DIVISION ONE
FILED: 04/02/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ON

In re the Marriage of:	)	1 CA-CV 11-0610
	)	
KAREN R. NOWAK,	)	DEPARTMENT E
	)	
Petitioner/Appellant/ Cross-Appellee,	)	**MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
v.	)	
	)	
MONTE C. NOWAK,	)	
	)	
Respondent/Appellee/ Cross-Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. FN2009-051488

The Honorable Michael D. Gordon, Judge

AFFIRMED IN PART; REVERSED IN PART

The Cavanagh Law Firm, P.A. Phoenix
by Christina S. Hamilton
Attorneys for Petitioner/Appellant/Cross-Appellee

Franks, Sheldon & Houser, P.C. Phoenix
by Todd Franks
Robert C. Houser
Attorneys for Respondent/Appellee/Cross-Appellant

T H O M P S O N, Judge

¶1 In this appeal concerning the dissolution of the marriage of petitioner/appellant/cross-appellee Karen R. Nowak (Wife) and respondent/appellee/cross-appellant Monte C. Nowak (Husband), Wife challenges the family court's decision finding that disability benefits being paid to Husband were not community property. She further contends that the spousal maintenance awarded was inadequate, and that the court erred in not finding expenses incurred by Husband to constitute excessive abnormal expenditures so as to require repayment to the community. Husband cross-appeals, arguing that the trial court erred in finding that certain bank accounts and stock were Wife's sole and separate property and in denying Husband's in limine motion to preclude Wife from maintaining that claim because of disclosure violations.[1] For the following reasons, we reverse the court's ruling regarding the Unisource Energy stock, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Husband and Wife were married on June 23, 1963. He was seventy-years old and she was sixty-nine years old at the time of trial. Husband was a medical doctor who was employed from 1973 to 1998, earning approximately $200,000 per year. In 1998, Husband

[1] Husband died on December 19, 2012, subsequent to the briefing in this appeal. His daughter Lorie Groll is his sole representative. Ms. Groll filed a motion with this court requesting that she and Husband's estate be substituted for Husband as appellee/cross-appellant. There has been no response. We grant the motion for substitution.

stopped practicing medicine because he was disabled due to cardiac and stress angina. He was insured under a disability insurance policy acquired during the parties' marriage. He was determined to be disabled under the policy, and since 1998 received a monthly non-taxable disability income of $15,000. Husband and Wife also received Social Security income of $2,165 and $916 per month, respectively.

¶3 Wife filed a petition for dissolution on July 6, 2009; Husband accepted service of the petition on August 5, 2009, thereby terminating the parties' community. *See* Ariz. Rev. Stat. (A.R.S.) §§ 25-211 (2007), -213(B) (2007).

¶4 Trial was set for November 22, 2010. On November 8, 2010, Husband filed a motion in limine asking the court to bar Wife from pursuing her claim that assets in four accounts--Bank of America CD 84**, Bank of America CD 85**, Bank of America Savings Account 73**, and Baird Investment Account 24**--as well as thirty-six shares of Unisource Energy stock, all acquired during the marriage, were her sole and separate property. Husband advised that the parties had extended the original disclosure cutoff date of October 25, 2010, to November 5, 2010, but Wife still had not produced evidence allowing the tracing of those accounts sufficient to maintain her claim that the assets were sole and separate.

¶5 On November 22, the date trial was set to begin, the court heard argument on Husband's motion in limine. Wife contended that she had produced documents by the November 5 date and suggested that if Husband needed time to review the disclosure the court could continue the case. The court denied the motion and continued the trial date to February 14, but limited Wife's evidence on the issue of her sole and separate property to the documents she had disclosed as of November 22.

¶6 In their joint pretrial statement, the parties disputed whether Husband's monthly disability payments were community property or his sole and separate property, with Wife asserting that the disability policy was in effect a retirement annuity that should be considered community property. They also disputed whether Wife was entitled to spousal maintenance. Wife argued she was entitled to $7,500 per month, one-half of the disability income on which the parties had been living; Husband asserted that Wife did not meet the statutory criteria for any spousal maintenance, but that if the court concluded she did, she should be awarded a very limited amount. Husband argued that she had resources to meet her needs. The parties also disputed whether the accounts 98**, 73**, 84**, 85**, 24**, and the Unisource Energy stock were Wife's sole and separate property. Wife contended that she received gifts and inheritance, that she kept these funds separate, that she invested some in Tucson Electric

Power which became Unisource Energy, and that she put some of the funds in account 73**. The funds from account 73** were later transferred to account 84**. She also contended that she had deposited $6,000 of her separate money into account 98**, which became the source of the funds invested in account 85**. She asserted that Husband admitted all of his salary and disability benefits went into Bank of America account **37 and that none of the disputed accounts were funded from that joint account. Husband's position was that the accounts were acquired during the marriage, were presumed to be community property, that Wife had failed to adequately trace the funds to separate property, and that all the accounts should be treated as community property. Also at issue was the disposition of various joint bank accounts and whether various expenditures made by Husband constituted waste, for which Wife should be reimbursed. The parties disagreed over several life insurance policies insuring Husband's life. Wife argued the policies should be maintained and awarded to her in light of the fact that disability payments would cease at Husband's death; Husband objected to Wife maintaining any insurance policies on his life and asked that the policies be liquidated and the proceeds split between them.

¶7 The court heard approximately eight hours of testimony over three days. The court found that both parties agreed that Husband had intended to work into his seventies and so had not

reached the age at which they anticipated he would retire. The court found that the disability policy was a substitute for Husband's income and, as such, was his separate property after dissolution of the marriage. Of the four insurance policies, the court ordered that three be liquidated and the proceeds be divided equally between the parties. The court further ordered Husband to maintain a life insurance policy with Wife as beneficiary to cover the total benefits under the spousal maintenance order. The court awarded the other life insurance policy to Husband. The court found bank accounts 98**, 73**, 84**, and 85** to be Wife's sole and separate property. The court stated generally:

> Wife has met her burden of proof by clearly and convincingly demonstrating these funds were initially separate, known by the parties to be separate, kept separate, and, now as the Court dissolves their marriage, are affirmed as separate property. The accounting and the testimony clearly and convincingly established that these funds were received from her parents (as a gift), then from her Father's death and also as a gift from Husband. They were invested and new separate accounts were created. Importantly, they were fastidiously maintained by Wife as her separate property. Husband clearly knew of their separate nature. For example, the parties met with an investment advisor who addressed Wife's property separately. Moreover, Husband openly spoke of Wife's "inheritance" and he, himself, maintained his own separate property. While Husband bears no burden of proof, he could not complain of missing community funds or unexplained transfers from the parties' community accounts. Husband's claim to her separate property in these proceedings was an afterthought precipitated by the acrimonious

> dissolution proceeding and refuted by Wife's clear and convincing evidence.

The court also awarded Wife the Unisource Energy stock as her sole and separate property.

¶8 The court found that Wife was eligible for spousal maintenance. It found her reasonable expenses to be approximately $7,000 per month, based on trial exhibit 89, adjusted for insurance premiums.[2] The court also found that, having determined that Husband would have continued to work and was not retired, it would find that Wife also would not be retired and so it would not require Wife to deplete her retirement income to satisfy her reasonable needs. After considering the factors under A.R.S. § 25-319(B) (2007), the court awarded Wife spousal maintenance in the amount of $6,000, to terminate upon Husband's death, Wife's death, or Wife's remarriage. The court found no excessive or abnormal expenditures of community property. The court denied both parties' request for attorneys' fees, noting that they were dividing a significant estate and could pay for their own attorneys, and finding that neither party had taken positions so unreasonable as to warrant fees.

¶9 Wife filed a motion for new trial, seeking reconsideration of the court's ruling on the life insurance, the

[2] Exhibit 89 showed monthly expenses at $10,083 with life insurance premiums of $3,038.

amount of spousal maintenance and the court's refusal to make the award non-taxable, the court's finding several other accounts, including the Baird Investment account 24**, to be community property, and the court's failure to allocate certain debts to Husband.

¶10 Husband also filed a motion for new trial asking in part that the court not require Husband to maintain an insurance policy in favor of Wife and that the court issue more detailed findings related to its ruling that certain accounts and the Unisource Energy stock were Wife's sole and separate property.

¶11 The court granted in part and denied in part each of the motions. The court revised its order regarding the insurance policies. The court awarded Wife two of the policies it had directed liquidated, with Wife to pay Husband fifty percent of their cash values, ordered one policy liquidated, and awarded the other to Husband, but found Husband was not required to maintain an insurance policy to secure spousal maintenance. The court found that the Baird Investment account and two others were Wife's sole and separate property.

¶12 Wife filed a timely notice of appeal; Husband filed a notice of cross-appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶13 Wife argues that the court erred in treating Husband's disability policy as separate property. The policy was purchased during the marriage and was paid for with community funds. At the time of the divorce, Husband had been receiving benefits for approximately thirteen years; he was seventy years old. Wife contends that the disability benefit should have been treated as a retirement benefit, and therefore community property. We review de novo the characterization of property as community or separate. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). We view all evidence and the inferences from that evidence in the light most favorable to upholding the trial court's decision. *Hatcher v. Hatcher*, 188 Ariz. 154, 157, 933 P.2d 1222, 1225 (App. 1996).

¶14 Generally, retirement benefits are a form of deferred compensation for work already performed and, to the extent the work was performed during a marriage, the benefits constitute community property. *McNeel v. McNeel*, 169 Ariz. 213, 215, 818 P.2d 198, 200 (App. 1991). Disability benefits are generally separate property belonging to the spouse suffering the disability. *Id.* at 214, 818 P.2d at 199. That the policy was acquired using community funds does not require a finding that the benefits are community property. *Hatcher*, 188 Ariz. at 157, 933 P.2d at 1225. The primary purpose of a disability policy is to

insure against the risk of loss of the insured's future earning capacity. *Id.* at 158, 933 P.2d at 1226. The benefits are a substitute for earnings. *In re Marriage of Kosko*, 125 Ariz. 517, 518, 611 P.2d 104, 105 (App. 1980). Where the disability results in a loss of income during the marriage, the resultant disability benefits are community property. *Hatcher*, 188 Ariz. at 158, 933 P.2d at 1226. However, just as a spouse's income post-dissolution is separate property, disability benefits that replace that income are likewise separate property of the disabled spouse. *Kosko*, 125 Ariz. at 518, 611 P.2d at 105. In *Kosko* the court explained,

> Whether paid for by the employer or the employee, the amount expended is to protect against a risk of disability which may, but usually does not, occur. The amount paid to protect against this risk does not accumulate in a fund, nor does it build into an equity having an ascertainable value. Although the entitlement to this benefit may be attributed to employment and thus have a community origin, the money so expended does not produce a community asset subject to division at dissolution. What it produces is coverage for the *individual spouse* against the risk of disability and loss of future earning ability. Disability benefits, then, are a substitute for earnings in the event of disability. Just as the post-dissolution earnings of a spouse are separate property . . . so then it is logical that post-dissolution disability benefits are separate property.

Id. (citation omitted).

¶15 Wife contends that, given Husband's age, the disability benefit here is more akin to a retirement benefit and argues that, under *McNeel*, it should be treated as community property.

¶16 In *McNeel*, Wife was entitled to half of Husband's retirement pursuant to a property settlement agreement incorporated into their dissolution decree. *McNeel*, 169 Ariz. at 213, 818 P.2d at 198. Husband took early retirement and received benefits of $850 per month. *Id.* Soon after, he suffered a heart attack and was notified that his pension was being changed from early retirement to disability, resulting in an increase of $337 per month. *Id.* at 213-14, 818 P.2d at 198-99. Husband was notified that the disability pension was the same amount as the amount of pension that a retiree would receive at regular retirement and told that the trust would withhold half the $850 per month for payment to Wife as her share of the retirement and pay the rest to Husband. *Id.* at 214, 818 P.2d at 199. Husband sought clarification of the dissolution decree from the court, which agreed with the determination of the trust that Wife should receive $425 per month as her share of the retirement. *Id.* The court further stated that upon Husband's attaining regular retirement age, Wife was entitled to half the total amount paid to Husband. *Id.* On appeal, Husband argued that the pension payments were disability payments and therefore his separate property. *Id.* The appellate court affirmed the trial court's

ruling. *Id.* at 215, 818 P.2d at 200. The court held that Wife was entitled to her share of the retirement benefits, which had already been determined to be $850 per month, but that the difference of $337 per month represented a disability payment, which was Husband's separate property. *Id.* The court further found that Wife's entitlement to the increased amount upon Husband's attaining regular retirement age was supported by the terms of the pension fund, which provided that upon reaching retirement age, a retiree "on a disability pension shall have his benefits continued regardless of whether or not he remains disabled." *Id.* at 215 n.1, 818 P.2d at 200 n.1.

¶17 Wife also cites several cases from other jurisdictions that have held that in certain circumstances a disability policy could be treated as community property. In *In re Marriage of Saslow*, the Supreme Court of California considered whether private disability insurance paid for with community funds should be characterized as community or separate property. 710 P.2d 346 (Cal. 1985). The court ultimately concluded that the most equitable approach requires the trial court to "treat disability benefits as separate property insofar as they are intended to replace post-dissolution earnings that would have been the separate-property income of the disabled spouse, and treat the benefits as community property insofar as they are intended to provide retirement income." *Id.* at 351-52. In *In re Marriage of*

Leland, 847 P.2d 518, 527 (Wash. Ct. App. 1993), the Court of Appeals of Washington, considering the question, agreed with the *Saslow* court's determination of the most equitable result, but resolved the question on a contract basis. Noting that all property acquired during a marriage was community property unless defined by statute as separate, the court held that the disability benefits were "onerously" acquired through an enforceable contract between the marital community and the insurance company with payments from community funds. *Id.* The court found it irrelevant that the payments did not represent deferred compensation or meet the definition of retirement benefits under pension laws, but held that the payments provided an income bearing a strong resemblance to a pension benefit. *Id.* at 528.

¶18 None of these cases compels the result sought by Wife under the facts presented here. In Arizona, payment for the policy with community funds does not make a disability payment community property except to the extent that it replaces income lost to the community. *Hatcher*, 188 Ariz. at 157-58, 933 P.2d at 1225-26. Unlike *McNeel*, where the terms of the pension continued the benefits regardless of the disability, which would imply that the benefits had a retirement element, the terms of Husband's contract here expressly provide that the benefits continue "while you are totally disabled." *McNeel*, 169 Ariz. at 215 n.1, 818 P.2d at 200 n.1. Under the terms of the contract, if Husband is not

totally disabled, he would cease receiving benefits. In addition, the pension in *McNeel* had a retirement element in the sense that the pension was already paying retirement benefits at the time McNeel became disabled. *Id.* at 213, 818 P.2d at 198. Had Husband here not become disabled, the policy would have paid no benefits.

¶19 The parties here both testified that they had expected Husband to work into his seventies, with Husband stating that he intended to work into his eighties or until he died. Wife testified that they planned on his working that long and that they purchased the policy in case Husband could not work into his seventies. Husband stated that they had never discussed any intention of his retiring. And, as already noted, the policy pays benefits only so long as Husband is disabled; had Husband not become disabled, no benefits would have been paid. The testimony before the court established that the disability policy was intended by the parties as a substitute for earnings. This intent supports the characterization of the disability policy as Husband's separate property.

¶20 Wife also argues that the court's award of spousal maintenance in the amount of $6,000 per month was insufficient to meet her needs. We review a trial court's award of spousal maintenance for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 348, ¶ 14, 972 P.2d 676, 681 (App. 1998). We view the evidence in the light most favorable to upholding the trial

court's decision and affirm if any reasonable evidence in the record supports it. *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984).

¶21 In finding that Wife was eligible for spousal maintenance, the court found that, because it had not considered Husband as retired for purposes of the disability benefits, it would not consider Wife to be retired, and would not require Wife to deplete her retirement assets. The court found that Exhibit 89, which was a monthly budget prepared by Wife, "credibly represent[ed] her needs, adjusted for the insurance premiums." Exhibit 89 listed a monthly budget of $10,083. Of that total, Wife listed life insurance premiums of $3,038. The couple had four insurance policies. The court initially ordered three be liquidated[3] and the proceeds be divided between the parties; the court awarded the fourth to Husband and ordered Husband to maintain an insurance policy naming Wife as beneficiary to cover total benefits owed under the spousal maintenance order. Both parties moved for a new trial with respect to the insurance policies. Wife asked the court not to order the policies liquidated and to award her those policies--the USAA Whole Life Policy with a $500,000 cash payout at Husband's death, premiums of $1,782.45, and a cash value of $150,920; the Lutheran Brotherhood

[3] Together these policies had a cash value of more than $500,000.

Whole Life Policy 31** with a cash payout of $500,000 upon Husband's death, a waiver of the premium, and a cash value of $358,600; and the Lutheran Brotherhood Annuity 76** with a cash value of $27,787 and no cost. Wife expressed concern that, because Husband had bipolar disorder, he might fail to maintain the insurance policy for her benefit. She also requested that the court shift the expense of the premium for the policies to her expenses and adjust the spousal maintenance to pay the cost, arguing that it would be the same cost to Husband, but that she would be assured that the premiums were paid. Husband objected to having to maintain any policy of insurance in Wife's favor. The court thereafter revised its order and awarded Wife the USAA Whole Life Policy and the Lutheran Brotherhood Flex Policy, ordering her to pay Husband fifty percent of the cash value. The court did not adjust Wife's spousal support to provide for payment of the premiums.

¶22 Wife argues that Exhibit 89, which Wife prepared and on which the court relied, did not take into account any tax consequences, and if Wife receives $6,000 per month support, with taxes and taking into account her Social Security payment of $916.00 per month, Wife would have a monthly income of approximately $5,187. She also argues that when the court awarded her the insurance policies in granting her motion for new trial, the court should have adjusted her expenses accordingly to

recognize the additional approximately $3,000 per month expense of the premium. Wife asserts that her budget is $10,083 per month and the court's award does not account for those expenses.

¶23 We find no abuse of discretion. The court was not required to award spousal maintenance in an amount equal to Wife's stated expenses regardless of funds available to Wife. Wife left the marriage with substantial assets. Of the joint checking accounts, Wife received more than $30,000, from joint retirement accounts Wife received more than $450,000, and from her separate accounts she received approximately $140,000.[4] Although the court said it would not require Wife to deplete her retirement assets, the court when assessing the award of spousal maintenance could and in fact was required to consider the property available to her to meet her reasonable needs. A.R.S. § 25-319 (A)(1), (B)(9); *Deatherage v. Deatherage*, 140 Ariz. 317, 320-21, 681 P.2d 469, 472-73 (App. 1984).

¶24 As for the insurance premiums, the court could, in its discretion, conclude that the insurance policies were a voluntary expense. Wife asked that the policies be awarded to her and the court granted that request. In awarding the policies to Wife, the court gave Wife the option of maintaining the policies or

[4] The total amount would necessarily be reduced by approximately $90,000 that Wife must pay to Husband for his half of the insurance policies (minus $50,000 plus interest Husband borrowed from one of the policies).

liquidating them and investing the proceeds to earn income. We find no abuse of discretion in the trial court not requiring Husband to bear the expense of the policies.

¶25 Wife also argues that the trial court's division of the community accounts was inequitable. She asserts that she should not be held equally responsible for withdrawals Husband made on a Home Equity Line of Credit (HELOC) and a second line of credit, a substantial portion of which she claims was expended for noncommunity expenses.

¶26 On June 24, 2009, Husband told Wife that he wanted a divorce. On June 25, Husband withdrew $60,000 from the HELOC--Bank of America 57**--and deposited the funds into a new Chase/Washington Mutual account 93**. He testified that he did so because he was concerned that Wife and their son would cut him off financially. On July 8, Wife withdrew $48,000 from the Baird Rollover IRA 84** and deposited those funds into Bank of America account 48**. Wife testified that she removed the funds because she was concerned that Husband might spend their funds and she would not be able to pay their bills. On July 24, 2009, Husband withdrew another $20,000 from the HELOC, which was deposited at Wife's request into the couple's joint Bank of America checking account **37 to help pay community expenses. That same day, Husband took an advance of $20,000 on another line of credit--Bank of America LOC 98**; Husband testified he used these funds to pay

off a time share belonging to the couple as well as other expenses on a credit card. On August 3, Husband took another advance from the HELOC, which was deposited into Bank of America joint checking account **37. Husband was served on August 5, 2009, thereby terminating the community. *See* A.R.S. §§ 25-211(A)(2), -213(B). Husband withdrew $7,000 from the HELOC on August 21, 2009.

¶27 Husband testified that he expended the funds on a place to live since he was no longer living in the marital residence; on clothes, dishes, cleaning supplies, a television and other necessities in establishing a new residence since he could not retrieve items from his home; on a preplanned trip with his son-in-law and grandson; and for various community expenses for which he was never reimbursed. He testified that the couple had lived an extravagant lifestyle, spending approximately $240,000 per year. He further testified that at the date of service he had approximately $34,500 remaining and agreed that that amount was community property to be split with Wife. Wife claimed that Husband owed her $54,436 for waste of community assets once Husband's contribution to community expenses from the withdrawals was taken into account.

¶28 The court ordered that the $34,490 remaining from Husband's withdrawal of the community funds be split between the parties. With respect to Wife's claim for waste, the court stated:

> The Court has reviewed the accounting set forth in Exhibit no. 87 and the testimony about Husband's withdrawal and use of community funds following the parties' separation. Wife attempted to account for Husband's receipt of $127,000 and *her* withdrawal of funds from the parties' joint account in an effort to demonstrate waste for which she seeks reimbursement of approximately $54,000.00. Husband, on the other hand, has opposed the claim and detailed his position during the last day of Trial, and further with his written position at pages 42-46 of Husband's Second Amended Proposed Findings of Fact and Conclusions of Law (filed March 16, 2011). The Court has carefully reviewed both positions. . . . The Court finds Husband's position detailed, accurate and very fair. Husband shall pay Wife the amount of $14,650.00.[5]

Included in the portion of Husband's Second Amended Proposed Findings of Fact and Conclusions of Law that the court appears to have found "accurate" and "fair," was a provision asserting that Husband's rent for alternative housing as well as expenses for purchasing clothes and household items was not waste: "Wife cannot hoard all of the property and then complain that replacement of some items is not a reasonable expense. Husband did not engage in

[5] Husband's Second Amended Proposed Findings of Fact and Conclusions of Law presented a list of Wife's specific claims for reimbursement for which Husband agreed reimbursement was warranted offset by Husband's claims for reimbursement against Wife, for a reimbursement amount from Husband to Wife of $14,650.

excessive replacement of items nor did he incur excessive alternative housing expenses."[6]

¶29 We review a trial court's apportionment of community property for an abuse of discretion. *Hrudka v. Hrudka*, 186 Ariz. 84, 93, 919 P.2d 179, 188 (App. 1995). We view the evidence in the light most favorable to affirming the trial court's decision and will affirm if any evidence reasonably supports the decision. *Kohler v. Kohler*, 211 Ariz. 106, 107, ¶ 2, 118 P.3d 621, 622 (App. 2005). The division of property must be equitable, and the court may consider whether one party has engaged in excessive or abnormal expenditures when deciding on the division of property. A.R.S. § 25-318(A), (C) (2007). Each party to a marriage has "equal management, control and disposition rights over their community property." A.R.S. § 25-214(B) (2007). A spouse alleging abnormal expenditures must make a prima facie showing of waste, after which the spouse who spent the funds must demonstrate that the expenditures were legitimate. *Gutierrez*, 193 Ariz. at 346-47, ¶ 7, 972 P.2d at 679-80.

¶30 Wife argues on appeal that the court should have found Husband's use of the HELOC and line of credit funds to be excessive expenditures or waste because they were unnecessary and

---

[6] That the court found no excessive or abnormal expenditures is shown in the court's consideration of that factor with respect to spousal maintenance; the court found it "Not Applicable."

clearly excessive. We find no abuse of discretion in the court's determination that Husband did not engage in abnormal or excessive expenditures. Husband was not living in the marital home during the month of July and so needed to find and pay for other accommodations. He testified that he did not have access to the marital home to retrieve what he needed for daily living and so he expended funds to obtain those necessities. He also expended funds on a preplanned trip with family. Most of the spending occurred before service of the petition for dissolution. Husband was as entitled to spend community funds for his living expenses as Wife was for her living expenses.

¶31 On cross-appeal, Husband challenges the court's ruling finding that several accounts constituted Wife's sole and separate property. Husband also asserts that the court erred in denying his motion in limine to preclude Wife from asserting her claim regarding her sole and separate property because of discovery violations.

¶32 We first address Husband's claim that the court should have granted his motion in limine. Rule 65(C), Arizona Rules of Family Law Procedure (A.R.F.L.P.) provides:

> A party who fails to timely disclose information required by Rule 49 or 50 shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or in support of a motion, the information or the testimony of a witness

> not disclosed, except by leave of court for good cause shown.

A.R.F.L.P 65(C)(1).[7] To use information first disclosed later than thirty days before trial, a party must obtain leave of court by motion. A.R.F.L.P. 65(C)(2).

¶33 The purpose of the discovery rules is to give the parties a reasonable opportunity to prepare for trial. *Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶ 13, 62 P.3d 976, 980 (App. 2003). The rules are to be interpreted so as to "maximize" resolution of cases on the merits and should be applied using common sense. *Id.* at 235, ¶ 14, 62 P.3d at 980. When disclosure is late but the trial is delayed, giving the parties adequate time to prepare, any prejudice may be minimized or eliminated. *Id.* at 236, ¶¶ 17-18, 62 P.3d at 981; *Gerow v. Covill*, 192 Ariz. 9, 18, ¶¶ 42-43, 960 P.2d 55, 64 (App. 1998). The trial court has broad discretion in ruling on discovery and disclosure issues and we review its decision only for an abuse of that discretion. *Link v. Pima Cnty.*, 193 Ariz. 336, 338, ¶ 3, 972 P.2d 669, 671 (App. 1998).

¶34 Here, the court continued the trial "in the interest of justice," giving Husband more than two months to prepare, and sanctioned Wife at Husband's request by precluding her from using

[7] A.R.F.L.P. 65 is based on Rule 37, Arizona Rules of Civil Procedure. A.R.F.L.P. 65 Committee Comment.

any materials not disclosed by the date of the court's ruling. Disclosure was therefore not later than thirty days before trial. The court applied a common-sense solution that allowed the case to be resolved on the merits without prejudice to Husband, who had adequate time to prepare. We find no abuse of discretion.

¶35 Husband argues that Wife did not adequately demonstrate that four financial accounts and the Unisource Energy Stock were her sole and separate property. We review a trial court's determination of whether property is separate or community de novo. *Pownall*, 197 Ariz. at 581, ¶ 15, 5 P.3d at 915. We view all evidence and reasonable inferences from that evidence in the light most favorable to supporting the trial court's determination of the character of the property as separate or community. *Noble v. Noble*, 26 Ariz. App. 89, 92, 546 P.2d 358, 361 (1976). "We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680. Moreover, the trial court, and not this court, decides whether the evidence presented is clear and convincing or merely preponderates. *Yano v. Yano*, 144 Ariz. 382, 384, 697 P.2d 1132, 1134 (App. 1985).

¶36 All property acquired during marriage is community property unless it is acquired by gift, devise or descent. A.R.S. § 25-211(A)(1). If separate funds are commingled with community funds the entire fund is presumed to be community property unless

the separate funds can be traced. *Cooper v. Cooper*, 130 Ariz. 257, 259, 635 P.2d 850, 852 (1981). The party claiming that the funds are separate bears the burden of proving their separate nature by clear and convincing evidence. *Id.* at 259-60, 635 P.2d at 852-53. If the funds can be traced, however, mere commingling does not transmute the account to a community account, especially where the community funds commingled are negligible in comparison to the separate funds. *Noble*, 26 Ariz. App. at 95-96, 546 P.2d at 364-65. Separate property remains separate as long as it can be identified. *Porter v. Porter*, 67 Ariz. 273, 283, 195 P.2d 132, 138 (1948).

¶37 Wife testified that her separate accounts originated with gifts from her parents and an inheritance from her father. She testified that in 1980, 1981, and 1982, she received $6,000 from her parents, which she invested in a Shearson account, and then subsequently received an inheritance from her father's estate of $22,246, which she also invested at Shearson. Her sister testified that she had received similar distributions from her parents. Wife testified that she had discussed the distributions with Husband and had told him that, on the advice of her father's lawyer, she was keeping the funds separate. Anton Nowak, the couple's son, testified that he had heard Husband on numerous occasions refer to Wife's accounts as her inheritance. Wife further testified that she would go with Husband to their

financial advisor at Shearson and they would refer to her account as her inheritance account or her separate account and Husband did not disagree. Wife explained that she transferred the separate funds to Merrill Lynch, to Charles Schwab, and to Sun America, a subsidiary of AIG, and then to Baird, when their account representative at Sun America moved to that entity. She also testified that as she transferred her funds, she and Husband also transferred other accounts, and when she and Husband discussed their various accounts with the various financial advisers, they always referred to her accounts as her separate accounts. Wife testified that the first time Husband disputed that the accounts were her separate property was several months after the divorce began when he told her she had commingled the funds and that he would get half of the accounts. She testified that when Husband first received his Social Security benefits he decided to keep it in a separate account for his own use, so when she started to receive hers, she put it into her own account, which was account 98**; she testified that the initial deposit of $6,000 into that account was a gift from Husband.

¶38 Anton Nowak testified that he had traced Wife's accounts by looking at bank statements, investment statements, and deposit and investment slips. He also examined the bank statement of the couple's joint account **37, into which all of Husband's income and disability were deposited, looking specifically for any

evidence that any of the community funds were distributed into any of Wife's separate accounts. He testified that he found no evidence of any such distributions, although he noted a few instances where funds were deposited into joint account **37 and then returned to Wife's accounts. Nowak produced a document, Exhibit 90[8], which traced the origins of Bank of America 98**, Bank of America 85**, Bank of America 84**, Bank of America Money Market Savings 73** and Baird Investment 24**. Exhibit 90 showed that account 85** was begun with a $10,000 transfer from account 98**, which originated with a gift from Husband. It also traced account 84** back to Wife's initial deposit of her inherited money at Shearson. Consistent with Wife's testimony, the Baird account 24** was traced back through AIG, Schwab, and Merrill Lynch, although numerous account statements were missing; Wife's testimony that she moved her investments from Shearson to Merrill Lynch connected the account to her original inheritance. Account 73** was also shown to have originated from the gifts and inheritance from Wife's parents.

¶39 The evidence before the court supports the court's conclusion that these funds were initially separate and were known

[8] Husband complains about Anton's testimony and the inadequacy of a schedule prepared by a non-expert and based "entirely on hearsay." We note that Arizona Rule of Evidence 1006 allows a summary of voluminous documents to be presented to the court, so long as the documents summarized are available to the other party and to the court.

by the parties to be separate. We do not find the gaps in documentary evidence to be fatal, as suggested by Husband. The court found Wife's testimony clear and convincing and Husband's claim that he did not know of the accounts not credible. Moreover, as noted by Wife, there is no evidence of commingling requiring precise tracing. Husband's claim that the accounts are community is based on the presumption that property acquired during the marriage is community property, not on a claim that separate funds were commingled into a community fund. Wife proved to the court's satisfaction that the origin of the accounts was separate property.

¶40 We reach a different conclusion, however, with respect to the Unisource Energy stock because we can find no evidence presented to the court with respect to this property. In the absence of any evidence showing that the stock was Wife's sole and separate property, the trial court had no basis to award the property solely to Wife. Moreover, Wife makes no argument on appeal in response to Husband's claim of error regarding the stock.

¶41 Both parties seek an award of attorneys' fees on appeal pursuant to A.R.S. § 25-324 (2007), under which the court, after considering the financial resources of the parties and the reasonableness of their respective position, may award attorneys' fees. We find no award of fees is warranted. The parties have

adequate resources to pay their attorneys' fees and the positions taken were not unreasonable as to require an award of fees.

CONCLUSION

¶42 We reverse the trial court's ruling that the Unisource Energy stock is Wife's sole and separate property in light of the absence of any evidence in the record supporting its sole and separate character. We otherwise affirm the trial court.

/s/

_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DIANE M. JOHNSEN, Judge