2014 IL App (2d) 111096-U
No. 2-11-1096
Order filed March 18, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF ROSE MARY DRABIK, Deceased	)	Appeal from the Circuit Court of Du Page County.
	)	No. 07-L-1048
(Mary Elizabeth Smith and Mary Katherine Paul, as Independent Executors of the Estate of Rose Mary Drabik, Plaintiffs-Appellants, v. James T. Drabik, Defendant-Appellee).	)	Honorable Dorothy French Mallen, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in finding that funds given to defendant by his late mother were gifts rather than loans. Therefore, we reversed and remanded the cause for further proceedings.

¶ 2 Plaintiffs, Mary Elizabeth Smith and Mary Katherine Paul, as independent executors of the estate of their mother, Rose Mary Drabik, brought suit against defendant, their brother James T. Drabik. Plaintiffs sought repayment of money their mother allegedly loaned defendant during the last seven years of her life. Plaintiffs alleged claims of common law fraud, breach of implied contract, and unjust enrichment. The trial court ruled that plaintiffs failed to show fraud; that the evidence showed that Rose Mary considered the monetary benefits that she provided to

defendant to be gifts; and that it was not unjust enrichment for a child to retain a gift. On appeal, plaintiffs challenge the trial court's rulings only as to their breach of contract and unjust enrichment claims. We affirm in part, reverse in part, and remand the cause.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs filed a three-count complaint against defendant on October 8, 2007. They alleged that Rose Mary died on June 28, 2006. She was survived by her ten children, and her will, dated July 28, 1964, left her estate in equal shares to each child. Count I of the complaint, common law fraud, alleged in relevant part as follows. Rose Mary's late husband, Henry Drabik, died in 1999. Shortly afterwards, defendant induced Rose Mary to put his name on her credits cards, which he used from 1999 to 2006. Defendant told Rose Mary that he was unable to secure credit and had insufficient income from his graphic equipment business to pay for his personal and business expenses. From 1999 to 2006, Rose Mary paid at least $229,760 of credit card charges and cash advances that defendant incurred for his own use and benefit. There was also $22,000 of outstanding debt that defendant accumulated. Meanwhile, defendant deliberately concealed his income from Rose Mary though he had the means to pay the debts himself.

¶ 5 Count II of the complaint, breach of unwritten contract, alleged that Rose Mary allowed defendant's name to be placed on her accounts and allowed him to make charges in consideration of defendant's repeated promises to pay for any debt he accumulated on her credit cards and for any money she advanced to pay for charges on the cards.

¶ 6 Count III, unjust enrichment, alleged that defendant had been unjustly enriched by at least $251,760 at the expense of Rose Mary's estate.

¶ 7 In defendant's answer, he admitted charging hundreds of thousands of dollars on Rose Mary's accounts for his own use and benefit. He maintained that all the charges were with his

mother's authorization and consent. Defendant also admitted the allegation that "he now refuses to pay any of the debt he accumulated on Rose Mary's accounts."

¶ 8 Plaintiffs filed an amended complaint on August 18, 2011, containing the same substantive allegations. The amended complaint alleged that defendant had wrongly taken at least $292,631.53 from Rose Mary.

¶ 9 A. Trial

¶ 10 A bench trial took place from September 12 to 14, 2011. At the beginning of the trial, the parties submitted the following stipulations: (1) Rose Mary and her husband, Henry, had ten children; (2) Henry died in 1999, and his estate was not involved in this case; (3) defendant was the youngest child; (4) Rose Mary's will provided for the equal distribution of her estate to all ten of her children; (5) Rose Mary passed away on June 28, 2006; (6) in 1999, defendant told Rose Mary that he needed her to "assist him with advancing [*sic*] credit as he was allegedly unable to secure credit on his own and that he needed the funds 'for travel and business' and for 'whatever you use a credit card for. The primary reason was travel, but it was a credit card and used accordingly for all sorts of stuff…for both business and personal expenses' "; (7) from the time defendant began to use the credit cards, it was "his understanding that his mother 'expected [him] to pay what [he] could' "; (8) from time-to-time during the period defendant was using the credit cards, "he made 'regular' periodic payments on the debt, including payments" after Rose Mary died; (9) "[w]ith respect to those amounts charged by [d]efendant on his mother's credit cards, for his exclusive use and benefit, there remain[ed] $130,000 unpaid"[1]; and (10) defendant now refused to pay any of the remaining debt he accumulated on Rose Mary's accounts.

¶ 11 1. Jay Drabik

[1] Plaintiffs indicated to the trial court that $130,000 represented a compromise amount.

¶ 12 At trial, Jay Drabik testified in relevant part as follows. He was Rose Mary's second youngest child and defendant's brother. He and his siblings were raised in a small Chicago home that had only one bathroom for 12 people, and the family had only one car. His parents made sure that all of the children were treated the same. In 1975, his parents loaned Jay money to purchase a trailer home. Jay's understanding was that he had to repay the loan, and if any amount was still outstanding when his parents passed away, it would be deducted from his share of the estate.

¶ 13 In 1998, Jay saw his parents two to three times per week. After Henry died, Jay would visit Rose Mary at least twice per week. Jay would assist with chores, such as cleaning out the basement and doing yard work. In 1999, Jay saw defendant from time to time at Rose Mary's house, but defendant never said that he quit working for six months, that he was on Rose Mary's credit card, or that he was using the card for his personal and business expenses.

¶ 14 2. Mary Katherine Paul

¶ 15 Plaintiff Mary Katherine Paul testified as follows. There were seven girls in the family, all with "Mary" in their names, and three boys. Rose Mary and Henry were very loving and fair parents. They operated by the principle that they would not do for one what they could not do for all. When Henry died, Mary Katherine was living in Michigan, and she visited Rose Mary four to eight times per year. She also spoke to Rose Mary weekly. From 1999 to 2006, Mary Katherine did not have any idea that defendant was using Rose Mary's credit cards.

¶ 16 As one of the executors of the estate, Mary Katherine was responsible for collecting money from outstanding loans. At the time of Rose Mary's death, Jay owed the estate about $1,000 from his loan to buy the trailer and for money he received to replace a roof. Mary

Katherine did not know if Jay paid part of the loan after the instant case was filed. She also did not know of anything defendant did to help Rose Mary after Henry passed away.

¶ 17 Rose Mary discussed her estate plan twice with Mary Katherine. Rose Mary was a private person and did not discuss her financial affairs or the specifics of any of her children's financial affairs. When Rose Mary's estate was opened, it was worth about $450,000. There was a distribution of about $40,000 to each sibling, excluding defendant, who "signed something that he wanted nothing."

¶ 18 2. Norman Keller

¶ 19 Norman Keller testified as follows. He was the assistant supervisor for a company that processed payroll and provided other commercial services. Defendant hired Keller to process the invoices and handle payments for defendant's company, Graphic Equipment Service Corporation (GESC). Keller also occasionally wrote checks and balanced the checkbook for GESC. Defendant would give Keller receipts from work-related expenses, and Keller would invoice the clients for reimbursement and for defendant's work hours. Keller performed this role from the late 1990s until 2006. GESC originally had a business address in Downers Grove, but in 2000 Keller had defendant open a post office box in Villa Park so it would be more convenient for Keller to collect checks from clients and deposit them in the bank; Keller worked about one mile from the Villa Park post office. Originally, Keller was not aware whether defendant used a credit card to pay expenses, but at one point defendant said that he had used his mother's credit card to pay for airline tickets and wanted Keller to write her a check for reimbursement. Keller also wrote a check at defendant's request for Rose Mary for what defendant indicated was a repayment for an auto loan.

¶ 20 During the time Keller was working for defendant, there were sufficient funds in GESC's bank account to pay whatever ongoing expenses defendant incurred in association with his business trips. Once invoices were submitted, they were usually paid in 60 days, but sometimes defendant would take one or two months to give the paperwork to Keller. Keller agreed that he had never seen defendant's or Rose Mary's credit card statements and did not know if defendant ever had sufficient funds to pay off credit card balances.

¶ 21 3. Mary Lynn Drabik

¶ 22 The trial court accepted Mary Lynn Drabik as a fact witness rather than an expert witness. She provided the following testimony. She had been a tax consultant and preparer since 2005. Before that, she worked as an information systems and technology management consultant. Plaintiffs, who where Mary Lynn's sisters, asked her to assist them in getting to the truth and determining if there were any consequences from defendant's actions on Rose Mary's accounts. Mary Lynn reviewed all of the depositions and documents in the case. There were no business financial statements, payroll records, or income tax statements for defendant or GESC to review. Also, certain records had been subpoenaed from the bank and not received; Mary Lynn assumed no harm from defendant where she did not have supporting documentation.

¶ 23 Mary Lynn prepared documents summarizing her findings for the period of January 1999 to June 2006. She determined that defendant had an income of $750,000 during this time based on his deposition statements.[2] While her examination of GESC bank statements indicated $462,749.84 in income for defendant during this time, she did not have all the bank statements for 1999, and defendant has also referenced an undisclosed account.

[2] The trial court ruled that defendant's deposition statement that he earned about $100,000 per year during the relevant time was an evidentiary admission.

¶ 24 Mary Lynn reviewed Rose Mary's income tax statements and bank statements for 1999 to 2006. Rose Mary's spending patterns were very typical and routine, and she was very frugal. Rose Mary's lifestyle and need for cash did not change from 1998 through 2006, and she paid day-to-day expenses by check during this period. Rose Mary consistently took out $400 per month in cash, even before Henry died, so Mary Lynn attributed this amount to Rose Mary in doing her calculations. The bank statements showed many ATM withdrawals, and Rose Mary did not use an ATM. Defendant's deposition testimony indicated that he was the only person who used the ATM for Rose Mary's bank account, which also had defendant's name.

¶ 25 For the period of 1999 to 2006, Mary Lynn calculated that defendant took $61,550 in cash withdrawals from Rose Mary's account; had $130,000 in credit card charges on Rose Mary's credit cards, as stipulated by the parties; and incurred $63,419.85 in other charges on her accounts for his benefit. The last category included $26,303 in missing IRA funds, $20,663 for an auto loan, and several $850 rent checks to defendant's landlord. Mary Lynn considered these loans based on the family tradition that if any financial help was needed, it would be extended but was expected to be repaid. Mary Lynn calculated that in total, defendant took $254,969.85 from Rose Mary.

¶ 26 4. Defendant

¶ 27 Defendant provided the following testimony. He lived in Downers Grove, about one mile from his parents' home, from 1992 until 2010. When he was young, Rose Mary told him that he was their "insurance baby" and was there to take care of them when they got older, which defendant did. Defendant met them every Sunday night for dinner in addition to other visits.

¶ 28 Defendant established GESC in 1995. Defendant would fix complicated flexi graphic printing systems. Clients found defendant valuable because in addition to knowing how to fix

machines, he could adjust the quality of the print. Defendant was more interested in the work than in the financial compensation.

¶ 29 From 1995 to 1999, defendant would travel for work, and he had credit cards in his name that he used to pay for business expenses. Defendant's best year of earnings was 1996, when he earned about $114,000 gross. He filed a tax return for that year. Defendant believed he had annual gross receipts of roughly $100,000 from 1999 to 2006, but he was not sure of the amount.[3] He did not file income tax returns from 2000 to 2006.

¶ 30 Before Henry died, defendant used his parents' address for business purposes. At some point after Henry died, defendant opened a post office box in Villa Park. Mary Lynn recommended he not use Rose Mary's address for billing purposes because she thought that if defendant were sued by a contractor, Rose Mary could lose her house. Keller recommended the post office box in Villa Park. Clients sent checks to the post office box, and the checks would be deposited into GESC's bank account. Defendant used money in that account for personal and business purposes. Defendant discussed everything with Rose Mary, "especially" his work and income.

¶ 31 Defendant did not work much from January 1999 to June 1999 because he was devastated by Henry's death and also wanted to assist Rose Mary. During that time, he only went on some emergency calls and had very little income. In the first three months after Henry's death, defendant constantly stopped by Rose Mary's house. He kept her company and did anything she needed. Defendant believed he earned about $8,500 in 1999.

¶ 32 From 2005 to 2006, defendant was the child most often present at Rose Mary's house; he was there at least several times per week. He would talk to her, eat meals with her, fix or do

[3] Defendant later testified that he thought it was "far less."

whatever she needed, and drive her to visit her sister in the city. During that time, Jay would visit once a month, Mary Katherine would visit once or twice a year, and Rose Mary sometimes visited Mary Katherine in Michigan. Defendant was "astounded" by testimony that his contribution in helping Rose Mary was negligible.

¶ 33 When Henry died on January 17, 1999, defendant was not on any of his parents' accounts. However, defendant's name was on one of Rose Mary's bank accounts by January 28, 1999, 11 days after Henry died. Rose Mary added defendant's name to bank accounts because he was in Illinois and constantly available for her. Since Henry was gone, she was worried that if anything happened to her, she would not have access to the funds.[4] Rose Mary did not have any problems dealing with financial matters during that time or from 2000 to 2006.

¶ 34 In 1999, defendant did not have any credit cards or ability to get credit.[5] At some point, which he believed was before Henry died, defendant had been traveling in Texas, and his American Express card was "shut off." He had a conversation with Rose Mary before March 1, 1999, in which he asked her for help to get a credit card. Defendant wanted to use it primarily for business and travel expenses, but they ultimately agreed that he could use it for all of life's expenses. Rose Mary put defendant on her two credit cards, and he used them from March 1999 until Rose Mary died in 2006. Rose Mary was adamant about bills being paid on time. Rose Mary made periodic payments on the credit cards defendant shared with her, though she did not

[4] Plaintiffs objected to the testimony about why Rose Mary allegedly added defendant to her accounts; the trial court overruled the objection.

[5] Defendant later agreed that he had his own credit card at this time, but it had only a $1,000 limit. Defendant testified that this was not enough to cover even several days' worth of travel expenses.

exclusively pay the bills. Rose Mary did not know how to use an ATM, so any ATM charges on the bank accounts would have been made by defendant. Defendant was not certain whether he applied for a credit card in his own name from 1999 to 2006.

¶ 35 When asked, "Was it your understanding that you should pay back your mother when you could?", defendant replied, "As I could, yes." When defendant paid for his credit card charges, he would sometimes write a check. In other instances, he would withdraw cash from his account and pay Rose Mary or give the cash to the bank for payment on the credit card. He "constantly" used an ATM connected to the GESC account to make payments on Rose Mary's credit card. When credit card statements came, Rose Mary would show them to defendant. He was primarily concerned with the available credit and when the payment was due. He would tell her if he had made payments on it. The only time defendant would take a statement was if he did not have a receipt for a business expense and needed to give the statement to Keller for reimbursement.

¶ 36 Defendant did not have a regular income, so he could not pay the credit card charges on a regular basis. He paid as much as he could whenever he could. When he received a lot of money, he paid "a ton." At the same time, because defendant's income was sporadic, he had to keep upcoming expenses in mind. Defendant estimated that he charged about $250,000 between 1999 and 2006 and repaid about $120,000. Defendant paid off one of the credits cards on June 21, 2006, because it had a smaller balance, $2,706.63. Defendant had borrowed money from his aunt to pay for Rose Mary's expenses while she was in the hospital, and he used some of that money to pay off the credit card.

¶ 37 In October 1999, Rose Mary paid about $20,000 on defendant's behalf to purchase a car for him. Defendant had two lawsuits against Chrysler, and around September 29, 1999, he

received a check for $19,770 for the settlement of his lawsuit. Around August 11, 2000, he received an $18,750 check for the same lawsuit or a companion lawsuit. Around October 5, 2000, he received a third check for $1,250. Defendant did not know what he did with these settlement funds.

¶ 38 Defendant's basic personal monthly expenses did not change much from 1999 to 2006 and were around $1,300. Before 1999, defendant's parents had paid off a loan on a car and had given him a loan for another car, but he could think of no other gift over $2,000. From 1999 to 2006, it was defendant's understanding that Rose Mary received income from Social Security, pension income from Henry, a nominal amount of her own pension income, and income from stock. Defendant was not aware that Rose Mary had any increased need for cash during this time.

¶ 39 Defendant disagreed with other witnesses' statements that his parents would not do for one child what they could not do for all the children. That principle applied when the ten kids were sharing soft drinks or ice cream, but his parents would help any child who needed assistance. Defendant did not know the specifics of the aid his parents gave his siblings because his parents did not talk about it, but defendant knew that they sold their old house to his sister Mary Pat for a deep discount. They also helped Jay and another sister, Mary Rose. "[S]everal people" had not paid Rose Mary back at the time of her death for loans going back 20 years. When asked if he knew whether Jay's loan was repaid, defendant stated:

> "The loan, I believe was repaid *** after I had raised the issue that my siblings seem[ed] to be pursuing only me for indebtedness to my mother's estate, and not those other people who owed money because my mother wanted all of those debts forgiven on her death."

Plaintiffs objected to the last part of defendant's statement because it was "gratuitous" and based on the Dead Man's Act (Dead Man's Act or Act) (735 ILCS 5/8-201 (West 2010)). The trial court overruled the objection, stating "You've brought out so much."

¶ 40 Defendant currently had about $478 in his bank account. He did not have any savings accounts, retirement accounts, or investment accounts. Defendant was generally not "good" with money and did not reconcile his checkbook on a regular basis.

¶ 41 The amount still owing on Rose Mary's credit cards, which also had defendant's name, was $130,000. Defendant's siblings had never directly asked him to repay the amount. When asked, "Is it your understanding that you owe the balance on the credit cards," defendant replied in the affirmative. Defendant had not repaid the amount because he had no income and no money to repay it. When asked if there was "ever a time that [he] intended not to pay back the outstanding balances to" Rose Mary, defendant responded in the negative.

¶ 42 Defendant agreed that he signed a document that he would forgo collecting any money from the estate and that the funds "would go to pay what [he] owe[d]." Notwithstanding that agreement, defendant received an IRA distribution of $8,000.

¶ 43 B. Trial Court's Ruling

¶ 44 The trial court entered a written memorandum opinion on October 5, 2011, in which it found in favor of defendant on all three counts. In its factual findings, the trial court stated that Jay and defendant were the only children of Rose Mary who lived in Illinois.

¶ 45 Regarding count I, common law fraud, the trial court found, *inter alia*, that plaintiffs had failed to prove by clear and convincing evidence that: defendant's statement to Rose Mary that he could not get credit was false or made in reckless disregard of its truth or falsity; defendant's continuing failure to pay off the credit cards over seven years acted as a continuing false

statement; and defendant fraudulently failed to pay for the charges when he had sufficient income. In arriving at its conclusion, the trial court found that defendant had at least $60,000 in living and business expenses per year from 1999 to 2006, and the income that Mary Lynn was able to confirm for defendant averaged out to $61,699.98 per year.

¶ 46 We summarize the trial court's findings on counts II and III in more detail, as they are at issue on appeal. The trial court stated as follows regarding count II, breach of implied contract. Defendant testified and the parties stipulated that the agreement between defendant and Rose Mary for the credit card charges was that defendant would pay what he could. Defendant also testified that " 'Mom wanted all debts forgiven upon her death.' " "Since this arrangement continued for 7½ years with no attempts by Rose Mary to remove [defendant] from her credit cards or obtain any further payments from [defendant], his testimony as to the agreement is credible." Rose Mary handled her own finances, and there was no evidence that she was not of sound mind. If Rose Mary were unhappy with the arrangement between herself and defendant, she could have done a number of things, such as tell plaintiffs to make sure defendant repaid the debt after she died; change her will to refer to the debt and repayment; request that defendant sign a note for the repayment of the debt; or keep a record of money loaned. Since Rose Mary did none of these things, it tended to show, "more probably true than not," that the agreement was as testified to by defendant. The fact that Jay was not required to pay back his loan for over 30 years also added credibility to defendant's testimony.

¶ 47 Defendant agreed to pay " 'what he could.' " "Having established the terms of the agreement, can the court enforce an agreement that has no definite repayment terms?" Under *Barnes v. Michalski*, 399 Ill. App. 3d 254 (2010), a plaintiff does not have to prove the terms of repayment as part of its *prima facie* case. Rather, the common law supplies a reasonable time.

"But what of this case, where the terms are not 'when', but 'what' [?]" The law presumes a gift if someone transfers property to a family member. "Was the money [defendant] did not pay back a gift?" The party questioning the transfer has the burden of overcoming, by clear and convincing evidence, that the transfer was not a gift.

¶ 48 Here, all of the credit card charges, cash withdrawals, and checks written for defendant's benefit were transfers to a child. There was no clear and convincing evidence to rebut the presumption that these transfers were gifts. Although plaintiffs maintained that Rose Mary would not gift one child more than another, there was no direct proof of this. Rather, there was evidence to the contrary, such as the home loan to Jay and the fact that Rose Mary put only defendant on her credit cards. Rose Mary's actions clearly showed that she never intended to require defendant to repay what she gave him, given the duration of the charges and that Rose Mary did not take any of the previously-mentioned actions, such as having defendant sign a promissory note or changing her will. "Indeed, all of the evidences convince[d] [the trial court] that Rose Mary considered the monetary benefits she provided [defendant] to be gifts. There [was] no clear and convincing evidence to support a contrary finding." Therefore, the trial court entered judgment in favor of defendant on count II.

¶ 49 As for count III, unjust enrichment, the trial court stated as follows in relevant part. Plaintiffs claimed that defendant was unjustly enriched by the benefits he received from Rose Mary during the last 7½ years of her life. Plaintiffs were essentially claiming that such benefits to defendant resulted in less money going to the other nine siblings under the estate; there was no evidence of a detriment to Rose Mary or that she did not have enough money for any of her needs and wants during the relevant period. "The evidence is that she freely and voluntarily allowed her youngest son to charge on her cards and expected him to pay what he could.

Otherwise, the amounts were freely given." The law presumes that the transfer of money or property to a child is a gift, and the only evidence offered by plaintiffs that Rose Mary did not intend the money to be a gift was testimony that the parents would not do for one what they could not do for all. However, the evidence actually showed that the children were not treated equally, at least as adults. "Henry and Rose Mary Drabik attended to the needs of each child as best they could without regard to keeping score. This is what most good parents do." Defendant had the legal right to retain a gift, and what was freely given over Rose Mary's lifetime could not now be said to be an unjust enrichment to the recipient. There was no evidence that Rose Mary was not able to make intelligent decisions during the 7½ years at issue or that she was incapable of handling her own finances. "The evidence is clear that she choose [*sic*] to distribute her money in this matter." Therefore, the trial court also found in defendant's favor on count III.

¶ 50 Plaintiffs timely appealed. On appeal, plaintiffs argue that: (1) the trial court erred in applying a presumption that the monies were a gift rather than loans, because defendant never plead such a defense but rather stipulated that the funds were loans; (2) the trial court's rulings on counts II and III are against the manifest weight of the evidence; and (3) the trial court erred by allowing testimony barred by the Dead Man's Act and the Illinois Rules of Evidence.

¶ 51 II. ANALYSIS

¶ 52 A. Dead Man's Act and Illinois Rules of Evidence

¶ 53 We first address plaintiff's arguments regarding the Dead Man's Act and the Illinois Rules of Evidence. We begin with the Act. The Act bars anyone directly interested in an action from testifying on his or her own behalf about any conversation with the decedent or any event which took place in the decedent's presence. 735 ILCS 5/8-201 (West 2010). Certain exceptions exist, including if anyone testifies on the estate's behalf as to any conversation with

the deceased person or any event which took place in the decedent's presence. 735 ILCS 5/8-201(a) (West 2010). In such a scenario, the interested party may testify about the same conversation or event. *Id.* The purpose of the Act is to preserve fundamental fairness by protecting decedents' estates from fraudulent claims while also equalizing the position of parties in regard to giving testimony. *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005). The Act bars only evidence that the decedent could have refuted. *Id.* Whether a conversation or event is admissible under the Act is an evidentiary issue, so we review the trial court's ruling for an abuse of discretion. *Agins v. Schonberg*, 397 Ill. App. 3d 127, 130 (2009).

¶ 54 Plaintiffs note that prior to trial, they filed a motion *in limine* seeking to bar defendant's conversations with Rose Mary pursuant to the Act and the Illinois Rules of Evidence regarding hearsay. At the final pre-trial conference, the trial court granted the motion regarding the Act but stated that if the plaintiffs introduced any particular conversation or event, defendant would be allowed "to complete" that particular conversation or event. The trial court reserved its ruling regarding hearsay statements.

¶ 55 Plaintiffs argue that defendant's testimony that Rose Mary wanted all debts from her children forgiven upon her death was nonresponsive and also barred by the Dead Man's Act. Plaintiffs argue that the testimony fits within the statutory requirements and no exception allows its admission. Plaintiffs maintain that they did not "open the door" regarding this issue; that defendant did not raise this "affirmative defense" until his case-in-chief; and that instead of defense counsel asserting that plaintiffs opened the door, the trial court raised the issue *sua sponte*. For these reasons, plaintiffs assert that the trial court abused its discretion in admitting the testimony.

¶ 56 Defendant argues that the trial court correctly determined that plaintiffs had opened the door to his testimony. He notes that the stipulations referenced a conversation with his mother in which he asked for help obtaining credit cards, and the stipulation also recited his understanding that Rose Mary expected him to pay what he could. Defendant additionally points to Jay's testimony that Rose Mary and Henry expected Jay to repay any loans to their estates and Mary Lynn's testimony that Rose Mary would extend help when asked but expected to be repaid. Defendant further cites plaintiffs' questioning of him as an adverse witness, during which they asked what he told Rose Mary during the conversation in which he asked for a credit card.

¶ 57 Defendant cites *Perkins v. Brown*, 400 Ill. 490, 497 (1948), where the supreme court stated that a defendant who testified as an adverse witness about a deed he received from the decedent could explain the entire transaction. The supreme court stated:

> "Appellants having called Brown to testify and elicited from him the statement that he had received a deed for the property from the deceased and that he did not pay her for it or buy it from her, it was entirely proper to permit him to explain the entire transaction with the deceased, including the conversations had by her with him concerning the conveyance of the property, as such conversations were a part of the transaction inquired about by appellants." *Id.*

¶ 58 Defendant also argues that even if his statement should have been disregarded by the trial court, the trial court's memorandum reveals that it was not the crux of the decision. According to defendant, the trial court's "careful analysis of the transactions had led [it] to reject the idea of a series of loans in favor of a series of gifts," and the "issue of forgiving a loan upon death plays no significant role in the discussion."

¶ 59 We note that *Perkins* was interpreting a prior version of the Dead Man's Act under which the Act's protections were waived if someone testifying for the estate discussed the same "conversation" or "transactions," whereas the current version of the Act references "conversations" or "events." *Beard v. Barron*, 379 Ill. App. 3d 1, 13 (2008); compare *Vazirzadeh v. Kaminski*, 157 Ill. App. 3d 638, 644 (1987) (legislature presumably intended to change the scope of the statute when it changed the statute's language, rendering *Perkins* inapposite), and *Manning v. Mock*, 119 Ill. App. 3d 788 (1983) (narrowly interpreting the term "event" as used in the Act), with *Zorn v. Zorn*, 126 Ill. App. 3d 258, 262-63 (1984) (adopting expansive interpretation of "event").

¶ 60 Regardless of the applicability of *Perkins*, we agree with defendant that the trial court acted within its discretion in overruling plaintiffs' objection to defendant's testimony. Plaintiffs specifically questioned defendant about his conversation or conversations with Rose Mary in which he asked for help getting credit, and the parties entered stipulations regarding statements defendant told Rose Mary about needing credit and his understanding of the terms of the use. In this manner, plaintiffs can reasonably be said to have opened the door to allowing defendant to explain the entirety of the discussion regarding the loans. See *Haist v. Wu*, 235 Ill. App. 3d 799, 818 (1992) (purpose of exception allowing waiver of the Act's protections is to prevent the trier of fact from being presented with a one-sided version of the conversation or event). In other words, the trial court did not abuse its discretion in implicitly ruling that fundamental fairness, which is the goal of the Act (*Gunn*, 216 Ill. 2d 609), allowed defendant to discuss the entirety of the conversations at issue. *Cf. Haist*, 235 Ill. App. 3d at 819 (where the plaintiff implied through her examination of the defendant as an adverse witness that the decedent had given the doctor a phone number but he had not written it in his records, the defendant was entitled to explain why

these inferences were incorrect); *Wasleff v. Dever*, 194 Ill. App. 3d 147, 153-54 (1990) (where the plaintiff asserted through his complaint, deposition testimony, and trial testimony that the defendant was not authorized to sign the decedent's name on bank withdrawal slips, the defendant was entitled to testify to conversations she had with the decedent granting her the authority).

¶ 61 Although plaintiffs also allege error from the trial court's overruling their objection without input from defendant, plaintiffs cite no authority that the trial court must wait for the opposing party's response and rely only on that party's reasoning in ruling on an objection. Moreover, when granting plaintiffs' motion *in limine* on the Act, the trial court specifically stated that defendant would be allowed to testify about a conversation or event if plaintiffs introduced it first.

¶ 62 Plaintiffs additionally allude to error in admitting the statement because it was nonresponsive, but they do not elaborate on this argument or cite any relevant caselaw on the subject, thereby forfeiting any such argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument in brief shall contain citation to authorities relied upon); *Adler v. Greenfield*, 2013 IL App (1st) 121066, ¶ 59 (failure to support argument with citation to legal authority results in forfeiture of the argument on appeal).

¶ 63 As to plaintiffs' assertion that the testimony constituted an affirmative defense, we look to section 2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (West 2010)), which states, in relevant part:

> "The facts constituting any affirmative defense, such as [examples], and any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint ***, and any ground or defense, whether affirmative or

> not, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply." *Id.*

An affirmative defense essentially does not dispute the plaintiff's case but rather asserts a new matter that avoids liability. *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 16. Here, defendant's testimony would not qualify as an affirmative defense because defendant was testifying as to his parents' general loan terms rather than raising a new matter.

¶ 64 We next turn to plaintiffs' argument regarding hearsay. Plaintiffs challenge defendant's testimony that it was his understanding that Rose Mary added his name to her bank accounts because he was in Illinois and constantly available for her, and she was worried that, with Henry gone, she would not have access to the funds if anything happened to her. Plaintiffs maintain that the trial court erred in overruling their objection to this testimony on hearsay grounds.

¶ 65 Hearsay is a statement not made by the declarant while testifying at the trial or hearing that is offered to prove the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). A trial court's determination of whether a statement constitutes hearsay is reviewed for an abuse of discretion. See *People v. Cookson*, 215 Ill. 194, 204 (2005).

¶ 66 We conclude that the trial court did not abuse its discretion in overruling plaintiffs' objection, as defendant was not testifying as to what Rose Mary specifically said to him, but rather to his understanding of why his name was added to her bank accounts. In this manner, the testimony was similar to testimony elicited by plaintiffs from other siblings as to their understanding regarding repayment of money loaned to them by Henry and Rose Mary. Even if, *arguendo*, the testimony constitutes hearsay and should have been excluded, any error was harmless. Plaintiffs do not challenge the trial court's ruling on their fraud claim, and the central

issue for the other two counts is whether defendant should be required to repay the funds he received from Rose Mary. In light of the fact that it is undisputed that Rose Mary added defendant to her credit cards because he asked for help getting credit, the exact reason Rose Mary also added defendant's name to the bank accounts would not affect the outcome of the case. See *Kotvan v. Kirk*, 321 Ill. App. 3d 733 (2001) (erroneously-admitted hearsay evidence does not require reversal where the evidence does not materially affect the case's outcome).

¶ 67 B. Presumption of Gift

¶ 68 We now address plaintiffs' argument that the trial court erred in finding that they failed to rebut the presumption that the monies were a gift and not a loan. Plaintiffs maintain that the trial court misapplied the law by applying the presumption in the first place, because defendant never plead this defense but to the contrary stipulated and testified that the funds were a debt. Plaintiffs' argument raises a question of law, which we review *de novo*. See *Department of Transportation v. Lowderman, LLC*, 367 Ill. App. 3d 502, 504 (2006) (questions of law are reviewed *de novo*).

¶ 69 Plaintiffs point out that defendant never raised any affirmative defenses, and they maintain that an assertion that the funds were a gift constituted an affirmative defense. Plaintiffs argue that defendant's failure to raise the defense foreclosed the trial court from relying on it in its ruling. Plaintiffs cite *Spagat v. Schak*, 130 Ill. App. 3d 130, 134 (1985), where this court stated that if a defendant fails to plead an affirmative defense, "he is deemed to have waived the defense and it cannot be considered even if the evidence suggests the existence of the defense."

¶ 70 Plaintiffs argue that in addition to not raising the affirmative defense, defendant admitted at various times that the monies were a loan rather than a gift. Plaintiffs note that: defendant admitted the allegation that he now refused to pay back the "debt" he accumulated; defendant

agreed to characterizing the funds as "loans" during the jury instruction conference (before the trial was changed to a bench trial); the parties' trial stipulations referenced the funds as a "debt"; and defendant testified at trial that it was his understanding that he still owed the $130,000 balance on the credit cards, that he had not repaid the amount because he had no income or money to do so, and that there was never a time where he did not intend to repay the outstanding balances to Rose Mary. Plaintiffs argue that at the time of trial, no issue or presumption had been plead that the monies were a gift, making it impossible for them to anticipate or know that they had a burden to rebut a presumption of a gift. Plaintiffs maintain that even if the issue had been properly presented, defendant's admissions and stipulations conclusively established that defendant accumulated a debt and still owed at least $130,000, rebutting any potential claim that the monies were a gift instead of a loan. See *Swiecicki v. Swiecicki*, 255 Ill. App. 3d 1037, 1040 (1994) ("Even if we assume that a presumption of a gift has been raised by the defendants, it ceases to operate once contrary evidence is introduced.").

¶ 71 Plaintiffs further argue that in reaching its conclusion that the funds were a gift rather than a loan, the trial court did not properly analyze the case from a probate perspective. Plaintiffs maintain that Rose Mary's will left her estate equally to her ten children, and Illinois probate law allows only a written modification to a will. Plaintiffs cite *Meppen v. Meppen*, 392 Ill. 30 (1945), for the proposition that a loan may not be characterized as an advancement of the child's share under a written will. Plaintiffs also cite *Fleming v. Yeazel*, 379 Ill. 343, 346 (1942), where the supreme court stated that the fact that the decedent issued notes for debts and distributed her estate equally among the appellants and six others indicated the decedent's intent that the appellants pay their notes. Plaintiffs argue that because Rose Mary similarly left her

estate equally to her ten children, it is evidence that she intended any outstanding debt to be repaid.

¶ 72 Defendant argues that characterizing the money as a gift is not an affirmative defense listed in section 2-613. Defendant argues that it also falls into the category of seeking to avoid the legal effect or defeat the cause of action because it does not admit the complaint's allegations but rather seeks to avoid them. Defendant further maintains that the gift characterization would not have caused surprise to plaintiffs because they must have considered it, and the evidence elicited would not have changed. Defendant argues that the trial court additionally weighed all of the evidence and concluded that Rose Mary and Henry did not, in fact, treat all of their children equally, and Rose Mary's actions clearly showed that she never intended to require defendant to repay what she gave him, in that she allowed the charges to go on for 7½ years and did not take any affirmative action indicating that the monies should be repaid to the estate upon her death. Finally, defendant argues that while under *Meppen*, money he received from Rose Mary cannot be considered an advancement, *Meppen* was a different situation because there was a written note that constituted a loan. Defendant argues that *Fleming* is similarly distinguishable because the issue there was how and when to collect loans, and there was no dispute over the characterization of the transferred monies. Defendant concludes that plaintiffs "did not, and could not, provide the quantum of evidence that would constitute clear and convincing evidence that the transactions at issue were not gifts."

¶ 73 Addressing plaintiffs' argument that defendant was required to plead the issue of the funds being a gift as an affirmative defense, we note that while some Illinois cases reference a party raising such a defense (see, *e.g.*, *Greig v. Johnson*, 22 Ill. App. 3d 646, 650), plaintiffs do not cite, nor does our research reveal, any Illinois caselaw directly examining this issue. A

cursory look at cases in other jurisdictions reveals discordant views. Compare *Schneider v. Schneider*, 2008-Ohio-4495, ¶ 16 (gift defense was not an affirmative defense because it simply disproved the plaintiff's claim, rather than seeking affirmative relief or introducing a new issue into the case), and *Bowman v. Blair*, 889 P.2d 1069, 1071 n.2 (Ala. 1995) (assertions of gift did not amount to an affirmative defense because by contesting the plaintiff's claims of ownership, the defendant contested a matter asserted in the complaint and did not assume the complaint to be true), with *First National Bank v. Howard*, 42 Tenn. App. 347, 519 (1957) (claim that brooch was a gift was an affirmative defense that the defendant had the burden of proving). We need not resolve this issue here, however, as we ultimately conclude that even if the question of a gift was properly before the trial court, the presumption of a gift was rebutted by the evidence. As our consideration of this issue overlaps with plaintiff's argument that the trial court's ruling was against the manifest weight of the evidence, we turn to that subject before engaging in a more in-depth analysis.

¶ 74 C. Manifest Weight of the Evidence

¶ 75 Plaintiffs argue that even if the trial court applied the proper legal test, its ruling that the funds defendant received were a gift rather than a loan was against the manifest weight of the evidence. Plaintiffs cite *Hall v. Eaton*, 258 Ill. App. 3d 893, 895 (1994), where the appellate court defined gift as " 'a voluntary, gratuitous transfer of property by one person to another where the donor manifests an intent to make such a gift and absolutely and irrevocably delivers the property to the donee.' " *Id.* (quoting *Moniuszko v. Moniuszko*, 238 Ill. App. 3d 523, 529 (1992)). The *Hall* court continued, "A gift is not shown unless the donor has relinquished all present and future dominion and power over the subject matter of the gift." *Id.* Plaintiffs argue that when a repayment is made and accepted, as in this situation, the donor has not absolutely

and irrevocably surrendered control over the property, so the funds cannot be a gift. Plaintiffs argue that by acknowledging that he made periodic payments and still owed the $130,000 balance on the credit cards, defendant himself acknowledged that the funds were a loan rather than a gift. Plaintiffs note that when asked by his attorney why he did not pay the balance, defendant stated that he lacked the means to do so, rather than that the money was a gift. Plaintiffs contend that the trial court's rulings on counts II and III are therefore against the manifest weight of the evidence.

¶ 76 Defendant quotes portions of the trial court's ruling in support of its decision. He further argues that underlying the court's decision was not only its finding that the transfers were gifts, but that they were clearly not enforceable loans as they were not treated by defendant or Rose Mary as such. Defendant argues that the trial court's rulings on both counts II and III were therefore not against the manifest weight of the evidence. He alternatively argues that even if plaintiffs could show that the ruling on count II was against the manifest weight of the evidence, plaintiffs still cannot show the required element of detriment to Rose Mary to succeed on count III.

¶ 77 We now discuss both the presumption of a gift and the evidence adduced here. As the trial court recited, a property transfer from a parent to a child is presumed to be a gift, and this presumption may be overcome only by clear and convincing evidence. *In re Marriage of Patel & Sines-Patel*, 2013 IL App (2d) 112571 ¶ 49. Here, however, even assuming that defendant was not required to raise the issue of a gift as an affirmative defense, the presumption of a gift was rebutted given defendant's own repeated characterization of the funds from Rose Mary as a loan or debt. In particular, as plaintiffs describe, defendant: admitted the allegation and stipulated that he refused to pay "any of the *debt* he accumulated on Rose Mary's accounts"

(emphasis added); stipulated that Rose Mary " 'expected [him] to pay what [he] could' " (the expectation of repayment is contrary to a gift); stipulated that he made payments on the "debt," including payments after Rose Mary died; testified that he paid as much as he could whenever he could; answered in the affirmative when his counsel asked if it was his "understanding that [he] owe[d] the balance on the credit cards"; testified that he had not repaid the balance because he had no money to do so (rather than because it was a gift); testified that there was never a time that he did not intend to pay the outstanding balances to Rose Mary; and testified that he signed a document agreeing to forgo his share of the estate, with the funds going "to pay what [he] owe[d]."

¶ 78 In finding the funds to be a gift, the trial court referenced Rose Mary's failure to take any affirmative action indicating that the money was a debt, such as changing her will to refer to the debt, having defendant sign a note, keeping a record of the money loaned, or telling plaintiffs to have defendant pay the debt after she died. While this reasoning has some intuitive appeal, the facts can just as easily be viewed in a converse manner. That is, if Rose Mary wanted to characterize the funds as a gift, she could have taken an affirmative action such as changing her will to refer to the gift or telling plaintiffs that defendant was not responsible for any debts after she died. Moreover, as plaintiffs point out, to constitute a gift, the donor must absolutely and irrevocably deliver the property to the donee, relinquishing all present and future dominion and power over the gift. *Hall*, 258 Ill. App. 3d at 895. Here, Rose Mary did not completely relinquish her power over the funds she advanced to defendant, as she expected him to pay what he "could," showed him credit card statements, and accepted his repayments. Given these considerations, and especially given defendant's testimony and actions[6] indicating the funds

[6] As stated, the parties stipulated that defendant made payments on the credit card debt

were a debt, the trial court's finding that the funds were a gift was clearly against the manifest weight of the evidence.

¶ 79 Having determined that the evidence adduced could only support a finding that the funds were a loan, the question then arises of the loan's terms. The trial court cited defendant's testimony that Rose Mary wanted all debts forgiven upon her death and found defendant's testimony about his agreement with Rose Mary credible. Thus, the trial court's ruling could arguably be affirmed on the basis that, although the money could not be characterized as a gift, one of the terms of the loan was that any amounts outstanding at the time of Rose Mary's death would be forgiven. See *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 62 (we may affirm the trial court's judgment on any basis provided by the record). However, considering defendant's aforementioned actions of making payments on the credit card debt after Rose Mary died and agreeing to forego his share of the estate, with that money going toward what he "owe[d]," as well as his testimony that it was his understanding that he owed the balance on the credit cards but had not repaid them because he had no money to do so (as opposed to the debt being extinguished by Rose Mary's death), it would be against the manifest weight of the evidence to conclude that a loan term was debt forgiveness upon Rose Mary's death. Even defendant does not place much significance on his testimony on this subject, stating in his brief that "[t]he issue of forgiving a loan upon death plays no significant role in the [trial court's] discussion."

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even after Rose Mary died. Such an action is consistent with the monies being a loan and is inconsistent with the funds being a gift, as is defendant's action of agreeing to have his share of the estate go towards the money he "owe[d]."

¶ 80 Looking at the specific claims at issue on appeal, count II alleged "Breach of Unwritten Contract – Implied in Fact." A contract implied in fact exists where a contractual duty is imposed by a promissory expression, which may be inferred from the facts and circumstances and the promisor's expression showing an intention to be bound. *In re Marriage of D'Attomo*, 2012 IL App (1st) 111670, ¶ 19. A contract implied in fact may be based on the parties' act, even without any express statement of specific agreement about the details of the contractual relationship. *Id.* Here, the evidence we discussed showing a loan likewise shows a contract implied in fact between defendant and Rose Mary.

¶ 81 The parties stipulated that defendant's understanding was that Rose Mary " 'expected [him] to pay what [he] could' " towards the debt. As the trial court recognized, such evidence indicates that the loan did not have any definite repayment terms. The trial court cited *Barnes*, 399 Ill. App. 3d 254. There, the plaintiff wrote two checks to the defendant, a friend, totaling $27,000. *Id.* at 255-56. The trial court granted the defendant's motion for a directed finding, reasoning that because there were no specific terms of repayment for the alleged loan, the plaintiff had not met his burden of making a *prima facie* case. *Id.* at 261. The appellate court disagreed, stating:

> "the common law does not require the plaintiff to prove the 'terms of repayment' to obtain a judgment for repayment of a loan. If the loan contract omits the terms of repayment, the court will supply them. [Citations.] All the cases we have found agree that the parties' failure to stipulate the time for repayment of a loan does not vitiate the loan or excuse the recipient of the money from having to pay it back." *Id.* at 267.

The *Barnes* court stated that courts take two views regarding the time for repayment in such a situation: the first, that the loan is payment on demand, and the second, being the majority view,

that the loan must be repaid within a reasonable time. *Id.* at 267-68. The court stated that it did not need to resolve which of the two views was correct because at trial, the plaintiff offered some evidence of the loan's terms, in that he testified that he told the defendant that she could begin to pay him back when she got on top of her debts. *Id.* at 268. The court stated that in doing so, the plaintiff showed that by his own understanding, the loan was payable within a reasonable time rather than on demand, and he further admitted the repayment was to be in installments and without interest. *Id.*

¶ 82 Similarly, as the parties here stipulated that defendant's understanding was that Rose Mary " 'expected [him] to pay what [he] could' " towards the debt, it equates to the loan being payable within a reasonable time rather than on demand. Therefore, on remand, the trial court should determine a reasonable time for the repayment of the loan considering the facts of the case, including defendant's financial circumstances. Further, although the parties' stipulation and defendant's testimony indicated that he owed $130,000 for credit card charges, the parties disputed additional amounts for, among other things, cash withdrawals and missing IRA funds. On remand, the trial court will also have to determine what additional amounts, if any, defendant owes.

¶ 83 Last, we look at count III, unjust enrichment. To prove unjust enrichment, a plaintiff must show that the defendant has unjustly retained a benefit to the plaintiff's detriment, violating the fundamental principles of justice, equity, and good conscience. *Chicago Title Insurance Co. v. Teachers' Retirement System*, 2014 IL App (1st) 131452, ¶ 17. Unjust enrichment is not an independent cause of action but rather a remedy for unlawful or improper conduct as defined by law, including fraud, duress, or undue influence. *Id.* It may also be based on contracts implied in law, but this theory does not apply when the contract is express, whether oral or written. *Id.*

Unjust enrichment is an equitable remedy, so it is available only when there is no adequate remedy at law. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005).

¶ 84 Here, plaintiffs' allegations of unjust enrichment were based on the same facts as their allegation of breach of implied contract. At the pre-trial hearing, plaintiffs agreed with the trial court's statement that they would not be able to prevail on both counts II and III, *i.e.* that they were alternative theories. As we have found that the trial court's ruling on count II is against the manifest weight of the evidence, requiring a remand for further proceedings on that count in which the trial court is determine the total amount of the outstanding loan and a reasonable time for repayment, we need not further address count III.

¶ 85 III. CONCLUSION

¶ 86 For the reasons stated, we reverse the ruling of the circuit court of Du Page County and remand the cause for further proceedings consistent with this order.

¶ 87 Reversed and remanded.