2015 IL App (2d) 141260-U
No. 2-14-1260
Order filed July 31, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KIMBERLY M. ANDERSON, Petitioner-Appellee, and ASHLEY T. ANDERSON, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Jo Daviess County. No. 12-D-71 Honorable Kevin J. Ward, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: In marriage dissolution proceeding, the trial court did not err in declining to award the parties joint custody of their children and in awarding petitioner sole custody. The court erred with respect to property classification. Our holding moots respondent's claims of error with respect to property distribution, maintenance, and child support, all of which are to be revisited on remand.

¶ 2 In its judgment dissolving the marriage between petitioner, Kimberly Anderson, and respondent, Ashley Anderson, the trial court determined custody, child support, and maintenance. Respondent challenges these and other aspects of the trial court's judgment. We affirm in part, vacate in part, and remand for further proceedings.

¶ 3 I. GENERAL BACKGROUND

¶ 4 We begin with an overview of the case, and will supplement the facts as we discuss each issue on appeal.

¶ 5 The parties were married in October 2002. Two children were born from the marriage: a daughter, A.A., born December 24, 2003, and a son, W.A., born January 16, 2007. The parties resided together in Scales Mound until their separation in September 2012 when petitioner moved into her parents' home in Galena. The children continued to attend Scales Mound schools. Scales Mound and Galena are 11 miles apart.

¶ 6 Petitioner filed her dissolution petition on October 17, 2012, alleging a breakdown of the marriage on grounds of extreme and repeated mental cruelty by respondent. After a four-day dissolution trial in the summer of 2014, the trial court (1) granted petitioner sole custody of both children and set a visitation schedule for respondent; (2) ordered child support of $233.84 per week; and (3) "in lieu of any maintenance award," allocated to petitioner 60% of the marital estate and ordered respondent to pay $145,974.69.

¶ 7 II. CUSTODY

¶ 8 A. Facts

¶ 9 Following their September 2012 separation, the parties agreed to equal time with the children. Subsequently, a disagreement arose and the parties went to mediation, resulting in a schedule that was essentially 50/50, with petitioner having the children one or two more days per month than respondent. In her October 2012 dissolution petition, petitioner asked that the parties "be awarded joint custody, with physical placement to be awarded to Petitioner, subject to reasonable and liberal visitation [by] Respondent." In a contemporaneous motion for temporary relief, petitioner asked that this custodial arrangement be ordered on a temporary basis pending

trial. In his response to the motion, respondent asked that the court retain "the current care schedule[,] which is a joint physical care schedule with both parties providing substantial care for the minor children." Respondent asked, in the alternative, that he be made primary residential custodian. At the October 18, 2013, hearing on her motion for temporary relief, petitioner stated that the current care schedule was too hectic for the children because of the "back and forth." On October 28, the court entered an order awarding petitioner temporary sole custody of the children. Respondent was permitted visitation consisting of alternate weekends plus one day per week. The order provided a "right of first refusal," which allowed the party not having care of the children the right to take them in case the other party intended to place them in substitute care for a period longer than 6 hours. The order for temporary custody also required respondent to pay $211 per week in child support.

¶ 10 Subsequently, on respondent's motion, the court appointed Dr. Marc Wruble, a licensed clinical psychologist, to perform a custody evaluation. Wruble submitted a written report recommending that the parties have joint legal custody of the children. He also testified at the dissolution trial. The guardian *ad litem* (GAL), Susan Hess, submitted a written report (supplemented twice) recommending that petitioner have sole legal custody of the children. Hess did not testify at trial.

¶ 11 The following facts were adduced at the dissolution trial. Petitioner has a high school degree and a certificate in veterinary assistance. Respondent has a high school degree and an associate's degree in welding. When the parties were married in October 2002, petitioner was employed as a veterinary assistant at Galena Square Clinic in Galena and respondent was a mechanic at John Deere Company in Dubuque, Iowa, where he was employed since December 1998. In addition to her veterinary employment, petitioner operated a home pet care service.

¶ 12 The marital residence is situated on four acres in Scales Mound. Contiguous to that property is a 36-acre parcel, which at one time was the subject of a purchase agreement between respondent and his grandparents' trusts. *Infra* ¶¶ 69-92. During the marriage, the parties farmed the parcel and raised livestock on it. Upon returning home from John Deere each weekday afternoon, respondent would work the farm for several hours, assisted by petitioner. Petitioner was also principally responsible for housework and care of the children. For instance, she alone scheduled the children's appointments and activities. Respondent attended some of these. According to respondent, the parties shared in helping the children with their homework. In 2011, when W.A. was in preschool, petitioner quit her job at Galena Square so that she could concentrate on family responsibilities. Respondent had wanted her to quit when A.A. was born, but petitioner declined at the time. Once she left Galena Square, petitioner continued with her home pet care service. In December 2012, two months after the parties' separation, petitioner returned to work as a veterinary assistant, now at Veterinary Associates in Galena. She was still working there at the time of trial. She currently works four weekdays per week for an average of 30 hours. Her yearly gross income from Veterinary Associates is approximately $17,000. In 2013, her net income from her pet care service was $2,000. Respondent works Monday through Friday at John Deere, where his gross income is approximately $52,000 per year. He works an early morning shift but has some flexibility regarding his start time. Respondent's parents live nearby and assist him with the children. Petitioner receives help from her own parents, with whom she was still living at the time of trial.

¶ 13 There was testimony about respondent's drinking during the marriage. According to petitioner, respondent purchased a 40-ounce can of beer every evening on his way home from work, and also purchased a 30-can case of beer every couple of days. Occasionally, petitioner

would drink some cans from the pack. Petitioner told Wruble that respondent drank 10-12 beers each night, and on most nights became intoxicated and then passed out. Petitioner affirmed at trial that this was an accurate description of respondent's drinking and its effects. Petitioner testified to an instance when the children became frightened because they were unable to wake respondent. She claimed that respondent was not available for the children during the marriage because he was "always busy or gone or drinking."

¶ 14 Respondent agreed that he drank "quite a bit" during the marriage. He estimated that he bought two 30-can packs of beer every week, but was unsure how much he drank. He denied that he became intoxicated every night. Respondent characterized himself as a heavy sleeper and explained that he sometimes fell asleep early because he worked hard and had inadequate sleep the night before. Respondent claimed that petitioner herself drank "a lot" on weekends but not as much during the week. A week after the parties separated, respondent quit drinking altogether for 14 months. Respondent explained that he did so because of accusations that he was not able to control his intake of alcohol. He now drinks "a little bit" of alcohol. Asked how much he drinks, respondent answered, "I have a couple of beers here or there and—it just depends." He has not received any treatment in connection with his alcohol consumption.

¶ 15 At trial, Wruble was asked about respondent's alcohol consumption. Wruble testified that respondent reported drinking 10 to 12 beers each night during the marriage (however, this remark by respondent does not appear in Wruble's report). Wruble also noted (again, in his testimony, not his report) that another therapist had diagnosed respondent with substance abuse. Asked whether respondent would need a "structure[d] support system" to address his drinking, Wruble said it would depend on the circumstances, and noted that respondent has decreased his consumption and that none of Wruble's psychological tests indicated respondent for substance

abuse. Wruble disagreed that someone who "has been diagnosed with alcoholism [and] hasn't addressed it through any structured support system[]" should not drink socially. Wruble claimed the "research would bear that out."

¶ 16 Respondent testified that he devotes less time to farming now so that he can spend more time with the children. Petitioner and other witnesses agreed that, since the separation, respondent has become much more involved with the children and attuned to their needs. Petitioner suspects, however, that respondent is acting more conscientiously simply to put on a good face for the court and that he will return to drinking after the divorce is final.

¶ 17 The parties described disagreements and conflicts during the marriage. Respondent testified that it was "pretty typical" for petitioner to raise her voice, curse at him, and push or hit him. Anna Winter, petitioner's sister, described the parties' relationship as having "a lot of tension" before their separation. Winter witnessed respondent yell and curse at petitioner in front of the children, causing the three of them to cry. Winter also witnessed petitioner yell at respondent, but usually it was in response to him yelling at her first. Wruble's report stated that "[b]oth parties alleged that the other parent emotionally mistreated them and verbally abused them." The parties "agreed that the relationship was dysfunctional and fraught with conflict for some time."

¶ 18 Respondent recalled one instance during the marriage when he and his friends played a practical joke on petitioner by pretending that respondent was passed out on the picnic table. Respondent testified that, as his friends carried him into the house, petitioner punched and kicked him. Petitioner testified that she did kick respondent in the ribs, but claimed she was nine-months pregnant with A.A. at the time and was worried about how she would get to the hospital with respondent incapacitated. Respondent claimed that his ribs were broken from the incident.

Petitioner testified that she was unaware of any rib fracture until the divorce proceeding. As petitioner recalled, respondent did not seek immediate medical treatment; rather, during a work physical months later it was discovered that respondent had had a rib fracture at some prior time. Petitioner denied that this past fracture was necessarily connected to the kicking incident. She claimed that this was the only time that she physically assaulted respondent.

¶ 19 There were disagreements during the marriage over family matters. Wruble's report indicated that the parties were at odds over "how they spent their time *** and what was considered to be priorities for how the children spent their time." The children were involved in 4-H activities among other things. A.A. particularly enjoyed showing cattle as part of 4-H. Petitioner kept the cattle at her parents' home and encouraged the activity. According to her, respondent considered showing cattle a waste of time and did not attend the cattle shows. Respondent also objected to the time and gas petitioner consumed in maintaining the cattle at her parents' home. Petitioner testified that this disagreement between the parties caused "problems" in the marriage.

¶ 20 As to the parties' rapport since the separation, petitioner testified that there was currently "a lot of tension" between them. She characterized their communication and cooperation as poor in certain areas, particularly regarding visitation schedule changes, but she acknowledged sharing the blame for this. Respondent complained that petitioner frequently is condescending and disrespectful toward him. The parties felt, however, that their relations will improve once the divorce proceeding concludes.

¶ 21 There was evidence of specific conflicts and disagreements since the separation. Respondent testified to a confrontation between the parties at the children's school in Scales Mound. This incident occurred prior to the mediation and the court's order for temporary

custody. According to respondent, the schedule in place at the time dictated that he would have the children that day, but petitioner "made a new schedule and said this is what we're going to go with." As petitioner was preparing to park at the school, respondent stepped in front of the car, expecting petitioner to stop. She did not, and the car struck respondent, apparently carrying him for some distance before he fell off. Petitioner gave no account of the incident in her testimony, but only acknowledged that she was interviewed by the police and no charges were filed.

¶ 22 Respondent testified that, after this incident, he suggested that the parties begin exchanging items through a tote at the end of the lengthy driveway to the marital residence. The tote was originally placed there during the marriage to save package carriers the burden of negotiating the drive. Petitioner complained at trial that, when she requests clothes from the marital home, respondent leaves them in the tote instead of sending them with the children. Petitioner also complained that respondent has permitted her inside the marital home only twice since the separation, even though she still has personal property there. Respondent also has not let her have anything from the marital home other than clothes.

¶ 23 One recurring source of conflict addressed extensively at trial was the visitation schedule. Subsequent to the October 2013 temporary order on visitation, the parties informally agreed to a schedule that increased respondent's time to the prior level of 50%. Friction arose, however, over requested schedule changes. One conflict was over the cattle shows in which A.A. participated. Petitioner testified that respondent resisted her request that he adjust his visitation schedule so that petitioner had A.A. on the days of the shows. The parties ultimately went through their attorneys to reach a resolution. Petitioner characterized respondent as generally uncooperative in terms of schedule changes. According to her, he inflexibly enforces his right of

first refusal under the temporary order, even in cases where the children simply want to spend time at a friend's house.

¶ 24 For his part, respondent testified that he tries to be flexible in regard to petitioner's requests for schedule changes. However, he insists on equality and does not agree "rashly" to her requests. As evidence of his good faith, respondent noted that he spontaneously offered petitioner the Fourth of July one summer.

¶ 25 The parties each identified schedule changes that the other refused. Petitioner testified that respondent has refused her repeated request that they "swap" their weekends so that petitioner can have the children on the same weekends that her divorced sister, Anna Winter, has her children. According to petitioner, respondent has offered only vague reasons for refusing the request. Petitioner admitted that she has not asked her sister whether she can shift weekends with her ex-husband; rather, she is waiting to see if respondent is as flexible as he claims regarding schedule changes. Respondent explained that he has declined the swap because the current schedule aligns his visitation weekends with those of a good friend who is also divorced and has children on a visitation schedule. Respondent also noted that he has taken the initiative to speak with Winter's ex-husband, who expressed willingness to swap weekends with Winter.

¶ 26 Respondent testified that, in late 2012, he asked petitioner for a switch because he wanted to take the kids on vacation. He was "kind of told that was too bad, so ever since then I don't really ask."

¶ 27 Another source of contention is the children's activities. Petitioner testified that, during W.A.'s first year playing soccer, respondent would attend W.A.'s games when petitioner had W.A., but when respondent had visitation he would not bring W.A. to his games. (This issue was mooted, petitioner explained, when the soccer games began to fall exclusively on days when

petitioner had W.A.). In his testimony, respondent in turn accused petitioner of failing to attend A.A.'s volleyball games when respondent had visitation. Respondent also complained that petitioner fails to inform him when she schedules the children's activities, with the result that he misses them Respondent claimed that petitioner does this deliberately in order to interfere with his relationship with the children. Respondent further accused petitioner of discouraging him from attending the children's 4-H events.

¶ 28 Wruble noted that W.A. informed him that petitioner disliked being in respondent's presence during the children's events. W.A. also confirmed that petitioner had failed to inform respondent of some of the children's events. Regarding respondent, however, Wruble concluded that he tended to guard his visitation time and believed the children's activities detracted from it.

¶ 29 Petitioner acknowledged at trial that she was uncomfortable in respondent's presence because of the "looks" he gives her. She maintained, however, that her failure to inform respondent of events was inadvertent, and stemmed from her habit during the marriage of taking total control of planning the children's activities. She admitted that she needs to work better at communication. She also admitted, however, that she has indeed discouraged respondent from attending 4-H events. She feels these are events for the children and petitioner's family.

¶ 30 There was also evidence of disagreements in the area of medical care for the children. A.A. previously saw psychologist Judith Rowett for anxiety. The parties gave conflicting accounts of why the sessions stopped. Petitioner testified that, several sessions into the treatment, respondent met with Rowett for the first time and concluded that she was an inappropriate fit because she did not have Christian values. A.A. stopped seeing Rowett because respondent demanded it, though petitioner did not approve of the decision. In respondent's account, however, the decision to discontinue therapy was mutual. The parties testified that,

after discontinuing services with Rowett, they tried two other psychologists in turn, during which time W.A. also began treatment for anxiety. Ultimately, the parties mutually agreed against both psychologists. Petitioner suggested that A.A. return to Rowett, as they had a good relationship. Respondent disagreed. Petitioner testified that she doubts that the parties will ever agree on a therapist for the children. This is unfortunate, Wruble commented, because he feels the children need therapy for their anxiety. Both parties acknowledged at trial that the children need therapy.

¶ 31 Respondent noted that the children have been receiving chiropractic care. Recently, they switched chiropractors to one that could take a type of X-rays that the other could not. The switch was at petitioner's instance; respondent did not believe the change was necessary but felt he had no say in the matter.

¶ 32 Respondent testified that, since the separation, he has taken the initiative in scheduling and attending the children's medical appointments. He noted that petitioner, despite having had sole responsibility for these matters during the marriage, has missed several of the children's medical appointments. Also, respondent identified occasions where he felt petitioner did not react quickly enough to the children's physical complaints. On one occasion, W.A. complained of back pain after playing on a trampoline, and on another occasion he complained of a tooth ache. In both instances, petitioner made an appointment a few days out. Respondent intervened and moved the appointment up because W.A. was in pain.

¶ 33 Regarding her attendance at appointments, petitioner explained that she did not feel the need for both parents to attend all appointments. She denied that she was neglectful of the children's medical needs. She was asked specifically about the doctor's recommendations for W.A.'s stomach discomfort. The doctor recommended probiotic capsules or yogurt. Petitioner admitted that she does not always remember to give W.A. the probiotic supplements because

mornings in her parents' house are hectic. She emphasized, however, that W.A. regularly eats yogurt and has not complained of stomach discomfort in over a month. Respondent, however, testified that W.A. complained about his stomach less than a week ago.

¶ 34 Petitioner testified that respondent phones the children nightly when they are in her care. A.A. began keeping a journal of her daily activities so that she was prepared to answer respondent's questions. The therapist whom A.A. was seeing at the time told respondent that A.A. should not be keeping such a journal. Respondent testified that he never asked A.A. to keep a journal and denied "grilling" her in his nightly calls.

¶ 35 The parties also disagreed over where the children should attend school. Petitioner wanted them to transfer to Galena schools while respondent preferred they remain in Scales Mound schools. There was uncontested evidence that Scales Mound schools are ranked higher in test scores and that Galena schools are on a State "watch list" for failure to comply with State standards.

¶ 36 The parties also presented evidence of the programs available in the Scales Mound and Galena schools to assist W.A's difficulty with reading. W.A. shows dyslexic tendencies but has not been diagnosed. Lori Hickman-Davis, W.A.'s first grade teacher, testified that there are three levels of reading assistance provided by Scales Mound, in ascending order of need: (1) phonics tutoring; (2) Response to Intervention (RTI) services; and (3) special education. RTI is a State-wide program. When W.A.'s reading problems became manifest in first grade, he did not qualify for RTI or special education because of his test scores. However, Scales Mound has a phonics tutor, Susan Anderson, respondent's mother. Anderson began to work with W.A. using the Orton-Gillingham method of dyslexia tutoring, in which she is trained. W.A. was formally discharged from Anderson's tutoring at the end of first grade because of his increased test scores.

Because, however, W.A. has regressed over the summer, Anderson has begun to work with him again. Hickman-Davis and Anderson stressed that if W.A.'s reading does not remain at adequate levels, he will fall increasingly behind in school. Anderson knew of no other school district in the area that has a tutor trained in the Orton Gillingham method.

¶ 37 Anna Winter, who teaches at Galena's middle school, testified that W.A.'s qualification for RTI at Galena would depend on his test scores. Galena schools do offer reading assistance services, but Winter was unsure whether the elementary school has anyone trained in the Orton Gillingham method.

¶ 38 Petitioner admitted that she registered the children at Galena schools for this coming fall without informing respondent. Respondent first heard of the registration through the schools themselves. Petitioner admitted that, if the roles were reversed, she would have wanted respondent to let her know of his intent to enroll the children in his school district.

¶ 39 Wruble opined that joint custody was appropriate given the parties' relatively low level of conflict. He commented in his report:

> "Fortunately, both parties express a moderate to relatively mild level of hostility between them at present. [Respondent] noted that they have been able to have phone conversations, exchange e-mails, but contact through their attorneys['] e-mail seems to work best. Both parents also indicated that they expect that once this custody battle is over that they will have little to no hostility between them."

¶ 40 Wruble testified that the parties displayed the least level of conflict of any couple he has seen in his previous five years of custody evaluations. Though the parties "have conflict," are "at loggerheads," and "can't agree on things," Wruble has not seen in them "the level of alienation, hostility, anger [and] contempt that [he] normally see[s]" in dissolution cases. The

parties' communication "can be a lot better and it needs to be a lot better," but "again it doesn't seem to have the level of conflict and hostility" that Wruble typically sees. Wruble has seen joint custody work with parents who displayed far more conflict than he sees in the parties. Wruble did note, however, that personality testing found obsessive-compulsive traits in both parties and that such persons tend to find compromise difficult.

¶ 41 Assessing the parties' positions on major parenting issues, Wruble first noted that they did not report "significant differences of opinion about the children's religious education." Conflict lay, rather, in these three areas: "medical treatment, education, and extracurricular activities." The parties disagreed over which schools the children should attend: Galena or Scales Mound. Wruble recommended Scales Mound schools because they were "objectively superior." On the issue of health care, Wruble recommended that the "school parent" (the one residing in the school district that the court designates for the children to attend) be responsible for scheduling the children's routine medical appointments. In the event of a disagreement as to health care, respondent would have tiebreaking power because petitioner "has a recent history of neglecting some of the children's needs in these areas, not because she disagrees there is a need, but because she considers them inconvenient or because she gets 'too busy.' " However, petitioner should have tiebreaking power for extracurricular activities because she encourages them more than respondent, and thus "[her] stance *** is much more consistent with the developmental needs of the children."

¶ 42 Wruble did not recommend which party should be sole custodian in the event the trial court found joint custody inappropriate. He did note, however, the parties' main strengths and weaknesses as determined by his interviews, clinical observations of parent-child interaction, and psychological testing. Wruble observed that, in the areas of "positive emotional attachment,"

"parental availability," and "children's preferences," petitioner was the "slightly" favored parent. When queried directly, the children had no parental preference, but rather their preference manifested itself during psychological testing. In the area of "supporting the child's need for the other parent," respondent was the (unqualifiedly) favored parent. Wruble found the parties "not significantly different in overall parental effectiveness."

¶ 43 Hess, the GAL, recommended against joint custody because she did not observe in the parties the level of cooperation, mutual respect, and unselfishness necessary for such an arrangement. Hess did not elaborate. She recommended that petitioner have sole custody. Hess applied the custody factors specified in section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/602(a) (West 2014)). She based her recommendation on the following considerations: (1) petitioner was the primary caregiver for the children during the marriage; (2) she has the more flexible work schedule; (3) the children, who have anxiety issues, are more at ease in petitioner's presence, and respondent was increasing A.A.'s anxiety by "questioning if not pressing the children for information about [petitioner]"; and (4) the children reported that Susan Anderson made negative remarks about petitioner in the children's presence. Hess did not ask the children their preferences because they were not of a suitable age for that inquiry.

¶ 44 In their trial testimony, both Wruble and Susan Anderson addressed Hess's remark about Anderson's negativity toward petitioner in the presence of the children. Wruble noted that this information was not revealed during any of his interviews and seemed to come "from left field." Wruble also believed that the attitudes of extended family members are peripheral in the custody determination. Anderson denied making any negative comments about petitioner in the presence of the children. Anderson recalled the one thing she did that the children might have

misconstrued. During the summer of 2013, Anderson was cleaning her bathroom closet when she discovered toothbrushes that petitioner had left on hand for visits during the marriage. As the parties had been separated for a year and Anderson did not foresee petitioner returning to use the brushes, she began using them for house cleaning as she customarily did with any family member's old toothbrush.

¶ 45 At the close of evidence, the parties agreed to submit their closing arguments in writing. Respondent submitted a proposed judgment for dissolution and a written argument. The proposed judgment awarded the parties joint custody. In his argument, respondent proposed joint custody and, in the alternative, sole custody with him. Petitioner, whose dissolution petition had sought joint custody, now asked strictly for sole custody.

¶ 46 The court granted petitioner sole custody. In its written judgment, the court explained:

> "The record is clear that these children, 7 and 10 years of age, are exemplary by all accounts and are very close as siblings. Further, they have the benefit of an extended family support system through each parent. However, the parties have been unable to cooperate, most significantly with respect to the children's schooling, extracurricular activities, and counseling needs. They have been hostile and engaged in physical confrontation with each other. Dr. Wruble's testimony that each party should have some form of 'impasse breaking power' suggests that, in his opinion, in the future, these parties are unlikely to be able to agree as to the major decisions affecting the children. An award of joint custody would not be appropriate."

¶ 47 Justifying the award of sole custody to petitioner, the court said:

> "Petitioner was the primary, if not sole, caretaker of the children until the separation of the parties in October 2012. Respondent's use of alcohol prior to the

separation was problematic. Although, since the separation, to his credit, the Respondent has become much more involved with the children, and reduced his alcohol use, the best interests of the children [are] most appropriately served by sole custody in the Petitioner."

¶ 48 B. Analysis

¶ 49 Respondent's argument heading on custody in both his opening and reply briefs reads: "The Court committed error by denying the parties joint legal custody and equal parenting rights with regard to the children." In the body of his argument, respondent presents joint custody as his first choice.

¶ 50 Section 602(a) of the Marriage Act (750 ILCS 5/602(a) (West 2014)) states that "[t]he court shall determine custody in accordance with the best interest of the child," and that section provides a list of "relevant factors." Section 602.1(b) of the Marriage Act (750 ILCS 5/602.1(b) (West 2014)) states that "[u]pon the application of either or both parents, or upon its own motion, the court shall consider an award of joint custody." The criteria for an award of joint custody are as follows:

> "(c) The court may enter an order of joint custody if it determines that joint custody would be in the best interests of the child, taking into account the following:
>
> (1) the ability of the parents to cooperate effectively and consistently in matters that directly affect the joint parenting of the child. 'Ability of the parents to cooperate' means the parents'' capacity to substantially comply with a Joint Parenting Order. The court shall not consider the inability of the parents to cooperate effectively and consistently in matters that do not directly affect the joint parenting of the child;
>
> (2) The residential circumstances of each parent; and

(3) all other factors which may be relevant to the best interest of the child." 750 ILCS 5/602.1(c) (West 2014).

¶ 51 We find no error in the trial court's refusal to order joint custody. Joint custody is rarely appropriate, as it "requires an unusual level of cooperation and communication from both parents." *In re Marriage of Swanson*, 275 Ill. App. 3d 519, 524 (1995). "[U]nless parents have an unusual capacity to cooperate, substantial disagreement shall arise, ultimately resulting in harm to the child." *In re Marriage of Drummond*, 156 Ill. App. 3d 672, 680 (1987); see also *In re Marriage of McCoy*, 272 Ill. App. 3d 125, 130 (1995) ("joint-custody orders are usually unworkable and should rarely be entered"). "[W]e view joint custody as most extraordinary and counsel skepticism when trial courts hear promises from newly divorcing parents that they can surmount the manifest difficulties of a joint-custody order." *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 877 (1994). "A trial court's determination regarding custody is given great deference because that court is in a superior position to judge the credibility of the witnesses and determine the best interests of the child." *In re Marriage of Iqbal*, 2014 IL App (2d) 131306, ¶ 55. The court's decision on custody will stand on appeal unless it is against the manifest weight of the evidence. *Id.*

¶ 52 The trial court rightly disagreed with Wruble that the parties relate well enough to jointly parent. There was evidence of yelling, verbal abuse, and even physical assault during the marriage. Conflict and mutually negative attitudes continued after the separation. According to petitioner, there is currently "a lot of tension" in the parties' relations. She claimed that communication is poor in certain areas, particularly visitation. Respondent characterized petitioner as frequently condescending and disrespectful toward him. The parties accuse each other of stubbornness and insensitivity. Petitioner complains that respondent unreasonably

refuses her requests for changes in the visitation schedule, while respondent complains that petitioner signs the children up for activities, and recently enrolled them in Galena schools, without informing him first. Respondent suggests that petitioner withholds such information because she wants to interfere with his relationship with the children. Petitioner in turn suspects that respondent's increased interest in the children since the separation is an insincere attempt to curry favor with the court. Petitioner also claims that respondent has barred her from entering the marital residence and insists on leaving items for her in a tote at the end of the driveway. Such accusations, whatever their truth, show mutually jaundiced attitudes that hold no promise for the close cooperation required of joint custody. "Since joint custody requires extensive contact and intensive communication, it cannot work between belligerent parents." *Drummond*, 156 Ill App. 3d at 679 (citing *Scott, Joint Child Custody—An Exception*, 64 Chicago Bar Record, 406 (1983)).

¶ 53 We recognize, of course, that the parties have successfully worked together at times. Both before and after the trial court's temporary order on custody and visitation, they made efforts to fashion their own care schedule without third-party intervention. One disagreement, however, erupted into an ugly confrontation where petitioner struck respondent with her car. Moreover, the parties were recently at such loggerheads with respect to a visitation issue (regarding A.A's cattle shows) that their attorneys had to resolve it. They also cannot agree on a counselor for the children despite their mutual recognition that the children need therapy.

¶ 54 Wruble may indeed be correct that the parties relate remarkably well compared to other couples he has seen in custody disputes. Moreover, it may be that the parties will improve their relations once the divorce is entered, as both predict. On this record, however, the parties do not

presently possess the "unusual level of cooperation and communication" (*Swanson*, 275 Ill. App. 3d at 524) necessary for joint custody.

¶ 55 Wruble's proposed custody arrangement would assign one of the parties tiebreaking power in parenting areas where they are historically in conflict. Such an arrangement begs the question of whether the parties have too much animosity even to abide by the adjudication process. We agree with the trial court that Wruble's proposal is not appropriate for the parties in their present state of relations. The court's refusal to award joint custody was not against the manifest weight of the evidence.

¶ 56 Respondent cites *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103 (2002), as support for the position that joint custody is viable under these facts. In *Seitzinger*, each party sought sole custody of their daughter, Sabrina. The court entered an order for joint custody, and the petitioner appealed. She contended that that the parties "could not cooperate with respect to raising Sabrina." *Id.* at 108. Specifically, "the parties could not agree on day care or preschool pending the outcome of the case, the parties held separate religious beliefs, [the respondent] was not good about giving Sabrina her medicine, and the parties simply could not cooperate." *Id.* at 108-09. The appellate court disagreed. First, the court found evidence of cooperation in that the parties fashioned their own pretrial custody schedule and worked together in arranging counseling for Sabrina. Second, the court rejected the petitioner's assertion that the parties could not cooperate. The court found, contrary to the petitioner's representation of the record, no "specific instances of lack of cooperation." *Id.* at 109. *Seitzinger* is distinguishable, as there were many specific instances of conflict, as well as general animosity, in the record before us.

¶ 57 Respondent asserts that the level of conflict between the parties is at least distinguishable from that exhibited in *McCoy*, 272 Ill. App. 3d 125, where the appellate court affirmed the trial

court's denial of joint custody. In November 1991, the trial court dissolved the parties' marriage but reserved the issues of custody and visitation. The parties continued the 50/50 care arrangement that they had in place since their separation. By the time of the custody hearing in late 1992, the respondent was convicted of battery of the petitioner. At the custody hearing, the respondent claimed that the parties were able to cooperate with each other since the dissolution judgment. The petitioner contradicted his testimony, claiming that the respondent was quick-tempered, violent, depressive, and insistent on getting his way. *Id.* at 127. The trial court denied the respondent's request for joint custody and awarded the petitioner sole custody. Following the entry of the order, the respondent went to the petitioner's place of work and stared at her through the office door until he was asked to leave. Two days later, he attempted suicide. *Id.*

¶ 58 The appellate court affirmed the denial of joint custody, citing the respondent's battery conviction, the petitioner's testimony that he was violent and uncooperative, and the respondent's "destructive behavior after he learned of the custody award." *Id.* at 130.

¶ 59 The fact that neither party in this case exhibited the hostility, violence, and recalcitrance of the respondent in *McCoy* does not mean that the trial court erred below. The particular facts of this case, showing mutual antagonism by the parties, support the trial court's denial of joint custody.

¶ 60 Respondent asks in the alternative for sole custody. He begins with these remarks:

> "In this case, Ashley provided evidence that although Kim requested sole legal custody, it was actually Kim who failed to cooperate with Ashley. If sole legal custody had to be ordered, then it should be awarded to Ashley, as he was better able to involve Kim and cooperate in co-parenting as the below examples will demonstrate. A parent

should not be able to cause the problems and then benefit from the problems she caused. So many things were blown out of proportion or twisted. [Citation.]."

¶ 61 Respondent then proceeds to list several examples (most of which we have cited in the previous section (*supra* ¶¶ 8-47)) where he believes petitioner was uncooperative, unreasonable, or uncommunicative with him in matters relating to the children. Even after this, however, he expresses his optimism about the parties' ability to work together:

"Perhaps Kim gave the most hope when she admitted that both parties have been frustrated with each other, there is presently tension, and once this is over it will be 'a lot better'; that there were times when she should have approached things differently or not gotten upset. [Citation.] Kim admits that Ashley does the same, but that both of them are working on it, and she is responsible for the communication problems[,] too. [Citation.] This sure sounds like a good basis for joint legal custody and shared parenting.

These voluminous examples [*i.e.*, the foregoing examples of Kim's unwillingness to cooperate] demonstrate that Ashley can better facilitate and encourage the other parent's relationship with the children. See [735 ILCS 5/602(a)(8) (West 2014) ("the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child")]. Kim has significant struggles in this area, but she admits trying. The children have close relationships with both parents, each other, and other family and friends at both homes, applying this factor equally to both parents. See [750 ILCS 5/602(a)(3) (West 2014) ("the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests")]. *** The remaining factors for

the best interests of the child either do not apply, or apply equally to both parents, except the parent's wishes, which is stated throughout this argument."

¶ 62 Thus, by his own admission, respondent believes that the only custody factors that weigh in his favor are his custodial preference (750 ILCS 5/602(a)(1) (West 2014)) and petitioner's unwillingness to foster a close and continuing relationship between him and the children (750 ILCS 5/602(a)(8) (West 2014)). Even as to the latter factor, however, respondent recognizes that petitioner "admits trying." By petitioner's "unwillingness to cooperate," respondent primarily means her failure to notify him before registering the children for activities and, more recently, before registering them for school in Galena. Respondent claimed that petitioner was thereby attempting to interfere in his relationship with the children. We cannot say, however, that this factor weighs in respondent's favor; certainly it does not do so to the extent that it controls the analysis. Petitioner reciprocated respondent's accusation by citing instances where he displayed behavior that was hardly constructive. For instance, petitioner testified that respondent's refusal to allow petitioner to have care of A.A. on days she was showing cattle (an activity that petitioner enjoyed with A.A.) necessitated the involvement of the parties' attorneys. Petitioner also accused respondent of causing A.A. anxiety by pressing her for details about what she does when in petitioner's care.

¶ 63 In any case, the "unwillingness to foster" factor, while certainly relevant, is not the only pertinent consideration in this case. We do not agree with respondent's conclusory remark that the remaining custody factors are neutral. The trial court was concerned by the volume of respondent's drinking during the marriage, but recognized that his consumption is reduced. Obviously, respondent is functioning much better as a parent now, but exactly how much he has diminished his drinking is unclear. He made the vague statement that he has "a couple of beers

here or there and—it just depends." The court also noted that petitioner was the primary caregiver for the children during the marriage. While there is no longer in Illinois a presumption in favor of the mother as custodian (*In re Marriage of Bush*, 170 Ill. App. 3d 523, 529-30 (1988)), it remains "appropriate to consider which parent has been the primary caretaker of the children" (*In re Marriage of Hefer*, 282 Ill. App. 3d 73, 77 (1996)). Respondent's narrow, and rather tentative, argument on sole custody fails to persuade us that the court erred in granting petitioner sole custody.

¶ 64 For the foregoing reasons, we find no error in the trial court's custody determination.

¶ 65 III. CLASSIFICATION AND DISTRIBUTION OF PROPERTY

¶ 66 Respondent argues that the trial court committed various errors with respect to the classification and distribution of property.

¶ 67 A. Classification

¶ 68 Before distributing property in a marriage dissolution case, the trial court must first classify the property as either marital or nonmarital. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 44. If the court's classification involves a question of fact, we review it under the manifest weight standard; if it presents simply a question of law, we review it *de novo*. *In re Marriage of Raad*, 301 Ill. App. 3d 683, 686 (1998).

¶ 69 1. The 36-acre parcel

¶ 70 a. Background

¶ 71 We address first respondent's contention that the court distributed property that was not owned by either party. The court found that, during the marriage, respondent acquired an equitable interest of $187,444.70 in a 36-acre parcel contiguous to the marital home. Respondent claims this was error. We agree.

¶ 72 The 36-acre parcel has farm buildings but no residential structures. Hylene Anderson, respondent's grandmother, testified that, several years ago, respondent agreed to purchase the parcel from trusts held by Anderson and her husband, Lee. The price was to be paid in installments. Hylene recalled that respondent took possession of the land in 2007 or 2008 while the contract term was ongoing. Hylene testified that she no longer possessed the original contract but had destroyed it when respondent defaulted. She retained some copies of the contract; however, no copy was introduced into evidence by either party. The parties did, however, introduce into evidence an "Amortization Schedule," which both Hylene and respondent recognized as the document specifying the schedule of payments under the installment contract. The schedule noted "a principal balance" of $49,180 and called for yearly payments on March 1 beginning in 2008 and ending in 2017. Hylene testified that the schedule did not reflect a down payment of $4,900 paid by respondent in 2007. Taking the down payment into account, Hylene testified that the total purchase price of the land was $54,080. In his testimony, however, respondent claimed he was unsure of the total price; he estimated that it was between $57,000 and $59,000.

¶ 73 The parties also introduced a "Memorandum of Contract," which memorialized "a contract for real estate" that was executed by the trusts and respondent on November 27, 2006. The memorandum was itself signed by respondent and by Lee and Hylene as trustees of their respective trusts. Hylene affirmed that the contract referenced in the memorandum was the contract for sale of the parcel to respondent. Attached to the memorandum was a full legal description of the subject property and an "Escrow Agreement and Instructions" signed by Lee, Hylene, respondent, and the escrow agent. The escrow agreement provided instructions for the deposit in escrow of documents including a trustee's deed for the subject property. The escrow

agent was authorized to release the trustee's deed to respondent if and when he paid the purchase price in full. If the price was not paid in full, then the escrow agent was authorized to return the trust documents to the sellers. The escrow agreement also specified that all notices of default were to be given in writing to the escrow agent.

¶ 74 Hylene testified that, according to her records, respondent paid at least $34,000 toward the purchase of the land. The parties introduced into evidence copies of cleared checks written from the parties' joint checking account to Hylene and/or Lee Anderson. Checking the copies against her records, Hylene recognized several checks written between February 2007 and December 2011 that were installment payments on the contract. Some of these checks were signed by petitioner and some by respondent. According to Hylene, respondent first deviated from the payment schedule in January 2010 when he paid $5,650.00 of the $6,567.20 required. Respondent's payments in 2011 and 2012 were also for less than the scheduled amount. Respondent paid nothing on the contract in 2013 or 2014. Hylene testified that she first sent respondent a notice of default in 2013, "a couple of weeks after he defaulted on the first payment," though she now realized that he was "short" or in "default" on his payments as early as 2010.

¶ 75 Hylene testified that the trustee's deed and other documents have been released to her from escrow and she has shredded them. Her attorney advised her that she could foreclose on the property, but she decided against it because they are a "close family." She did not believe that she had to take any "further action in order to take back either possession or ownership of [the] land." In her opinion, the trusts still own the parcel. Hylene testified that, after the default, petitioner and respondent continued to possess the land under a rental arrangement with Hylene. The arrangement was ongoing as of trial.

¶ 76 Mary Vincent, an attorney, testified that she represented Hylene in connection with the sale of the 36 acres to respondent. Vincent initially testified that respondent first defaulted under the contract in 2013. Later in her testimony, however, Vincent acknowledged sending respondent a letter in December 2013 declaring that he defaulted 21 months previously. Vincent then admitted that she did not "actually know the date of the very first default." Asked what legal steps she recommended to Hylene in the wake of the default, Vincent said she advised Hylene to obtain respondent's signature on a quitclaim deed for the property. Vincent also discussed the idea with respondent's attorney, but respondent hesitated and has yet to sign any such deed. In Vincent's opinion, respondent defaulted on the contract and, consequently, the trusts own the parcel, but the property "probably needs to be foreclosed" in order to "clear[] up any issues related to the title."

¶ 77 Respondent testified that, after he signed the contract, he and petitioner began to raise crops and livestock on the parcel. He recalled that 2010 was the first year that he did not make a full payment under the purchase contract. The first year he made no payment at all was 2013. In December 2013, he received a notice from Hylene's attorney declaring him in default as of 21 months earlier (March 2012). Respondent forwarded the notice to petitioner's attorney and also informed the attorney that he would be unable to make a payment in 2013. Respondent testified that he lacked the funds to make the 2013 payment. Asked if he had "a savings account with over $20,000 in it" with which to make the 2013 payment, he replied that the account balance was actually less than $20,000 at the time. He further testified that, at the time the 2013 payment was due, he had an outstanding balance of $19,000 on a farm operating loan from a local bank that the funds in the savings account were "earmarked for." On further questioning, however, respondent acknowledged that the full balance of the operating loan was not due in 2013. Asked

if he made a choice to pay the operating loan rather than make the contract payment, respondent answered, "If that's a debt I have, what am I supposed to do?"

¶ 78 Respondent further testified that, after receiving Hylene's declaration of default, he remained in possession of the land under a rental arrangement with Hylene. Until 2014, he both farmed the land and raised livestock. In 2014, he raised only livestock, namely cows. Some of the cows are owned by the parties and some by Hylene. The current rental arrangement with Hylene is that respondent provides her 50% of the proceeds from calves born from the cows that the parties own.

¶ 79 Petitioner testified that respondent consulted with her before he entered into the contract to purchase the parcel. During the amortization period, she helped petitioner farm the land and raise livestock. Petitioner acknowledged that checks to Hylene and her husband for the purchase of the parcel were written from the parties' joint checking account. Petitioner claimed, however, that she was unaware prior to her filing for divorce in October 2012 that respondent was delinquent on his payments. Petitioner also claimed she was unaware why respondent became delinquent.

¶ 80 The court found that respondent's incomplete payments on the contract created an equitable interest in the property that the sellers had failed to extinguish by resort to section 15-1106 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1106 (West 2014)) or sections 9-102 and 110 of the Illinois Forcible Entry and Detainer Act (Forcible Entry Act) (735 ILCS 5/9-102, 110 (West 2014)). The court then proceeded to determine a value for the property. The parties submitted conflicting expert opinions on value. The court accepted the opinion of Tom Howe, the expert retained by petitioner, that the parcel's fair market value was $214,000. Taking into account the amounts respondent paid toward the parcel, the court

determined that respondent's, and the marital estate's, equitable interest was $187,444.70. The court allocated this equitable interest to respondent in the property distribution.

¶ 81 b. Analysis

¶ 82 Respondent maintains that there was no proof that he had any equitable interest in the parcel because the evidence of a purchase agreement failed to meet the requirements of the statute of frauds, codified in section 2 of the Frauds Act (740 ILCS 80/2 (West 2014)). Section 2 states in relevant part that "[n]o action shall be brought to charge any person upon any contract for the sale of lands, *** for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith ***." 740 ILCS 80/2 (West 2014). Respondent asserts that the documents admitted at trial omitted such vital terms as the purchase price, "what constitutes a breach," or "how the seller would take back title upon default." "The only thing known for sure," respondent asserts, "was the payment plan" as reflected in the amortization schedule. We need not determine whether the evidence of a contract met the statute of frauds, for even if we found an enforceable contract we would still disagree with the trial court that respondent acquired a beneficial interest in the parcel. The problem is that none of the contract terms evidenced at trial address the matter of how previously paid installments are to be disposed in the event of a default. The common law in Illinois is that, unless the agreement provides otherwise, a purchaser under an installment contract forfeits previously paid installments when he defaults and the vendor is ready and able to perform. *Dodson v. Nink*, 72 Ill. App. 3d 59, 63 (1979); *Pruett v. La Salceda, Inc.*, 45 Ill. App. 3d 243, 247 (1977). In defaulting, respondent forfeited the amounts paid because Hylene was ready and able to perform at all times.

¶ 83 In finding that respondent acquired a beneficial interest in the 36-acre parcel, the trial court cited *In re Brown*, where the United States Bankruptcy Court for the Northern District of Illinois remarked that, under Illinois common law, "a buyer who has paid substantial sums under the contract and defaults in a small amount may be ousted from the property, with no opportunity (under the contract) to cure the default or recover any equity." 249 B.R. 193, 195-96 (Bankr. N.D. Ill.) (citing Lisa A. Danielson, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform*, U. Ill. L. Rev. 91, 92-93 (1986)). The court noted that Illinois statutory law "had addressed this potential for unfairness in two ways." *Id.* at 195. The court cited section 15-1106(2) of the Foreclosure Law (735 ILCS 5/15-1106(2) (West 2014)) as providing (in the court's words) that "if the buyer under a long-term real estate installment contract has paid a substantial portion of the amount due, the contract is treated as a mortgage, giving the buyer substantial rights of notice, cure, and redemption of equity." The court then remarked that, "where the mortgage foreclosure procedure is not required, the seller must comply with the provisions of [the Forcible Entry Act] in order to effect a forfeiture of the buyer's interests." *Id.* at 196. Here the *Brown* court cited sections 9-101 through 9-119 of the Forcible Entry Act (735 ILCS 5/9-101 through 9-119 (West 2014)).

¶ 84 Agreeing with the *Brown* court, the trial court cited the same provisions in holding that respondent retained a beneficial interest because the sellers of the 36-acre parcel did not seek recourse through those statutory channels. We hold that the court misapplied the provisions. First, section 15-1106(2) of the Foreclosure Law requires that foreclosure be sought for

> "any real estate installment contract for *residential* real estate entered into on or after the effective date of this amendatory Act of 1986 and under which (i) the purchase price is to be paid in installments over a period in excess of five years and (ii) the amount unpaid

> under the terms of the contract at the time of the filing of the foreclosure complaint, including principal and due and unpaid interest, at the rate prior to default, is less than 80% of the original purchase price of the real estate as stated in the contract." (Emphasis added.) 735 ILCS 5/15-1106(2) (West 2014).

The 36-acre parcel, however, is not residential real estate, so this provision does not apply.

¶ 85 For very basic reasons, the Forcible Entry Act also does not apply here. The Act "provides a summary statutory procedure for determining the sole issue of possession." *Yale Tavern, Inc. v. Cosmopolitan National Bank*, 259 Ill. App. 3d 965, 971 (1994). "The purpose of the statute is to quickly restore an aggrieved party to possession of his land and to prevent breaches of the peace caused by the common law method of regaining possession of property through self-help." *Id.* As of trial, Hylene had no desire to dispossess respondent of the 36-acre parcel. Nor did she need to dispossess him in order to have title adjudicated, for she could have filed a simple quiet title action. See *Gurga v. Roth*, 2011 IL App (2d) 100444, ¶ 11 ("In an action to quiet title, the question of title is involved, while in an action for forcible entry and detainer, the right to possession is involved."). The trusts' failure to use the Forcible Entry Act against respondent reveals nothing about whether he had a beneficial interest in the 36-acre parcel.

¶ 86 Hence, none of the trial court's reasons convince us that respondent acquired a beneficial interest in the 36-acre parcel. Moreover, petitioner cites no authority in defense of the court's determination. We conclude that it was error for the trial court to account to the marital estate a beneficial interest in the 36-acre parcel.

¶ 87 We note that the trial court found in the alternative that if, in fact, the installment payments under the contract were forfeited by respondent's default, then this forfeiture

represented dissipation of assets in the same amount, $187,444.70. The court did not explain its reasons for the finding.

¶ 88 Challenging the finding of dissipation, respondent first contends that the finding was error because petitioner did not place him on notice before trial that she was alleging dissipation based on the default. As petitioner points out, however, respondent relies on an amendment to section 503(d)(2) of the Marriage Act that took effect in January 2013, several months after petitioner initiated these proceedings. See Pub. Act. 97-941, § 5 (eff. Jan. 1, 2013) (amending 750 ILCS 5/503(d)(2) to require that a "notice of intent to claim dissipation *** be given no later than 60 days before trial or 30 days after discovery ends, whichever is later"). Therefore, respondent has not established that petitioner had to give pretrial notice of a dissipation claim.

¶ 89 Petitioner makes her own claim of forfeiture, arguing that respondent "did not preserve the record by objecting to Petitioner's claim of dissipation at trial." Petitioner, however, does not identify where she asserted dissipation prior to her written closing argument. Respondent, in his own responsive written argument, challenged her claim. Therefore, we reject the notion that respondent did not "preserve" his challenge to dissipation.

¶ 90 Proceeding to the merits of the dissipation issue, we set forth the substantive standards. In allocating property in a dissolution proceeding, the trial court must consider any "dissipation by each party" (750 ILCS 5/503(d)(2) (West 2014)). "[W]here a party has dissipated marital assets, the court may charge the amount dissipated against that party's share of marital property in order to compensate the other party." *In re Marriage of Jones*, 187 Ill. App. 3d 206, 233 (1989). "Dissipation generally has been defined as the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown." *In re Marriage of D'Attomo*, 2012 IL App (1st)

111670, ¶ 36. "The question of whether a spouse has dissipated marital assets depends on the facts of the case." *In re Marriage of Tabassum and Younis*, 377 Ill. App. 3d 761, 779 (2007). Pertinent to the issue at hand, "a spouse's failure to pay the mortgage on marital property [has] amounted to dissipation when the spouse had the financial ability to prevent foreclosure." *In re Marriage of Parker*, 252 Ill. App. 3d 1015, 1019 (1993); see also *In re Marriage of Siegel*, 123 Ill. App. 3d 710, 719 (1984); *In re Marriage of Aslaksen*, 148 Ill. App. 3d 784, 788-89 (1986). "Once a *prima facie* case of dissipation is made, the charged spouse has the burden of showing, by clear and convincing evidence, how the marital funds were spent." *Tabassum and Younis*, 377 Ill. App. 3d at 779. "If the spouse fails to meet this burden, the trial court is required to find dissipation." *Id.* The trial court's determination on dissipation will be upheld on appeal unless it is against the manifest weight of the evidence. *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 374 (2008).

¶ 91 Petitioner failed to make a *prima facie* case that respondent dissipated marital assets by defaulting on the contract to purchase the 36-acre parcel. She did not demonstrate that the dissipation occurred when the marriage was undergoing an irreconcilable breakdown. See *D'Attomo*, 2012 IL App (1st) 111670, ¶ 36. The parties separated in September 2012; there was no evidence that the breakdown occurred earlier. Respondent's first failure to meet the payment schedule was in early 2010, long before the separation. He received no formal declaration of default until December 2013, but even this notice identified March 2012 as the time of the first default, again predating the September 2012 breakdown. The finding of dissipation, therefore, was against the manifest weight of the evidence.

¶ 92 For the foregoing reasons, we hold it was error for the court to include in the marital estate an equitable interest of $187,444.70, corresponding to the installment payments

respondent made before he defaulted on the contract for the purchase of the 36-acre parcel. By defaulting, respondent forfeited those payments. The court also erred in its alternative holding that, if respondent did forfeit those payments, then the $187,444.70 was dissipation that should be charged against his share of the marital estate in order to compensate petitioner. We therefore vacate this portion of the court's judgment and remand for the court to divide the marital estate as adjusted.

¶ 93 2. Accounts

¶ 94 Respondent argues, and we agree, that the trial court misclassified as marital property his Vanguard account and his Putnam IRA account, which had current balances of, respectively, $27,060.41 and $860.39. The court ordered that the accounts be divided equally between the parties. Respondent gave unrebutted testimony that he opened the accounts in his own name before the marriage and that no funds were added to them during the marriage. Accordingly, the accounts were nonmarital property when the marriage commenced. See 750 ILCS 5/503(a)(6) (West 2014) ("property acquired before the marriage" is nonmarital property). Furthermore, no marital funds were added to the accounts and respondent did not otherwise claim a right of reimbursement with respect to them. See 750 ILCS 5/503(a)(7) (West 2014) (increase in value of a nonmarital asset is nonmarital property, subject to right of reimbursement). As the accounts were respondent's nonmarital property, the trial court erred in dividing them between the parties. Accordingly, we vacate this portion of the trial court's judgment and direct the court on remand to designate the Vanguard and Putnam accounts as nonmarital.

¶ 95 Respondent also claims that the trial court erred with respect to one of two retirement accounts he has through his employer, John Deere. Respondent testified that he has both a tax deferred savings plan (TDSP), or defined contribution plan, and a defined benefit pension.

Respondent testified that he contributes 6% of his yearly salary to the TDSP and that John Deere matches the 6%. According to respondent, the TDSP had a balance of $157,199.39 as of December 31, 2013. The trial court determined that the TDSP was 75% marital property and 25% nonmarital. The court did not explain this allocation, but presumably it based these percentages on the respective number of years respondent worked at John Deere before the marriage (approximately 4 years) and during the marriage (approximately 12 years).

¶ 96 Referring to the TDSP as his "401(k) plan," respondent argues that the trial court erred by failing to calculating the marital and nonmarital portions of the TDSP according to the method applied in *In re Marriage of Hunt*, 78 Ill. App. 3d 653 (1979). Respondent is mistaken, as the *Hunt* method is used "in allocating the division of unmatured pension interests" (*In re Marriage of Richardson*, 381 Ill. App. 3d 47, 52 (2008)) (citing *Hunt*, 78 Ill. App. 3d 653). The court indeed applied the *Hunt* method to respondent's defined benefit pension, but the method was not appropriate for respondent's TDSP, a defined contribution plan. Under a defined benefit plan, "the value of the benefit is determined at retirement based on years of service and final salary." *Id.* at 49. Under a defined contribution plan, "the value of the pension is based on contribution/deposits made to the plan and investment risk and can be determined before retirement." *Id.* The present balance of the TDSP was available to respondent, and in turn to the trial court. We therefore reject respondent's contention.

¶ 97 3. Livestock

¶ 98 Next, respondent challenges the trial court's valuation of livestock. In its list of marital property, the court referred to "cattle, sheep, hogs" and assigned them an overall value of $30,000. The court did not assign any individual values. The court apportioned the livestock to respondent. Respondent contends that the figure of $30,000 was excessive. We agree, and

remand for the trial court to reconsider its valuation of the livestock in light of the following evidence.

¶ 99 Respondent testified that, in 2008, he entered into an agreement with Hylene to purchase 18 cows from her. He later defaulted on the contract but was permitted to retain the 14 cows for which he had paid. According to Hylene, the total purchase price for the 18 cows was $10,080 or $560 per cow. This was a discounted price, explained Hylene, because respondent "did a lot of things for us when we were on the farm." Respondent testified that the original purchase price was around $1,200 per cow and that Hylene later discounted it to $600 each as a "gift." Despite this allusion to a gift, however, respondent's proposed asset valuation introduced at trial attached a value of $14,800 to the cows (or $1,000 per head). Respondent also testified that the parties owned a bull, which was purchased separately. Respondent's proposed valuation for the bull was $1,700. Respondent did not testify regarding sheep or hogs.

¶ 100 Petitioner's financial affidavit introduced at trial listed "cattle, sheep, hogs" at $60,780. Listed separately were "sheep" at $400 and "hogs" at $1,209.60. Petitioner clarified in her testimony that the $60,780 included the $400 and $1,209.60, leaving the value of the cows at $59,170.40. Petitioner further noted that the hogs were sold since she prepared her affidavit. Asked how she arrived at the value for the cows, petitioner admitted that she was not sure how many there were. Using her estimated number of cows (which she did not specify) and market value per cow (which she did not specify), she arrived at the figure of $59,170.40.

¶ 101 Like respondent, we are unsure how the trial court arrived at a value of $30,000 for "cattle, sheep, hogs." There was unrebutted testimony that the parties did not own hogs at the time of trial. Moreover, petitioner assigned a value of $400 to the sheep, and this figure was unchallenged. Consequently, the figure of $30,000 was justified only if the evidence suggests

that the cattle themselves were worth all of $29,600. This is no evidence to support this particular figure, and the court provided no reasons for its valuation. We can only speculate that the court might have considered this a reasonable compromise between $59,170.40 suggested by petitioner and $16,500 (the combined value of the cattle and bull) suggested by respondent. We vacate the valuation of the livestock and remand for the court to reconsider the evidence and provide reasons for its figure.

¶ 102 4. Precious Metals

¶ 103 Respondent contends that the trial court erred in classifying as marital property the entire value of precious metals—gold and silver—that the parties possessed. Respondent introduced into evidence an appraisal report itemizing coins, bars, and rounds of the metals. The total appraised value was $25,099.85. In his financial affidavit, respondent claimed that $14,410.32 worth of the metals was nonmarital property. The trial court accepted the appraised value of the metals but included the entire $25,099.85 worth in the marital estate.

¶ 104 Respondent asserts that the trial court erred by failing to classify as nonmarital the amount respondent specified. We disagree, notwithstanding the fact that, as respondent notes, petitioner offered no evidence to rebut respondent's testimony. "The party claiming that the property is nonmarital has the burden of proof, and any doubts as to the nature of the property are resolved in favor of finding that the property is marital." *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1017 (2009). Respondent did not identify which metals were purchased before the marriage. He testified only that he purchased some metal at "$10.50 an ounce." The uncertainty of the proof is held against respondent. Therefore, the trial court did not err in its classification of the metals.

¶ 105 4. Handgun and Rings

¶ 106 Respondent contends that the court erred in classifying as gifts, and therefore as petitioner's nonmarital property, a .22 handgun and petitioner's wedding and engagement rings. Respondent asserts that "[o]nly gifts from outside the marital union should be recognized as gift[s]." Respondent cites no authority for this proposition. Consequently, the contention is forfeited, and we reject it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (argument shall include "citation of the authorities *** relied on," and points not argued are forfeited).

¶ 107 B. Distribution of Marital Property

¶ 108 Respondent challenges the property and monetary awards to petitioner. The marital estate totaled $254,529.50. "In lieu of any maintenance," the court divided the marital estate 60% to petitioner and 40% to respondent. Furthermore, "to equalize the parties' respective interests accordingly," the court awarded judgment for petitioner in the amount of $145,974.69.

¶ 109 Respondent challenges this judgment as excessive. We do not reach this issue given the errors we have identified concerning the classification of property. On remand, the court must exclude from consideration the $187,444.70 beneficial interest that the court erroneously believed respondent held in the 36-acre parcel. *Supra* ¶¶ 69-92. The court must also reclassify as nonmarital respondent's Vanguard and Putnam accounts. *Supra* ¶¶ 93-94. Finally, the court must reexamine its finding that the livestock, "cattle, sheep, hogs," had a value of $30,000 and provides reasons for its conclusion. *Supra* ¶¶ 97-100. Following this, the court must revisit the distribution of property and, necessarily, the intertwined issue of maintenance. See 750 ILCS 5/504(a)(1) (West 2014) (entitlement to maintenance depends on, *inter alia*, "the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance").

¶ 110 IV. CHILD SUPPORT

¶ 111 Respondent also contends that the court erred by not ordering a deviation downward from the child support guidelines. Per those guidelines, which determine support based on the payor spouse's net income, the court ordered that respondent pay child support of $233.84 per week. See 750 ILCS 5/505(a)(2) (West 2014). Respondent contends that this amount is excessive given the expenses he will incur in having the children for 12 to 14 overnight visits per month, per the visitation schedule. We do not reach this issue given our holding that the court must on remand reclassify property and, accordingly, revisit its property distribution. *Supra* ¶¶ 107-09. Respondent will then have an opportunity to argue for a deviation based on the relevant factors, one of which is "the financial resources and needs of the custodial parent" (750 ILCS 5/505(a)(2)(b) (West 2014)). The custodial parent's "financial resources" include assets received in the property distribution. See *In re Marriage of Perlmutter*, 225 Ill. App. 3d 362, 380 (1992).

¶ 112 V. CONCLUSION

¶ 113 To summarize, we affirm the trial court's judgment on custody. We vacate, however, aspects of the court's property classification. First, the court wrongly included in the marital estate a beneficial interest in the 36-acre parcel, when in fact neither party obtained such an interest. Second, the court wrongly designated as marital property respondent's Vanguard and Putnam accounts. Third, the court must reexamine its valuation of the parties' "cattle, sheep, hogs," and justify the conclusion it reaches. In connection with reexamining the property distribution, the court must reconsider the issues of maintenance and child support. Accordingly, we affirm in part and vacate in part, and remand for further proceedings consistent with this order.

¶ 114 Affirmed in part and vacated in part.

¶ 115 Cause remanded.