court ordered James to pay monthly child support in the amount of \$965. In dividing the marital estate, the court charged James with \$6,277 dissipation. James was also ordered to pay \$14,248.44 in past mortgage payments he did not pay as required of him in the December 15, 2010, order.

¶ 35 Finally, the trial court divided the marital estate. Sarah received (1) the marital residence, (2) her 2010 minivan, (3) 50% of James' military and SERS pension, (4) her checking account, (5) her savings account, and (6) her massage business. The court assigned Sarah the following debts: (1) the mortgage on the marital home, (2) the loan on her mini van, (3) the Sam's credit card debt, (4) the Capital One credit card debt, and (5) the Lowe's credit card debt. James was awarded (1) his Jeep, (2) 50% of his military and SERS pension, and (3) his checking account. The court assigned the following debts to James: (1) his Jeep loan, (2) the Bank of America credit card debt, (3) the American Express credit card debt, and (4) the Military Star

credit card debt.

¶ 36 On May 15, 2012, James filed a motion to reconsider. On June 10, 2012, the trial court held a hearing on James motion, hearing issues related to financial matters. On September 25, 2012, the court heard arguments of the parties on the motion to reconsider and denied the motion.

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, James argues the trial court erred in (1) denying his motion to vacate the temporary order entered on December 15, 2010, (2) entering a plenary order of protection and ordering his supervised visitation with the minor children, (3) ordering him to pay \$965 per month in child support, (4) dividing the marital assets and awarding Sarah the marital residence, and (5) finding he dissipated the marital estate. We address each argument in turn.

¶ 40 A. The December 15, 2010, Temporary Order

¶ 41 James first argues the trial court erred when it denied his motion to vacate the temporary order entered on December 15, 2010. James alleges the court should have vacated the temporary order because his attorney withdrew prior to its entry, and he was therefore not adequately represented; nor was he allowed time to obtain new counsel before the court entered the order. James further contends the court should have vacated the temporary order because it did receive evidence or testimony on the temporary order prior to its entry. James argues he did not agree to the setting of child support at \$965 month.

¶ 42 Sarah argues James was adequately represented by counsel when the trial court entered the December 15, 2010, temporary order and his counsel did not withdraw until after the

order was entered. She further alleges James ratified the temporary order when he signed an "Agreed Temporary Order" on December 17, 2010, which stated the provisions of the December 15, 2010, temporary order remained in full force and effect. We agree with Sarah.

¶ 43 The record contains a docket entry reflecting the parties appeared before the trial court with their attorneys on December 13, 2010. The court entered an order stating the parties agreed to set child support at \$965 per month and a temporary relief hearing would take place on December 15, 2010. The record does not contain a transcript of any proceedings on December 13, 2010.

¶ 44 A December 15, 2010, docket entry show James and Sarah both appeared before the trial court with their attorneys and a temporary order was entered. The temporary order granted Sarah custody of the minor children and provided a visitation schedule for James. The order further set child support at \$965 per month. It also shows James' counsel was permitted to withdraw and the trial court admonished James he had 21 days to obtain new counsel. The record does not contain a transcript of the proceedings on December 15, 2010.

¶ 45 Finally, on December 17, 2010, an agreed temporary order was filed in the trial court. The order provided the December 15, 2010, temporary order would "remain in full force and effect" and was signed by James, Sarah, and the trial judge. The record does not show whether the parties appeared before the trial court with counsel; nor does it contain a transcript of any proceedings for December 17, 2010.

¶ 46 On December 21, 2010, James filed a motion to vacate the temporary order, alleging (1) the case was assigned to Judge Braud but was signed by Judge Otwell, (2) he was not notified the temporary order was going to be entered, (3) he did not agree to the order's term (4)

he did not sign the order, and (5) and the trial court did not receive evidence or testimony concerning the order.

¶ 47 On February 25, 2010, James filed a petition to terminate and/or abate child support, alleging (1) his motion to vacate the December 15, 2010, temporary order was still pending and (2) he received notice he was being placed on unpaid disability leave. The trial court denied James' motion to vacate in its April 16, 2012, judgment of dissolution of marriage.

¶ 48 At the September 30, 2011, hearing on final dissolution, James testified his counsel only discussed with him the issue of his removal from the marital home prior to the December 15, 2010, hearing on temporary relief. He further testified his counsel withdrew prior to the court's entry of the temporary order. The trial court found otherwise.

¶ 49 The trial court's April 16, 2012, dissolution judgment states the court heard arguments of counsel on the temporary order, set child support at \$965 per month, and James' counsel was permitted to withdraw *after* the temporary order was entered. It also states James signed an agreed temporary order on December 17, 2010, providing the provisions of the December 15, 2010, temporary order would remain in effect, and such action was a ratification of the temporary order. We agree with this finding.

¶ 50 The Second District has upheld a trial court's decision to deny a party's motion to vacate an agreed order where the parties appeared and presented the agreed order, the trial court approved it, and the parties and the court signed the order. See *In re Marriage of Nau*, 355 Ill. App. 3d 1081, 1086-87, 824 N.E.2d 650, 654-55 (2005). This court has upheld a trial court's denial of a motion to vacate an order, concluding a party could not challenge child support abatement in an earlier order where the party stipulated to the abatement in a later order. See

People ex rel. Gibbs v. Ketchum, 284 Ill. App. 3d 70, 78, 671 N.E.2d 1149, 1154 (1996). These cases apply to James.

¶ 51 Whether James' counsel withdrew prior to the trial court entering the temporary order on December 15, 2010, or immediately thereafter, is irrelevant, considering all the circumstances. The court first set child support at \$965 per month on December 13, 2010, and James *was represented* by counsel at that time. The order states child support was "by agreement of the parties." Further, James ratified the December 15, 2010, temporary order when he signed an agreed temporary order on December 17, 2010, incorporating the December 15, 2010, provision for child support. The December 17, 2010, agreed temporary order was presented to the court, signed by the court, and also signed by Sarah and James. James signed the later agreement and cannot now claim the trial court exceeded its authority in entering the order.

¶ 52 B. Supervised Visitation and The Plenary Order of Protection

¶ 53 James next argues on appeal the trial court erred in granting supervised visitation and entering a plenary order of protection. Specifically, James suggests (1) the court applied the "best interests" standard instead of the serious "endangerment standard" and did not make the proper finding for supervised visitation, and (2) the court should not have entered a plenary order of protection because (a) he violated the emergency order of protection only once, and (b) it will have "serious ramifications" for his employment, which may result in a loss of employment.

¶ 54 1. *Supervised Visitation*

¶ 55 Section 607(a) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) provides "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously

the child's physical, mental, moral[,] or emotional health." 750 ILCS 5/607(a) (West 2010).

"Liberal visitation is the rule, restricted visitation is the exception, and thus the custodial parent bears the burden of proving by a preponderance of the evidence that visitation with the noncustodial parent would seriously endanger the child." *In re Marriage of Slayton*, 292 Ill. App. 3d 379, 386-87, 685 N.E.2d 1038, 1043 (1997). We will not reverse a trial court's decision as to custody and visitation unless the court abused its discretion or the judgment resulted in a manifest injustice to the parent or child. *In re Marriage of Minix*, 344 Ill. App. 3d 801, 803, 801 N.E.2d 1201, 1203 (2003).

¶ 56 We reject James' argument that the trial court's decision regarding visitation was in error because the court did not make specific findings regarding serious endangerment. The Fifth District has held a court's order on supervised visitation does not have to make a "formalistic recital that section 607 ha[s] been complied with." *In re Marriage of Johnson*, 100 Ill. App. 3d 767, 771, 427 N.E.2d 374, 377 (1981). Rather, the court only need to find a danger is posed to the children before visitation rights can be restricted. *Johnson*, 100 Ill. App. 3d at 771, 427 N.E.2d at 377. We agree with this holding. At the same time, trial courts should make the findings necessary to satisfy section 607, and the prevailing party should ask the court to make appropriate findings. We are not required to reverse the court's order for failing to make a specific finding James seriously endangered the children but encourage trial courts to do so in the future.

¶ 57 We reject James' notion the trial court applied the "best interest" standard when ruling on visitation. The trial court is presumed to know the law and follow it, and we will not assume it failed to do so unless the record affirmatively shows otherwise. *People v. Thorne*, 352

Ill. App. 3d 1062, 1078, 817 N.E.2d 1163, 1177 (2004). In the court's March 2, 2012, memorandum of opinion, the only reference the court makes to the best interest of the children is in regard to custody. Again, in the court's April 16, 2012, dissolution judgment, the court speaks to the best interest of the children in awarding full custody to Sarah. The court explained unsupervised visitation would be inappropriate because "there are some instances of [James'] behavior that cause some concern for th[e] [c]ourt."

¶ 58 We must still review the trial court's order of supervised visitation and determine if the court abused its discretion or the judgment resulted in a manifest injustice to James or the children. After reviewing the record, we conclude the court's decision was supported by the evidence.

¶ 59 Dodson testified James would get "mad" over where the parties ate during the supervised visitation and got "mad" because someone other than Sarah was driving her van when the children arrived for visitation. James spoke of the divorce during visitations, "raise[d] his voice" to Sarah, talked about his health conditions in front of the children, called his daughter a "liar" on several occasions, and threatened to call the Department of Children and Family Services. James discussed calling the police in the children's presence. This caused the parties' son to be upset. During one visitation in the park, James gave his daughter a "Nook" (electronic book). James insisted Sarah join them so he could demonstrate how to operate the Nook. When she refused, James withheld the Nook from his daughter. On four or five occasions James has "talked poorly" about Sarah in front of the children, saying, for example, "your mom is going to lose the house." Dodson thinks James is "controlling." Dodson testified Sarah remains parked outside in her vehicle during visitations but it is not disruptive to the children.

¶ 60 James testified and denied or contradicted Dodson's observations, and he contended Sarah is always present during visitation and that is disruptive.

¶ 61 James explained he put the Nook back in his Jeep "for security reasons." James said it was not him who wanted Sarah to come over to their table at the park; it was the parties' son who wanted Sarah involved in his birthday celebration.

¶ 62 James admitted he pleaded guilty to violation of the order of protection and was placed on court supervision. James explained he violated the order in January 2011 because he had a "bad gut feeling" something was wrong at the marital residence. James sat in the backyard of the marital residence, covered with a blanket. James has not violated the order since the January incident.

¶ 63 At the September 25, 2011, hearing, James testified he was diagnosed with post-traumatic stress disorder (PTSD) and is receiving counseling services once every three weeks.

¶ 64 Sergeant Anthony Castellano, James' military supervisor, testified on James' behalf at the September 2011 hearing, but he admitted he has never witnessed James interact with his children.

¶ 65 In the final dissolution judgment, the court ordered supervised visitation on a temporary basis. The court explained, in order to allow unsupervised visitation, James would need to enroll in mental health counseling and provide the court proof of the ongoing sessions. The court also stated it would review the status of visitation periods on April 27, 2012. Based on the testimony of Dodson, James' admission to violating the order of protection, and the diagnosis of PTSD, we believe the trial court did not abuse its discretion in ordering supervised visitation, especially in light of the fact the court planned to review the status of visitation after James

enrolled in counseling. James has an opportunity to prove to the court supervised visitation is no longer necessary and may file a petition to modify visitation when he can offer such proof.

¶ 66

2. Plenary Order of Protection

¶ 67

We lack jurisdiction to address James' appeal of the plenary order of protection. On December 20, 2010, the trial court entered an *ex parte* order of protection in case No. 10-OP-1932. The court later consolidated case No. 10-OP-1932 with the parties' dissolution proceedings in case No. 10-D-978, which is the subject of this appeal. On November 22, 2011, the court entered a plenary order of protection. The plenary order of protection resolved all issues lodged in Sarah's petition and was scheduled to terminate on November 22, 2012. When the court entered the plenary order of protection, it became appealable. See *In re Marriage of Gordon*, 233 Ill. App. 3d 617, 627-28, 599 N.E.2d 1151, 1158-59 (1992) (where a complaint for an order of protection under the Domestic Violence Act is brought independent of the dissolution proceedings, and there is nothing further pending in the complaint, the order of protection is final and becomes appealable under Rule 301). James should have filed an appeal of the plenary order within 30 days of its entry. He did not, and we lack jurisdiction to review the order. We note James' notice of appeal only identifies case No. 10-D-978 (the dissolution case) and does not make reference to case No. 10-OP-1932 individually or as a consolidated appeal.

¶ 68

C. Child Support

¶ 69

James argues the trial court abused its discretion in denying his request for modification of child support. Both parties mischaracterize this issue as a modification of child support. The parties treat the court's December 15, 2010, temporary order as a final order on child support, while construing the April 16, 2012, dissolution judgment as a denial of James'

request for a modification of child support. Temporary orders terminate when the final judgment is entered (see 750 ILCS 5/501(d)(3) (West 2010)). The issue is better framed as a direct appeal of the court's dissolution judgment on child support and whether the evidence supported the court's decision to set child support at \$965 per month.

¶ 70 The parties' confusion may have stemmed from the fact James requested an abatement of child support after the temporary order was entered, alleging a change in financial circumstances. However, applying section 510 of the Dissolution Act (750 ILCS 5/510 (West 2010)), as the parties suggest, which allows for modification of "the provisions of any judgment respecting *** support[.]" would require this court to make a determination of whether the evidence supported a material change in financial circumstances and, if it did, whether the trial court properly modified the support accordingly. The proper consideration is whether the trial court abused its discretion in *setting* child support under section 505(a) of the Dissolution Act (750 ILCS 5/505(a) (West 2010)). We will review the evidence presented, including James' evidence his financial circumstances changed after the temporary order was entered, and the propriety of the court's order on child support, pursuant section 505(a).

¶ 71 Under section 505(a) of the Dissolution Act, the trial court may order either parent to pay child support in an amount that is reasonable and necessary. 750 ILCS 5/505(a) (West 2010). The Dissolution Act provides guidelines for determining the minimum amount of child support. Under the guidelines, a parent ordered to pay child support for two children will be required to pay 28% of his or her net income, unless it is determined a deviation from the guidelines is appropriate. 750 ILCS 5/505(a)(1) (West 2010).

¶ 72 On December 13, 2010, the trial court set temporary child support at \$965, which

we have established was an agreed-upon amount. On December 15, 2010, this figure was included in the court's temporary order. On December 17, 2010, the court entered an agreed temporary order, adopting the child support provisions from the December 15, 2010, temporary order. On December 21, 2010, James filed a motion to vacate the temporary order. Later, on February 25, 2011, James filed a motion to abate child support.

¶ 73 At the June 10, 2011, hearing, Sarah admitted into evidence the parties' 2008 tax return as petitioner's exhibit No. 3, the parties' 2009 tax return as petitioner's exhibit No. 6, and the parties' 2010 tax return as petitioner's exhibit No. 9. These returns reflected an adjusted gross income of \$52,257 for 2008, \$70,395 for 2009, and \$48,933 for 2010.

¶ 74 At the September 30, 2011, hearing, James presented evidence he had a net income of \$40,081 from the State of Illinois and \$8,927 from the military for 2010, for a total net income of \$49,008 in 2010. James testified he was unemployed in February, March, and April 2011 due to a spider bite. James only received income from the military in April and May 2011, and he was currently "unfit for duty." James testified he had a forthcoming hearing with the military medical review board to determine if he would be medically retired from the army or honorably discharged. James filed an amended financial affidavit, reporting a *gross* income of \$29,709 from the State for January to September 2011. James did not provide evidence of his *net* income from the State through September 2011. His affidavit reported a *net monthly* income of \$3,519 from the State through September 2011. He testified his military pay was not reflected on the financial affidavit. Respondent's exhibit No. 82 showed a military *gross* income of \$4,152 and a *net* income of \$3,749 through September 2011. James' total gross income through September 2011, from the State and military combined, was \$33,861.

¶ 75 At the November 22, 2011, final hearing, James testified he was on medical leave with the State, was not receiving income from the State, and had been on medical leave since mid-September 2011. James testified the military was treating his spider bite as a workers' compensation issue. James would receive back pay from the military if the medical review board determined his spider bite was an injury in the line of duty, but he would not receive any back pay from the State. James did not file an additional financial affidavit with the trial court before the November 2011 hearing.

¶ 76 In the April 16, 2012, dissolution judgment, the trial court found James agreed to setting his child support obligation at \$965 per month on December 13, 2010. James' 2010 tax return "evidence[d] that he earned \$54,681.00 from the State of Illinois and \$9,846.49 from the United States Army in 2010." The court further found "[James] did not meet his burden to provide sufficient evidence that his child support obligation should be reduced for 2011. Through September 15, 2011, [James] earned \$48,773.00." Finally, the court found "[James] did not provide evidence of 2012 income. [James'] testimony that he will not earn income in 2012 is at this point unproven and therefore he should file Motion to Modify Child Support when these figures are known."

¶ 77 We conclude the trial court did not abuse its discretion in setting child support at \$965 month. Sarah presented evidence James had a *net* income of \$48,933 in 2010. James did not dispute the 2010 earnings. Thus, based on the 2010 tax return, the court should have set child support at \$1,141 per month ($48,933 \times 28\% = 13,701/12 = 1,141$). James presented evidence his gross income through September 2011 was \$33,861, but James failed to present evidence of his net income. James also presented evidence his net monthly income from the

State through September 2011 was \$3,519. Assuming the court used James' figure of \$33,861 for calculating support through September 2011, \$965 per month would be less than 28% ($33,861 \times 28\% = 9,481/9 = 1,053$). We note the \$33,861 figure reflects James' gross income and would have to be reduced to arrive at his net income. This information, however, is not in the record. Assuming the court used James' figure of \$3,519 net monthly income to calculate James' 2011 potential earnings and support obligation, the court could have set child support at \$985 per month ($3,519 \times 12 = 42,228 \times 28\% = 11,823/12 = 985$).

¶ 78 In regard to James' 2012 income, the trial court found James did not provide evidence of what that income would be. James testified he was on medical leave from the State, beginning in September 2011, but did not provide evidence he would permanently lose his employment with the State. James also testified did not know whether he would be medically discharged from the military or medically retired, and it was possible he would receive back pay from the military. This information would not be known until James underwent further treatment for his spider bite in Kentucky and a determination on James' ability to continue to serve in the military was made at a hearing before the medical review board. James' assertions child support should be reduced were unsupported by the evidence and, until the foregoing issues are resolved, James' future income is speculative. Once a decision has been made James (1) will or will not remain employed with the State, (2) will be medically retired or medically discharged from the military, and (3) James will or will not receive back pay for his time of unemployment in 2011, and James can provide evidence concerning these determinations, James can file a petition to modify child support.

¶ 79 D. The Division of The Marital Estate

¶ 80 James next argues on appeal the trial court erred in dividing the marital estate. In particular, James argues the court (1) did not properly determine the value of James' SERS pension, (2) erred in awarding Sarah the marital residence, including equity in the home, and (3) erred in ordering James to pay past due mortgage payments in the amount of \$14,248.44.

¶ 81 1. *SERS Pension*

¶ 82 "The valuation of assets in an action for dissolution of marriage is a question of fact for the trial court to determine" and conflicts in testimony are "matters to be resolved by the trier of fact." *In re Marriage of Tietz*, 238 Ill. App. 3d 965, 975, 605 N.E.2d 670, 677-78 (1992). We review the trial court's valuation of marital property under the manifest weight of the evidence standard. *In re Marriage of Hubbs*, 363 Ill. App. 3d 696, 699-700, 843 N.E.2d 478, 482-83 (2006).

¶ 83 James testified since 1996, James has contributed \$46,796 to his SERS pension. At the September 30, 2011, hearing, James admitted respondent's exhibit No. 7 into evidence, reflecting James' contributions to his SERS pension totaled \$46,796. James testified he understood his pension to consist of his contributions and the State's contributions. James explained he can start drawing on his pension at age 50, but will not receive the contributions made by the State until he has completed 20 years of service. At the November 22, 2011, hearing, Sarah admitted, as petitioner's exhibit No. 1, her financial affidavit. In her affidavit, Sarah listed the value of the SERS pension at \$146,078.

¶ 84 The trial court valued James' SERS pension at \$146,078. On this record, we conclude the court's valuation of the SERS pension was not against the manifest weight of the evidence. At a minimum, the pension's value was \$46,796. James admitted the pension

consisted of his contributions and the State's contributions. It was therefore James' responsibility to present evidence of the value of the State's contributions in addition to the value of his contributions. See *In re Marriage of Benz*, 165 Ill. App. 3d 273, 285, 518 N.E.2d 1316, 1322 (1988) ("It is the obligation of the parties to provide sufficient information to the trial court in marital property valuation matters."). James chose not to present valuation on this issue. The trial court's adoption of Sarah's valuation of the combined contributions was not against the manifest weight of the evidence, where Sarah presented the only evidence as to the pension's total value.

¶ 85 Whether the trial court valued James' pension at \$46,796 or \$146,078 is essentially irrelevant. The parties are in agreement Sarah and James will each receive 50% of James' pension. Thus, in light of the fact the court equitably divided the marital estate, as discussed next, the 50/50 distribution of the pension will not affect the overall distribution because the parties will receive equal amounts of the pension.

¶ 86 *2. Marital Home and Equity*

¶ 87 James further contends the trial court erred in (a) awarding Sarah the entire amount of equity in the marital home and (b) awarding Sarah the marital home.

¶ 88 Section 503(d) of the Dissolution Act requires the trial court to divide the marital property in "just proportions considering all relevant factors." 750 ILCS 5/503(d) (West 2010). "The division need not be mathematically equal to be equitable." *Tietz*, 238 Ill. App. 3d at 979, 605 N.E.2d at 681. The court's division of the marital estate is reviewed for an abuse of discretion. *Hubbs*, 363 Ill. App. 3d at 700, 843 N.E.2d at 483.

¶ 89 James argues the division of the marital property is erroneous because he did not

receive 50% of the equity in the marital home. James' argument fails for two reasons. First, James disregards that the equitable division of the marital estate contemplates the division of the estate as a whole, and not the itemized division of individual pieces of the estate. Second, James does not show the trial court's 62/38 split of the marital estate in favor of Sarah was an abuse of discretion.

¶ 90 In the dissolution judgment, the trial court divided the marital estate as follows: Sarah received (1) the marital residence, purchased at \$168,000, (2) her 2010 minivan, valued at \$23,305 (3) 50% of James' military pension and SERS pension, valued at \$73,039 (the court valued the SERS pension at \$146,078 but did not assign a value to the military pension, as it is undetermined at this time whether James will be entitled to such pension) (4) her checking account in the amount of \$272.55, (5) her savings account in the amount of \$5, and (6) her massage business, valued at \$250. Sarah's awarded assets totaled \$264,871.55. The court assigned Sarah the following debts: (1) the mortgage on the marital home—\$156,734.20, (2) the loan on her minivan—\$26,843.55, (3) the Sam's credit card debt—\$2,622.90, (4) the Capital One credit card debt—\$107.17, and (5) the Lowe's credit card debt—\$11,000. Sarah's total debt assignment was \$197,307.82, leaving her with a marital estate of \$67,563.73.

¶ 91 James was awarded (1) his Jeep, valued at \$24,550, (2) 50% of his military and SERS pension, valued at \$73,039, and (3) his checking account containing \$2,000, for a total award amount of \$99,589. The court assigned the following debts to James: (1) his Jeep loan—\$18,000, (2) the Bank of America credit card debt—\$13,051, (3) the American Express credit card debt—\$5,280.28, and (4) the Military Star credit card debt—\$5,232.48, for a total debt of \$41,563.76, leaving James with a marital distribution of \$58,025.24. James was also

charged with dissipating the marital estate in the amount of \$6,227. Although not specified in the final order, we assume the trial court factored in James' dissipation in making the marital distribution and credited each party with \$3,113.50.

¶ 92 After dissipation, Sarah's marital estate is \$70,677.23 and James' marital estate is \$61,138.74. The division of marital property resulted in Sarah receiving 54% of the marital estate and James receiving 46%.

¶ 93 The parties were married for 17 years, and during that time, Sarah mostly worked part-time. Sarah presented evidence her gross income in 2010 from her massage business was \$21,745, while James' gross income in 2010 was \$70,139. The trial court awarded Sarah custody of the two minor children and the marital home for her and the children to live in. The record shows the court considered all the relevant factors in dividing the marital estate, including the disparity in the parties' income, the custodial provisions, the duration of the marriage, and the desire for Sarah to live in the marital home with the children. The court's division was not an abuse of discretion.

¶ 94 James' argument the trial court erred in awarding Sarah the marital home also fails. The record shows the trial court considered the benefit of allowing the minor children to remain in the marital home, and rightfully so. See 750 ILCS 5/503(d)(5) (West 2010) ("the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children" is a factor considered in dividing the marital estate). This court has held, because of the obvious negative effects of divorce on children, " 'children should be afforded continuity in their environment to reduce the emotional disruption caused by the separation of the parents' " by being allowed to remain in the marital home. *Tietz*, 238 Ill. App.

3d at 980-81, 605 N.E.2d at 682 (quoting *In re Marriage of Brenner*, 95 Ill. App. 3d 100, 102, 419 N.E.2d 400, 402 (1981)). The court awarded Sarah custody of the children. The court was entitled to award Sarah the marital home for the children's benefit. The record shows the court divided the marital estate in a way to preserve continuity for the children and equitably distribute the estate. The court did not abuse its discretion.

¶ 95 *3. Mortgage Payments*

¶ 96 In relation to the division of the marital estate, James argues the trial court erred in ordering him to repay mortgage payments paid by Sarah during the course of the dissolution. The entirety of James' argument is "the court entered a judgment against [James] for past due mortgage payments in the amount of \$14,248.44 that [Sarah] made while living in the marital residence which [James] submits was in error." James does not explain why it was error for the court to enter such judgment. We disagree with James.

¶ 97 The trial court, in its discretion, was allowed to grant any "appropriate temporary relief" upon motion by either party. 750 ILCS 5/501(a)(3) (West 2010). The temporary order, entered on December 15, 2010, required James to make the monthly mortgage payment associated with the marital residence. James failed to do so except for one occasion where he paid \$200. Sarah testified she paid the monthly payments, in the amount of \$1,187.37 from January 2011 to December 2011, totaling \$14,248.44. Considering James' income in relation to Sarah's, and the necessity for her and the children to remain in the marital home during the dissolution proceedings, the court properly ordered James to continue paying the mortgage in the interim. James disregarded the court's order. It was not error for the court to order James to pay the past due payments to Sarah in the final dissolution judgment.

¶ 98

E. Dissipation

¶ 99 James' final challenge on appeal is to the trial court's finding of dissipation. James argues he should not have been charged with dissipation of the marital estate for filing a joint tax return for 2010 because he used the refund to pay marital debts. James also argues (1) he should not have been charged with \$6,018 dissipation because he only received \$5,946 from the 2010 tax refund, (2) he should not be charged with Sarah's 2010 state and federal tax liability, totaling \$209, and (3) the trial court should have charged Sarah with dissipation in the amount of \$300.

¶ 100 Dissipation occurs when one spouse uses marital property for the 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 O'Neill*, 138 Ill. 2d 487, 497, 503 N.E.2d 494, 498-99 (1990). The burden of proving, by clear and convincing evidence, how the funds were spent is on the spouse charged with dissipation. *Hubbs*, 363 Ill. App. 3d at 700, 843 N.E.2d at 483. General and vague statements on how funds were spent is insufficient to avoid a finding of dissipation and we will affirm such finding if the expenditures are not adequately documented. *Hubbs*, 363 Ill. App. 3d at 700, 843 N.E.2d at 483. We will not reverse a court's finding of dissipation unless it is against the manifest weight of the evidence. *Hubbs*, 363 Ill. App. 3d at 699-700, 843 N.E.2d at 482-83.

¶ 101 In the trial court's March 2, 2012, memorandum of opinion, the court found James "did not meet his burden in establishing that he did not dissipate a marital asset by filing a 2010 tax return jointly, claiming both dependents and not notifying [Sarah,] resulting in [Sarah] having a tax liability for calender year 2010." The court further found James "did not provide evidence that he utilized the tax refund for marital purposes." In the final dissolution judgment, the court

"charged [James] with dissipation in the amount of \$6,227.00." The final order did not indicate how it arrived at \$6,227.

¶ 102 At the September 30, 2011, hearing, James testified he filed a joint married 2010 tax return for the him and Sarah "by accident." James did not amend the filing, but he would amend the 2010 taxes if the IRS required him to. James claimed both minor children as exemptions and did not include Sarah's income from her massage business in the tax return. The 2010 joint return, entered into evidence as petitioner's exhibit No. 9, reflects a refund amount of \$6,018. James testified he received \$5,946 from the return after fees were taken out. On direct examination, James testified he used the refund to pay "marital bills," including "some credit cards," but James could not remember which credit cards. On cross-examination, James testified he used the refund to pay \$1,500 to his attorney, \$390.58 for medical insurance, \$203 for his cell phone, \$158.57 for dental insurance, a "couple of small loans," his truck payment, and "American Home Shelter." Finally, James testified he paid \$1,910 to "Marketplace EDI payments." James thought it was a loan, but he could not "recall."

¶ 103 At the November 22, 2011, hearing, James testified he used the tax refund to pay "American Express, the Star Card," his Jeep payment, and auto insurance. He paid \$45 to "American Home Shield," \$297 for health insurance, "90-some dollars for dental" insurance, \$780 for rent, and \$120 for utilities.

¶ 104 James testified he transferred \$3,000 from the parties' joint account to his personal account on December 3, 2010, and paid \$2,000 of that money to his attorney. James also admitted transferring \$100 out of the joint account on December 1, 2010, \$200 on December 3, 2010, \$300 on December 9, 2010, and \$50 on December 10, 2010. James alleged Sarah removed

\$375 from the joint account.

¶ 105 Sarah testified James did not consult with her before filing the 2010 tax return. Sarah filed a "married filing separate" tax return, and as a result of James filing the joint return, Sarah owed \$81 in federal taxes. Sarah could not remember the state tax liability for 2010 but knew it was under \$300. Sarah filed a report of fraud with the IRS and is awaiting a determination on that issue.

¶ 106 Sarah testified she left the marital residence on November 22, 2010, and on November 30, 2010, she withdrew \$300 from the marital account.

¶ 107 We conclude the trial court's finding of dissipation was not against the manifest weight of the evidence. Once Sarah established James filed the 2010 joint tax return and received a refund of \$6,018, James had the responsibility of showing how the \$6,018 was spent. James does not direct us to where in the record we can find documentation of James' expenditures of the refund. We reviewed the nearly 1,700 pages of common-law record, looking for proof that James used the funds for purposes other than for his sole benefit, and we have found none. The only support James provides for his argument is his testimony in which he often contradicted himself and admitted using the funds to pay personal expenses such as his attorney fees and rent. The trial court found James dissipated the marital estate based on the evidence presented. Whether James' testimony concerning his expenditure of the funds was credible is a decision for the trial court (see *Tietz*, 238 Ill. App. 3d at 983-84, 605 N.E.2d at 683-84), and we defer to those credibility determinations.

¶ 108 The trial court ultimately found dissipation in the amount of \$6,277, not \$6,018, and James challenges this finding. The court did not explain how it arrived at the end figure.

However, the court did clarify \$6,018 of that amount was attributable to the 2010 tax refund. The court also stated James was responsible for Sarah's state and federal tax liability that resulted from James' filing of a 2010 joint return. The other \$209 then, we conclude, must have been Sarah's federal and state tax liability. Sarah testified her federal liability was \$81 and could not remember what her state liability was, but she knew it was under \$300. In his brief, James states Sarah's state tax liability was \$128 and her federal liability was \$81. Adding \$6,018 to \$81 and \$128, we arrive at a figure of \$6,277. James argues this figure is incorrect because (1) he only received a refund of \$5,946, (2) he should not have been charged with Sarah's tax liability, and (3) the court should have found Sarah dissipated the marital estate in the amount of \$300.

¶ 109 We reject each of these arguments. The finding of \$6,018 dissipation was not against the manifest weight of the evidence because of James' use of the tax refund. This figure is supported not only by the evidence already discussed, but by additional evidence of James' dissipation. In addition to receiving the 2010 tax refund, James admitted he removed \$3,000 from the parties' joint checking account on December 1, 2010, and used \$2,000 of that money to pay attorney fees. James further admitted removing another \$650 between December 1 and 10, 2010. The trial court could have found James dissipated the marital estate in excess of \$6,277. Therefore, regardless of (1) Sarah's admission she removed \$300 on November 30, 2010, (2) James' assertion he received \$72 less than the stated refund amount because of fees paid to TurboTax, and (3) James' assertion he should not be responsible for Sarah's 2010 tax liability of \$209, the court's finding of \$6,277 dissipation by James is supported by the record. The court could have found dissipation in excess of \$6,277, so we need not address James' individual arguments with respect to the \$72, \$209, and \$300.

¶ 110

III. CONCLUSION

¶ 111 We affirm the trial court's judgment. We conclude (1) the trial court did not abuse its discretion in (a) denying the ex-husband's motion to vacate the temporary order, (b) ordering supervised visitation, (c) setting child support, and (d) awarding the marital residence to the ex-wife; (2) the manifest weight of the evidence supported the trial court's (a) valuation of the ex-husband's SERS pension and (b) finding the ex-husband dissipated the marital estate.

¶ 112 Affirmed.