2018 IL App (2d) 171044-U
No. 2-17-1044
Order filed November 16, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF CARLENE DENOTTO, f/k/a CARLENE SWIFT, Petitioner-Appellant/Cross-Appellee, and ANDREW SWIFT, Respondent-Appellee/Cross-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County, Illinois No. 15 D 728 Honorable Kevin T. Busch, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's findings that the date of irretrievable breakdown was August 2014 and that the LLCs were marital property were not against the manifest weight of the evidence. However, the trial court's classification of the business property as non-marital was based on an erroneous application of the law. Affirmed in part, vacated in part, and remanded for further proceedings.

¶ 2 Petitioner, Carlene DeNotto (formerly Carlene Swift, hereinafter Carlene), appeals the trial court's judgment for dissolution of marriage to respondent, Andrew Swift (Andrew). Carlene argues that the trial court erred in finding a judicial admission in her initial notice of intent to claim dissipation and by classifying the real property owned by Andrew's business as

non-marital. Andrew cross-appeals, arguing that the trial court erred in classifying certain Limited Liability Companies (LLCs) associated with his non-marital business as marital property and finding that Andrew dissipated marital funds. He further argues that the trial court abused its discretion in awarding Carlene $13,667 a month in maintenance.

¶ 3 I. BACKGROUND

¶ 4 Carlene and Andrew were married on August 13, 1999, in Cancun, Mexico. The marriage produced one son, J.S., born in November 2003. Carlene petitioned for dissolution of marriage on June 6, 2015. On August 11, 2017, following a four-day trial, the trial court entered a judgment that dissolved the parties' marriage. The following facts are derived from the testimony and evidence introduced at trial. We limit our recitation of the facts to those that are relevant to the issues raised in this appeal.

¶ 5 A. The Parties' Marriage

¶ 6 The record reflects that the parties met in 1994 and dated for five years before getting married. At the outset of the marriage, Carlene worked as a clinical nurse specialist, earning somewhere between $75,000 and $100,000 annually. She continued to work until shortly before the couple's son was born in 2003, at which point she stopped working outside of the home. Her primary duties involved raising their son, caring for Andrew's son by a previous marriage when he was at their home, cooking, cleaning, shopping, and managing the day-to-day maintenance and repairs to the home. After five years of being a homemaker, Carlene returned to the workforce as a registered nurse, working as needed between 4 and 20 hours a week.

¶ 7 Throughout the marriage, Andrew was the president and sole owner of Cushioneer, Inc. (Cushioneer), a C corporation that makes foam packaging materials. Andrew's annual income was the subject of much debate during the trial; Andrew claimed it was $434,000, while

Carlene's expert asserted it was $687,393. However, it is uncontested that Andrew was the primary earner for the family. As the primary earner, Andrew controlled the parties' joint checking account, which was used to fund the family's expenses. Andrew also deposited money into Carlene's account for her own personal spending.

¶ 8 The parties established a marital home in Elburn. They owned multiple vehicles, had interests in several vacation properties, and took multiple vacations yearly—including a trip to the Cayman Islands in April 2010. During that trip, Andrew introduced Carlene to Sharon Earnest (Sharon) and her husband. Andrew informed Carlene that he had met the couple at the resort and that they happened to live near them in Illinois. Andrew allowed Sharon and her husband to charge drinks to the parties' room. Carlene thought that this behavior was unlike Andrew and grew suspicious.

¶ 9 Carlene testified that Andrew's suspicious behavior continued upon their arrival home. Carlene discovered photos of Sharon sitting on a bed in Andrew's phone. Andrew told Carlene that he ran into Sharon at a local department store and she wanted him to test out his new camera phone, so she posed on a display bed. Later, Carlene was looking through her son's phone and found nude photos of Sharon. Carlene recognized the setting of the nude photos to be the master bathroom of a condo Andrew was staying at during a recent vacation he took without Carlene. A hat that belonged to Andrew was visible in the photos. Carlene confronted Andrew about the pictures. Andrew explained to Carlene that his friend was dating Sharon and that his friend sent him the photos, which accidently synced to their son's phone. Carlene was aware of several more friendly text messages and photos exchanged between Andrew and Sharon, including a clothed photo of Sharon in May 2012.

¶ 10 In January 2012, Andrew had a heart attack brought on, in part, by his heavy cocaine use. He testified that Carlene helped him through his recovery. Andrew further testified that after his heart attack, his main priority was spending more time with his family. In October 2012, Andrew admitted to Carlene that he had bought thousands of dollars worth of cocaine weekly from Sharon because he was unhappy in the marriage. Citing her profession as a nurse, Carlene stated that she could not in good conscience leave the marriage because of Andrew's addiction and thus chose to stay with him.

¶ 11 In 2013, the couple began to attend marital counseling. Andrew testified that he attended a mere handful of the sessions, while Carlene testified that she attended over 40. Andrew felt that as soon as he "hit a bump," he became "lost" and disenchanted with therapy. Despite his lack of participation in marital counseling, Andrew did not believe that the parties stopped trying to work on their marriage until "late 2015" when Carlene told Andrew that she hated him. Andrew testified that that incident was when he "knew it was done."

¶ 12 Throughout the remainder of the marriage, Carlene and Andrew continued to take several vacations annually, both as a couple and with their son. The couple spent time alone in St. Thomas and in Europe in August 2014. Family trips included a weeks-long RV trip to Colorado as well as a Disney vacation around Christmas 2014. Upon the family's return to Illinois, their son reported to Carlene that he was receiving his father's text messages again. Carlene noted that the number texting Andrew looked familiar, read the exchange, recognized a picture of Sharon, and confronted Andrew that his son was receiving his "girlfriend's" text messages. Andrew denied ever having a sexual relationship with Sharon. Carlene soon thereafter petitioned for dissolution of marriage.

¶ 13 B. The Business Properties

¶ 14 Andrew began working for Cushioneer, then owned by his father, Warren Swift, in 1988. After several contentious years, Warren agreed that Andrew would buy Cushioneer for $3.3 million and become its sole owner and president. To facilitate the sale, on July 1, 1994, Andrew and Warren executed four documents, including a lease agreement between Warren, as landlord, and Cushioneer, as tenant, for the real property located at 1651 Pleasant Street, in De Kalb (hereinafter the business property).

¶ 15 The lease agreement was for a term of 15 years, from July 1, 1994 to June 30, 2009, and provided that Cushioneer would pay $10,425 per month for the first five years and $13,922.96 per month for the subsequent 10 years. The lease agreement also contained a provision entitled "Option to Purchase." The provision allowed Cushioneer to purchase the premises for $500,000 after the termination of the lease, and stated in part:

> "Tenant, may exercise this right to purchase the Leased Premises within the aforementioned time period by tendering a cashier's or certified check for earnest money in the amount of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) and an original real estate sale contract ("Contract") executed by Tenant, as Buyer."

¶ 16 In 2003, Andrew formed a business LLC, Swift Equipment Leasing, LLC (hereinafter Swift Equipment), to aid Cushioneer's tax liability by owning and leasing Cushioneer's equipment back to the company. Andrew's financial expert testified that it is not an uncommon for C Corporations to have related entities to bear certain expenses for tax planning purposes. There was no testimony as to the nominal funds used to create Swift Equipment.

¶ 17 Andrew testified that near the end of the 15-year lease term, he and Warren agreed to modify the terms of the option to purchase; in exchange for $465,000 Andrew could transfer the option to another entity. Andrew testified that he formed Swift Properties, LLC (hereinafter

Swift Properties) in July 2009 for the sole purpose of purchasing the business property and leasing it to Cushioneer. However, the business property deed admitted into evidence shows that the property was transferred from Cushioneer to Swift Properties, not from Warren to Swift Properties. Andrew further testified that Warren financed the purchase of the building, and Swift Properties did not make a down payment. Swift Properties owns no other asset but the business property, and there was no testimony as to what funds were used to create Swift Properties.

¶ 18 Andrew testified that as the sole owner of Cushioneer and the sole shareholder of both Swift Equipment and Swift Properties (collectively, the LLCs), he transfers money regularly between Cushioneer and the LLCs' bank accounts to pay for equipment like vehicles and for rent. There are no formalized written agreements for rent between the companies. He also testified that he uses the LLCs' bank accounts to pay for personal and familial expenses. Andrew testified that due to a key staff member leaving in February 2016, Cushioneer was in financial distress, so much so that he could not take a paycheck until October that year.

¶ 19 In February 2016, Andrew's personal bank account had $72,702.65; by October 2016 it contained only $31,600. Andrew testified that the bank statements were his accounting for what he spent the money on, but that he knew that he paid a mortgage for the marital home that was $4997 a month. Swift Equipment's bank account in February 2016 had $231,053.41; in October 2016 it had a balance of $134,000. Andrew again stated that his accounting was on the bank statements, but he used those funds to pay off multiple vehicles and that he "gifted" money into his personal account to pay for family expenses, as he did not take a paycheck. Swift Properties' bank account in February 2016 had $212,581; in October 2016 it had $48,676.40. Andrew explained that these transfers were necessary to pay back the loan on the building and to keep the company afloat.

¶ 20 C. Notices of Dissipation and Motion *in Limine*

¶ 21 On September 28, 2016, after about a year of litigation, Carlene filed a verified notice of intent to claim dissipation (first notice) with the court pursuant to section 503 of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/503(d)(2)(iii) (West 2016)). The notice claimed that the marriage began undergoing an irretrievable breakdown in August 2014. The allegedly dissipated funds amounted to $38,772.93 for charges from Andrew visiting anastasiadate.com, an adult website, 104 times.

¶ 22 Carlene then hired another counsel who subpoenaed Andrew's personal bank and credit card records as well as the LLCs' bank records. Thereafter, Carlene's counsel sent additional notices to Andrew's counsel. The second notice, dated December 30, 2016, claimed that the parties' marriage began undergoing an irretrievable breakdown before January 2013 and sought an additional $108,300 in dissipated funds. According to Carlene, these funds stemmed from Andrew not depositing marital money from Cushioneer in the joint checking account but rather keeping it "cash in hand." The notice broke down the dissipated funds annually, alleging $60,800 in 2013; $52,500 in 2014; $54,500 in 2015; and $12,500 in 2016. This notice was not verified by Carlene.

¶ 23 Carlene's third notice was dated February 15, 2017, and was also sent by Carlene's counsel to Andrew's counsel. In it, she claimed that the marriage began an irretrievable breakdown before June 2010. She claimed that Andrew had dissipated an additional $729,121 in marital funds by withdrawing $301,521 from the LLCs' bank accounts during 2016, and drafting checks to himself and to Sharon totaling $427,600.

¶ 24 The fourth and final notice was filed with the court on March 10, 2017. It again alleged that the date of irretrievable breakdown was June 2010. The notice claimed that Andrew

dissipated an additional $179,558.24 in marital funds by spending money from a Bank of America credit card. The total amount of allegedly dissipated funds from the four notices was over $1 million.

¶ 25 On June 8, Andrew filed a motion *in limine*, seeking to classify the date of irretrievable breakdown on Carlene's first notice, August 2014, as a judicial admission and to prevent Carlene from presenting evidence of alleged dissipation beyond that date. In her written response, Carlene admitted that when she filed her first notice she believed that the parties' marriage began undergoing an irretrievable breakdown in August 2014. However, she argued that the date on the first notice was not a judicial admission, Andrew's motion was untimely, and Andrew was not prejudiced by her initial verified notice because the subsequent filings served as amendments to the original notice.

¶ 26 During a hearing on the motion, Andrew's counsel pointed to the fact that Carlene herself admitted that she believed the parties' marriage did not begin to break down until August 2014. Counsel further argued that only after she obtained new counsel and learned that Andrew would contend that the LLCs were his non-marital property did her position change as to when the irretrievable breakdown occurred. Carlene's counsel argued that only after she received additional financial records was she made aware of Andrew's spending and sexual affair with Sharon, which changed her perception of the marriage. Counsel argued that is why she filed the subsequent notices.

¶ 27 The trial court found that the August 2014 date on Carlene's initial notice constituted a judicial admission. Carlene would therefore be "stuck with her judicial admission unless she [could] establish some evidence that [Andrew's relationship with Sharon] was a sexual relationship ***." The court continued,

> "[a] judicial admission has been made, that the initial date is the August 2014 date unless, as I've said, the evidence is such that [Andrew] had a sexual relationship prior to that date, [Carlene] only recently found out about it, and there is actual clear evidence that this was, in fact, an affair of a sexual kind."

The court reiterated this finding several times throughout the trial and allowed Carlene to introduce evidence of the allegedly dissipated funds before August 2014.

¶ 28 D. Trial Court's Findings

¶ 29 The trial court entered a judgment for dissolution of marriage on August 11, 2017. Relevant to the present appeal, the court reaffirmed its finding that the initial date on the notice of intent to claim dissipation was a judicial admission. The court was unconvinced of Carlene's position that the subsequent notices pushing back the date of irretrievable breakdown were appropriate because she only recently learned that Andrew had an affair. The court found that the evidence presented did not support that theory, stating "[g]iven the facts, Carlene either knew of, or ignored, her husband's infidelity; and therefore, her initial notice of dissipation binds her."

¶ 30 In accounting for the large sums of money transferred between the bank accounts after August 2014, the court pointed to Andrew's testimony of transferring funds between the bank accounts. "Andrew explained how the large transfers in 2016 were necessary to operate Cushioneer." The court found that Andrew's spending money on adult websites, totaling $38,773.93, "smacks of dissipation," and ordered Andrew to reimburse Carlene $19,387.

¶ 31 In regards to the business properties, the court found that because it was acquired before the marriage, Cushioneer was Andrew's non-marital property. Neither party disputes that finding. The court further found that the LLCs were marital because they were formed during the marriage and Andrew did not rebut the presumption that they were marital pursuant to section

503 of the Act. (750 ILCS 5/503(b)(1) (West 2016)). The court noted that although the LLCs are shell companies used to facilitate Cushioneer's operations, "[t]he value they add to the marriage is the income they generate." The court additionally found that the business property was Andrew's non-marital property and discussed how the building came into Andrew's possession through the 1994 lease agreement:

> "While the details are unclear as to the formality of the parties' actions in executing [the 1994 lease agreement], there is no dispute that Cushioneer was securing the rights and eventual ownership of the building from Andrew's father. This ownership interest, while possibly not fully executed, remained the same after the parties married. It is unclear when Cushioneer finally obtained clear title to the building, but the mere occurrence of the marriage did nothing to convert the building to marital property. It was in 2009 that Andrew decided to create Swift Properties LLC, and then transferred ownership of the building from his non-marital business to the marital LLC. This seems to be the crux of Carlene's argument, which is that the building transmuted to marital property. However, there is no evidence that this was Andrew's intent. To the contrary, Andrew intended that Cushioneer would continue to own and operate out of the building, and the LLC would merely be a smart business move. Nor was any marital property used to purchase or maintain the building."

¶ 32 The trial court then discussed in detail Andrew's annual income, noting that both parties hired experts to opine as to their theories on the case. The court found that in order to avoid tax liability, Andrew lends his annual bonus to Cushioneer and the next year Cushioneer pays back the bonus to him. The court found, despite Andrew's argument to the contrary, that Andrew's efforts in running the business directly account for 100% of Cushioneer's success, making the

bonuses a part of his annual salary. The court noted that the parties' joint tax returns show an income of $682,615, with a taxable income of $659,815. For the purpose of maintenance and child support, the court calculated Andrew's annual income to be $600,000. The court further calculated Carlene's potential income to be upwards of $80,000, if she were to work full-time.

¶ 33 In discussing maintenance, the trial court first noted that Andrew conceded that an award of maintenance for Carlene was appropriate before discussing relevant statutory factors pursuant to section 504 of the Act. 750 ILCS 5/504(a) (West 2016). The court discussed Andrew's income, Carlene's contribution to the marriage as a homemaker, and the parties' "lavish lifestyle" before noting that the gross incomes of the parties exceed the statutory guideline amount. Using the guideline as a reference, the court ordered Andrew to pay $13,667 a month in maintenance for a period of 12 years and 7 months, and $418 per month in child support. This allowed for a 60-40 split in favor of Andrew.

¶ 34 On November 30, 2017, the trial court heard Carlene's motion to modify the judgment for dissolution. The court clarified issues in regards to the timing of payments and solidified its decision on the business property, reasoning that the interest in the business property transferred to Andrew before the marriage via the option to purchase clause in the lease. On December 28, 2017, Carlene timely filed her notice of appeal. On January 4, 2018 Andrew timely filed his cross-appeal.

¶ 35 II. ANALYSIS

¶ 36 Carlene's primary argument is that the trial court erroneously found that her first notice of intent to claim dissipation included a judicial admission. She also argues that the trial court erred in classifying the business property as non-marital. In his cross-appeal, Andrew argues that the court erred in classifying the business-related LLCs as marital property, that he dissipated

marital funds by spending money on adult websites, and in determining Carlene's maintenance. Hence, in their respective appeals, the parties essentially dispute three of the trial court's findings: (1) the finding of dissipation of marital assets; (2) the classification of the business property and related LLCs; and (3) the award of maintenance to Carlene. We discuss these issues in turn.

¶ 37 A. Dissipation

¶ 38 Carlene contends that the trial court erred in two ways regarding the dissipation of marital funds. First, she argues that the trial court erred in determining the date of the marriage's irretrievable breakdown, as she maintains that the August 2014 date on the initial notice of intent to claim dissipation was not a judicial admission. Second, she argues that the court erred in finding the only dissipated funds were the $38,773.93 that Andrew spent on adult websites. In response, Andrew argues that Carlene was bound by her judicial admission that the marriage was not irretrievably breaking until August 2014. In his cross-appeal, Andrew argues that the $38,773.93 in dissipated funds were paid through non-marital funds, and therefore improperly classified as dissipated marital funds. For the following reasons, we affirm the trial court's findings that the date of irretrievable breakdown was August 2014, that the funds used to aid Cushioneer in 2016 were not dissipated marital funds, and that the $38,773.93 Andrew spent towards adult websites were dissipated marital funds. However, we reject the trial court's finding that Carlene's acquiescence to Andrew's spending habits precludes her from presenting evidence of allegedly dissipated funds.

¶ 39 Dissipation of marital property is among the relevant factors listed in Section 503(d) of the Act that a trial court is to consider when dividing marital property. *In re Marriage of Holthaus*, 387 Ill. App. 367, 373-374 (2008). Within the meaning of the Act, dissipation is 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 Schneeweis*, 2016 IL App (2d) 140147 ¶ 37. An irretrievable breakdown is not a prolonged gradual process extending from the initial signs of trouble in a marriage until the breakdown itself, but rather the date of irretrievable breakdown is when it becomes apparent that a breakdown is inevitable. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶¶ 90-91 (discussing *In re Marriage of Hazel*, 219 Ill. App. 3d 920 (1991)).

¶ 40 Whether a dissipation of marital property has occurred is a question of fact determined by the trial court; such a determination will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Schneeweis*, 2016 IL App (2d) 140147, ¶ 34. A decision is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the finding is unreasonable, arbitrary, or not based on the evidence presented. *In re Marriage of Patel and Sines-Patel*, 2013 IL App (1st) 112571, ¶ 66.

¶ 41 Here, Carlene notes that judicial admission is an unequivocal statement of a party about a "concrete fact" within that party's "peculiar knowledge." *Snow v. Power Construction Company*, 2017 IL App (1st) 151226, ¶ 81. She argues that her statement regarding the August 2014 date on her first notice of intent to claim dissipation was not a concrete fact within her peculiar knowledge and thus not a judicial admission. Andrew counters that, regardless of whether Carlene's statement was a judicial admission, the evidence supports the trial court's finding that the irretrievable breakdown became inevitable in August 2014. We agree with both Carlene and Andrew.

¶ 42 Carlene admitted that she stayed with Andrew despite significant red flags that he was cheating—Andrew taking photos of Sharon sitting on a bed, receiving photos of Sharon posing

nude in a bathroom next to his hat, and exchanging text messages of a personal nature with Sharon. Carlene further testified that in October 2012 she chose to remain in the marriage even after Andrew admitted to her that he was buying thousands of dollars on cocaine from Sharon weekly because he was unhappy. Both parties testified that they attended marital counseling in 2013. Andrew testified that although he did not go to counseling as often as Carlene, he did not believe that the parties ever stopped trying to work on their marriage. Throughout this time, the parties continued to go on vacations both as a family and as a couple. They continued to live in their marital home together with their son. Thus, although the parties experienced conflicts, we agree with Andrew that an irretrievable breakdown of their marriage did not become inevitable until sometime after 2013. See *McBride v. McBride*, 2013 IL App (1st) 112255, ¶ 46 ("Because courts cannot be charged with parsing the record to determine what action or argument started the exact date the breakdown begins, the point a marriage is undergoing an irreconcilable breakdown is the date a breakdown is inevitable.").

¶ 43 This case is analogous to *In re Marriage of LaRocque*, 2018 IL App (2d) 160973. There, the parties began experiencing conflicts in 2011, contacted divorce attorneys in 2012, and discussed living in separate homes in 2013 after the wife suspected that her husband was dating a paramour. However, the wife acknowledged that family and financial considerations kept her from pursuing a divorce until the parties returned from a trip to Mexico in 2014. *In re Marriage of LaRocque*, 2018 IL App (2d) 160973, ¶¶ 28-29. In determining the date that the breakdown became inevitable, the trial court accepted the parties' analogy of an egg being dropped from the top of a building. The trial court ruled that the metaphorical egg was not dropped until the parties' 2014 trip to Mexico, at which point it became clear to them that their marriage could not

be saved. *Id*. ¶ 88. We affirmed, holding that the evidence supported the trial court's reasonable inference that the purpose of the Mexico trip was to save the parties' marriage. *Id*. ¶ 90.

¶ 44 Here, similar to the facts in *LaRocque*, the evidence demonstrates that the parties continued working on their marriage until 2014. We note that, in her written response to Andrew's motion *in limine*, Carlene admitted her initial belief that the marriage began undergoing an irretrievable breakdown in August 2014. This is consistent with her comments to Andrew in December 2014, referring to Sharon as Andrew's "girlfriend," and her subsequently filing for dissolution of marriage in mid-2015. Furthermore, in determining that Carlene knew of Andrew's extramarital affair, the trial court found that Carlene was neither naïve nor gullible, and that she decided "that it was better to live the life she was leading" rather than conclude that her marriage was "over." We give deference to this finding, as the trial court is in a superior position to observe the demeanor of the witnesses, determine and weigh their credibility, and solve any conflicts in their testimony. *In re Marriage of Baumgartner*, 237 Ill. 2d 468, 486-487 (2010). Under these circumstances, we cannot say that the trial court's finding that the marriage became irretrievably broken in August 2014 was against the manifest weight of the evidence.

¶ 45 The next issue in dispute is the trial court's finding that Andrew's only dissipation was the $38,773.93 he spent on adult websites. In so finding, the court concluded that Carlene acquiesced to Andrew's expenditures on gambling, drugs, strip clubs, and travel. The court also noted Andrew's testimony that he routinely transferred large sums between accounts to facilitate Cushioneer's ongoing operations. Carlene argues that, even if she acquiesced generally to Andrew's spending behaviors, she was ignorant as to the specifics of his extracurricular expenditures. She further argues that Andrew failed to explain with adequate specificity how his large monetary transfers were intended to ensure Cushioneer's success. Carlene therefore argues

that, even if the marriage was not irretrievably broken until August 2014, the trial court erred in calculating the amount of Andrew's dissipation during the allowable time period. We agree with Carlene in part.

¶ 46 Carlene cites *In re Marriage of Hagshenas*, 234 Ill. App. 3d 178, 195 (1992), for the proposition that "the issue is not whether the spending is consistent with that engaged in prior to the breakdown but, rather, whether such spending was for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown." She argues that the trial court erred by focusing on her knowledge of Andrew's expenditures on gambling, drugs, strip clubs, and travel, rather than whether the funds were spent for Andrew's sole benefit and for a purpose unrelated to the marriage. We agree. "A party charged with dissipating marital assets is obliged to establish how those funds were spent by clear and specific evidence [citations]; general and vague statements that the funds were spent on marital expenses or to pay bills will not suffice to avoid a finding of dissipation." *Hagshenas*, 234 Ill. App. 3d at 194. Here, beyond arguing that Carlene acquiesced to his spending behaviors, Andrew makes little effort to refute Carlene's argument that his extracurricular expenditures were for his sole benefit and for a purpose unrelated to the marriage. We therefore hold that the trial court erred in determining that Carlene's acquiescence to Andrew's expenditures after August 2014 on gambling, drugs, strip clubs, and travel precluded her from arguing that the funds were dissipated.

¶ 47 However, we affirm the trial court's finding with respect to Andrew's business expenditures. The court found that Andrew sufficiently explained how the large monetary transfers in 2016 were necessary to operate Cushioneer. Specifically, Andrew testified that in 2016 Cushioneer was going through financial distress. To aid the company, he stopped taking a

paycheck and used funds in the LLC accounts to cover the household bills for both the marital property as well as a vacation property as listed on his financial affidavit. Andrew testified that the money transfers that decreased the LLC accounts and the then-joint bank account were necessary to keep Cushioneer afloat, and it is undisputed that Cushioneer accounted for the vast majority of the marital income. Thus, we agree with Andrew that he provided sufficient evidence to establish that the business expenditures were for a purpose related to the marriage.

¶ 48 However, we reject Andrew's argument in his cross-appeal that he did not dissipate the $38,773.93 he spent on adult websites. Andrew notes his testimony that he paid for the adult websites using credit cards that were automatically paid through the through the LLCs' bank accounts. Thus, he argues that the funds in question could not have been dissipated because they originated from a non-marital source. As we will discuss in more detail *infra*, we reject Andrew's assertion that the LLCs were non-marital. Under these circumstances, we agree with the trial court's finding that the money spent on adult websites "smacks of dissipation."

¶ 49 In sum, we affirm the trial court's findings that: (1) an irretrievable breakdown of the marriage did not become inevitable until August 2014; (2) Andrew's business expenditures after August 2014 did not amount to a dissipation of marital assets; and (3) Andrew dissipated the $38,773.93 that he spent on adult websites. However, we reverse the court's finding that Andrew's expenditures on gambling, drugs, strip clubs, partying, and travel did not amount to a dissipation of marital assets. On remand, Carlene shall be permitted to present and prove up any such extracurricular expenditures occurring after August 2014, and Andrew shall be given an opportunity to present and show by clear and convincing evidence that the funds were spent for a purpose related to the marriage. See *Hagshenas*, 234 Ill. App. 3d at 194-195.

¶ 50 B. Classification of Business-Related LLCs and Business Property

¶ 51 Carlene contends that the trial court erred in classifying the business property as non-marital property, asserting that Andrew failed to overcome the presumption that it was marital property. In his cross-appeal, Andrew contends that the court erred in classifying the LLCs as marital property, asserting that they served as mere conduits to avoid tax liability for Cushioneer. We note that we will not upset a trial court's classification of property unless it is against the manifest weight of the evidence—meaning the opposite conclusion is clearly evident or where the finding is unreasonable, arbitrary, or not based on the evidence presented. *Romano,* 2012 IL App (2d) 091339, ¶ 44.

¶ 52 We begin with the business property. The trial court found that the business property was Andrew's non-marital property, reasoning that his rights in the property vested when he entered into the lease agreement with Warren, which included an option to purchase the property. Carlene contends that this ruling was erroneous, arguing that the purchase option in the lease agreement did not grant Andrew a sufficient pre-marital ownership interest in the business property. We agree with Carlene. It is well-settled that an option to purchase in a lease is neither the sale of land nor the agreement to sell the land, but rather an agreement that one party shall have the right to buy the land at a fixed price within a certain time. *Wolfram Partnership, Ltd. v. LaSalle National Bank,* 328 Ill. App. 3d 207, 216 (2001) (citing *Keogh v. Peck,* 316 Ill. 318, 328 (1925)). Only *after* an option is *accepted and exercised* according to its terms does it become a present contract for sale, thereby transforming the parties' relationship from landlord-tenant to vendor-vendee. (Emphasis added.) *Wendy and William Spatz Charitable Foundation v. 2263 North Lincoln Corp,* 2013 IL App (1st) 122076 ¶ 28. We therefore reject the trial court's finding that the purchase option in the 1994 lease agreement between Warren and Cushioneer gave Andrew any ownership interest in the business property that predated his marriage to Carlene.

¶ 53 However, Andrew notes that the trial court offered an additional basis for its classification of the business property, pointing to the court's concluding statement that no marital property was used to purchase or maintain the business property. According to Andrew, this constituted a finding that is not against the manifest weight of the evidence. Carlene disagrees, arguing that Andrew "provided no concrete proof that [the business property] was purchased with nonmarital money." We agree with Carlene.

¶ 54 Andrew testified that Warren financed the $465,000 purchase price of the business property without requiring any down payment. However, he did not point to any specific accounting of the funds that were used to pay off the mortgage to Warren. Furthermore, the deed for the business property shows that it was transferred from Cushioneer to Swift Properties, not from Warren to Swift Properties. Hence, the trial court's statement that Andrew purchased and maintained the business property using non-marital funds was seemingly based on its uncontested finding that Cushioneer was Andrew's non-marital business. It appears that the court concluded, without pointing to any specific transactions, that Cushioneer purchased the business property and then transferred it to a business-related LLC for tax purposes.

¶ 55 Carlene notes that the business property is presumptively marital because it was acquired during the marriage. See *In re Marriage of Steel*, 2011 IL App (2d) 080974, ¶ 57. She also notes the trial court's finding that the business-related LLCs are marital property, which, as we will discuss in more detail below, we affirm. Thus, Carlene urges us to hold that the business property is marital. We decline.

¶ 56 As we have explained, the trial court's classification of the business property was based on a mistake of law—that Andrew's rights in the property derive from the purchase option in the lease agreement with Warren. However, to the extent that the court's statement that Andrew

purchased and maintained the business property using non-marital assets constitutes a finding, we are in no position to determine whether this finding is against the manifest weight of the evidence. The parties have provided nothing to establish the source of the funds that were used to purchase the business property, and our thorough review of the record has likewise proved inconclusive. Under these circumstances, prudence dictates that the matter should be vacated and that the trial court be instructed to make specific findings from the evidence presented at trial of which funds were used to purchase the business property.

¶ 57 The next issue in dispute is the trial court's classification of the business-related LLCs. The trial court found that the LLCs were marital property because they were acquired subsequent to the marriage, and that Andrew failed to meet his burden of showing how they were non-marital. After finding that the LLCs were marital, the trial court found that "[t]heir values, however, are minimal." The court later stated that "[the LLCs] value to the marriage is the income they generate," even though "the income is a function of tax planning and corporate structuring." In his cross-appeal, Andrew argues that this finding was erroneous because the LLCs were created for tax purposes.

¶ 58 We note that the parties have presented nothing with respect to the income generated by the LLCs. Thus, the import of the LLCs' classification is the trial court's finding that Andrew dissipated the $38,773.93 that he spent on adult websites. As we discussed above, Andrew argues that these expenditures were made exclusively from assets that were held by the LLCs. Accordingly, Andrew argues that he should not have been ordered to pay Carlene $19,387 for her half of the funds that were spent on adult websites. We disagree with Andrew.

¶ 59 Section 503(a) of the Act establishes a rebuttable presumption that "all property acquired by either spouse subsequent to the marriage" is marital property. 750 ILCS 5/503(a) (West

2016). "The presumption of marital property is overcome by showing through clear and convincing evidence that the property was acquired by a method listed in subsection (a) of this Section *or was done for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift*." (Emphasis added.) 750 ILCS 5/503(b)(1) (West 2016).

¶ 60 Here, although he does not cite section 503(b)(1), Andrew clearly relies on the "tax planning purposes" language therein. He notes the trial court's finding that the LLCs were created "to obtain favorable tax treatment" for Cushioneer, and argues that the LLCs "are nothing more than extensions of the business operations of [Cushioneer]." However, a recent decision from this court, *In re Marriage of James & Wynkoop*, 2018 IL App (2d) 170627, explains that the "tax planning purposes" language in section 503(b)(1) does not apply to the business-related LLCs in this case.

¶ 61 In *James*, the former husband appealed the trial court's marital classification of real property that was used to build a structure for his non-marital business. *James*, 2018 IL App (2d) 170627, ¶ 17. The court found that the real property was acquired after the marriage and that the husband did not produce clear and convincing evidence that any exception provided in section 503(a) applied to its acquisition. *Id.* On appeal, the former husband noted that section 503(a) provides an exception for property that is acquired for "tax planning purposes." He argued that the exception applied because, although the property was purchased in his name, it was nonetheless purchased for tax purposes. *Id.* at ¶ 22. We affirmed the trial court's ruling, reasoning that a spouse cannot take advantage of the "tax planning purposes" exception without establishing that the property was *transferred* from some other non-marital property as defined in 503(a) to some form of joint-ownership. We held in pertinent part:

> "The last sentence of section 503(b)(1) establishes the means by which the presumption of marital property may be overcome—depending on how the presumption arose. When section 503(b)(1) is read as a whole, it becomes clear that the phrase 'estate or tax planning purposes' modifies the previous sentence regarding the *transfer* of nonmarital property into some form of co-ownership between the spouses. Thus, in order to trigger the 'estate or tax planning' language under section 503(b)(1), one must first show through clear and convincing evidence that the property at issue was originally nonmarital under section 503(a)."

James, 2018 IL App (2d) 170627, ¶ 17.

¶ 62 Applying *James* here, Andrew cannot take advantage of "tax planning purposes" exception in section 503(b)(1) without showing that the LLCs were originally non-marital and were then transferred into some form of co-ownership between the parties. As the trial court noted, forming an LLC is simply a process involving filing paperwork and paying set fees with the Secretary of State. The court found, however, that "neither non-marital money nor property were used to create the [LLCs]." Accordingly, the trial court ruled that Andrew failed to overcome the presumption that the LLCs were marital property. Here, Andrew makes little effort to establish that the LLCs were formed using non-marital money or property, instead focusing on the funds that flowed through the LLCs. However, he offers nothing to establish that he created the LLCs using his non-marital funds, or that he transferred the LLCs to some form of co-ownership with Carlene. Thus, *James* teaches that Andrew cannot benefit from the "tax planning purposes" language in section 503(b)(1) of the Act. See *James*, 2018 IL App (2d) 170627, ¶ 17. Because it is undisputed that the LLCs were created after the marriage, and because Andrew

failed to overcome the presumption that the LLCs were marital, the trial court's classification of the LLCs as marital property was not against the manifest weight of the evidence.

¶ 63 Andrew also mistakenly argues that the LLCs should be classified based on the funds that flowed through them, pointing to his own testimony that these funds derived exclusively from Cushioneer. However, even if Andrew established that the funds flowing through the LLCs were exclusively non-marital, he has presented nothing to establish that this would impact the classification of the LLCs themselves. Thus, we affirm the trial court's classification of the business-related LLCs as marital.

¶ 64 C. Maintenance

¶ 65 Finally, Andrew argues in his cross-appeal that the trial court abused its discretion in awarding Carlene maintenance of $13,667 per month for 12 years and 7 months. However, our remand as to Carlene's dissipation claims for Andrew's extracurricular expenditures as well as the classification of the business property potentially affects "the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance ***." 750 ILCS 5/504(a)(1) (West 2016). Accordingly, reexamination of the amount of maintenance may be required on remand, and it would be premature for us to review Carlene's maintenance award in this appeal.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we affirm each of the disputed findings except the amount of Andrew's dissipation occurring after August 2014, the classification of the business property, and the award of maintenance. The orders relating to the amount of dissipation and the classification of the business property are vacated. The merits of the maintenance award are not addressed as it is premature under these circumstances.

¶ 68 Affirmed in part, vacated in part, and remanded with directions for further proceedings consistent with this disposition.