IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

TAKAKO SKAGGS,
Petitioner/Appellee,

and

BERNARD SKAGGS,
Respondent/Appellant.

No. 2 CA-CV 2021-0138-FC
Filed August 3, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. D20191882
The Honorable Deborah Pratte, Judge Pro Tempore

AFFIRMED

COUNSEL

Davis Miles McGuire Gardner, Tempe
By Douglas C. Gardner and Michael D. Girgenti
Counsel for Petitioner/Appellee

Tiffany & Bosco P.A., Phoenix
By Kelly L. Mendoza
Counsel for Respondent/Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eckerstrom and Judge Espinosa concurred.

V Á S Q U E Z, Chief Judge:

¶1 Bernard Skaggs appeals from the trial court's decree of dissolution of marriage, challenging its characterization of certain property, its finding that his former spouse did not engage in community waste, and its award of attorney fees. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to affirming the trial court's judgment. *Stevenson v. Stevenson*, 132 Ariz. 44, 45 (1982). Bernard and Takako Skaggs were married in 1997 and have two adult children. Although the parties were married in the United States, they lived in Japan, Takako's home country, for about six years before permanently moving to Tucson in 2002. Before the parties were married, Bernard owned real property in Seattle, two investment accounts, and a bank account in Japan, and Takako had two bank accounts in Japan.

¶3 The parties purchased several properties throughout their marriage. At issue in this appeal are the property on Mountain Pueblo and the three properties in Florida. In 2006, Bernard purchased Mountain Pueblo, which was titled only in his name. In 2015, Bernard transferred the property to Ikiniak, LLC, which he had set up for liability purposes, because it was a rental property. However, in 2016 the parties moved into Mountain Pueblo. Bernard then transferred the property back into his name "as his sole and separate property" and Takako signed a disclaimer deed, purportedly disclaiming all "right, title, interest, claim or lien" in Mountain Pueblo. Mountain Pueblo was sold in late 2019 during the pendency of the dissolution proceedings, and at a temporary orders hearing, the parties agreed that Takako would receive all of the proceeds but Bernard would retain "a future claim to his interest in the proceeds." In May 2019, Bernard purchased three properties in Florida, two of which are titled as his "sole and separate property" and one of which is titled jointly with his brother-in-law.

¶4 In June 2019, Takako petitioned for dissolution of the marriage. After a two-day bench trial in 2021, the court issued its ruling.[1] As relevant here, the court characterized the Mountain Pueblo property as community property and ordered Takako to refund Bernard his community share. It similarly characterized the Florida properties as community property and awarded Bernard all community interest after the properties are appraised and Takako is paid her one-half community share. The court characterized Takako's Japanese bank accounts as her separate property and awarded them to her. It also found that Bernard failed to establish that Takako had engaged in community waste. The court awarded Takako a portion of her attorney fees.

¶5 Bernard appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Characterization of Property

¶6 Bernard argues the trial court erred by designating the Mountain Pueblo property and Florida properties as community property and the Japanese bank accounts in Takako's name as her separate property.

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[1] The trial court issued its "In Chambers Under Advisement Ruling/Decree of Dissolution" in June 2021 that included finality language under Rule 78(c), Ariz. R. Fam. Law P. In the same ruling, the court ordered "that the marriage of the parties is dissolved and each party is returned to the status of single persons, effective when a signed formal order is filed with the Clerk of the Court" and ordered Takako's counsel to submit the formal order within thirty days of the ruling. This order effectively negated the inclusion of Rule 78(c) language because "further matters remain pending." *See Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, ¶ 6 (App. 2016) ("The inclusion of [finality] language does not render an otherwise non-appealable order or judgment appealable as a final judgment."). It appears Takako's counsel never submitted a formal order. Bernard subsequently filed a Motion to Alter or Amend Judgment under Rule 83, Ariz. R. Fam. Law P. However, because there was not a final judgment, we treat this as a motion for reconsideration. *See* Rule 83(c)(1) (filing of Rule 83 motion requires "entry of judgment under Rule 78(b) or (c)"). Then in September 2021, the court issued its order denying Bernard's motion in part and granting it in part and again included finality language under Rule 78(c), however this time no matters remained undecided. As such, the party's marriage was dissolved, and this matter became ripe for appeal in September 2021.

The characterization of property is a question of law we review de novo, *Helland v. Helland*, 236 Ariz. 197, ¶ 8 (App. 2014), but in doing so, we view all evidence and reasonable conclusions in the light most favorable to supporting the trial court's characterization of property as community or separate, *Hatcher v. Hatcher*, 188 Ariz. 154, 157 (App. 1996). Property acquired before marriage by either spouse or during the marriage by "gift, devise or descent," including any "increase, rents, issues and profits of that property," is separate property. A.R.S. § 25-213(A). All other property acquired by either spouse during the marriage is presumed to be community property, A.R.S. § 25-211, unless clear and convincing evidence proves "that the property is inherently separate," *Nace v. Nace*, 104 Ariz. 20, 22-23 (1968). A property's separate or community status is established at the time of its acquisition and does not change unless altered by agreement or operation of law. *Bender v. Bender*, 123 Ariz. 90, 92 (App. 1979).

Mountain Pueblo Property

¶7 Bernard contends the trial court improperly characterized the property on Mountain Pueblo as community property because he purchased it with "sole and separate funds that are traceable as [his] separate property" and Takako "personally signed a disclaimer deed for the Mountain Pueblo property." Property purchased during the marriage with the proceeds from one spouse's separate property remains that spouse's separate property. *Potthoff v. Potthoff*, 128 Ariz. 557, 563 (App. 1981). The spouse challenging the community presumption has the burden of proving the property's separate nature. *Schickner v. Schickner*, 237 Ariz. 194, ¶ 22 (App. 2015). An enforceable disclaimer deed is clear and convincing evidence that rebuts the community presumption unless it was signed as a result of fraud or mistake. *Saba v. Khoury*, 250 Ariz. 492, ¶ 6 (App. 2021). To prove a claim for fraud, a party must show:

> (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) the speaker's intent that the information should be acted upon by the hearer and in a manner reasonably contemplated, (6) the hearer's ignorance of the information's falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury.

Taeger v. Cath. Fam. & Cmty. Servs., 196 Ariz. 285, ¶ 28 (App. 1999). Although a mutual mistake is generally required to avoid a contract, a unilateral mistake can constitute grounds for contract avoidance when "the other party knows or should have known of the mistake." *Parrish v. United Bank of Ariz.*, 164 Ariz. 18, 20 (App. 1990).

¶8 As it related to Mountain Pueblo, Takako signed two disclaimer deeds. The first was signed by her attorney-in-fact and was in connection with a property on Camino Padre Isidoro, which Bernard claimed he had bought with his sole and separate property and later refinanced to provide the funding for the purchase of Mountain Pueblo. The second deed was signed when Mountain Pueblo's title was transferred back from Ikiniak LLC to Bernard. The court found that Takako established both disclaimer deeds were unenforceable due to fraud or mistake. Although Takako was only required to prove either fraud or mistake, the court made findings as to both defenses, and on appeal, Bernard argues the evidence does not support either theory.[2] Therefore, we will address each theory in turn.

¶9 Bernard argues that Takako did not prove the disclaimer deeds were procured by mistake. At trial, Bernard claimed that Takako had "continued to sign [the properties] over to [him]" because she knew they were his "sole and separate property." But Takako testified she and Bernard never had any conversations that she was waiving her interest in the properties by signing the disclaimer deeds. And while Bernard testified about conversations concerning the disclaimer deeds, he conceded that Takako's intent to give him the properties was never one of the reasons she signed the deeds. The court therefore did not err by finding the disclaimer deeds were "void due to . . . mistake" because "[Bernard] did not tell

[2] Bernard also challenges the court's finding that there was no evidence that the Mountain Pueblo disclaimer deed was accompanied by the required contemporaneous conduct under *In re Estate of Sims*, 13 Ariz. App. 215 (1970). Assuming without deciding contemporaneous conduct of Takako's intent to convey her interest were required, our review of the record shows this requirement was met. First, the disclaimer deed was written and clearly set forth that the property was Bernard's separate property. *See Bender*, 123 Ariz. at 93. Second, the deed was recorded with the Pima County Recorder's Office. *See id.* at 93 & n.1. This however does not change that the disclaimer deed is unenforceable because it was procured by fraud and mistake.

[Takako], nor did she understand that [she] was waiving all interest in this property."

¶10 Bernard also challenges the trial court's finding that the disclaimer deeds were unenforceable because they were procured by fraud. He maintains Takako failed to show the element of falsity to support a claim of fraud because the deeds at issue were "true" in that they included language that the properties were his separate property purchased with his separate funds. Here, Takako testified that although she understands enough English for "ordinary conversation in daily life," she "need[s] interpreters" for "something official" because "otherwise [she doesn't] get anything." Pointing to texts from Takako, Bernard maintains that she "was savvy enough to insist . . . that she [was] able to read and understand a contract before signing." But this does not negate the evidence showing Takako believed the purpose and effect of her signing the disclaimer deeds were something different. Takako testified that she believed she was signing them for her protection, which was corroborated by Bernard's testimony. She also testified that Bernard was evasive in answering any further questions she had about the deeds. Considering the evidence, the court specifically found that all nine elements of fraud were met:

> [(1) Bernard] in all instances regarding the Disclaimer Deeds and Power of Attorney where he made representations to [Takako] as to why he wanted her to sign these documents, [(2)] his representations were false by his omission of information that by signing these documents, she was giving up her community interest in this property and in their retirement; [(3)] that his representation and/or omission was material; [(4)] that he had knowledge of its falsity; [(5)] that his intent was that it should be acted upon by [Takako] in the manner reasonably contemplated; [(6) Takako]'s ignorance of its falsity; [(7) Takako]'s reliance on this purported truth; [(8)] her right to rely on this truth and [(9) Takako]'s proximate and consequence injury.

¶11 We conclude that the trial court's finding of fraud is supported by the record. To the extent its findings were based on assessing the witnesses' credibility and weighing conflicting evidence, we will not second guess its determinations on appeal. As the trier of fact, the trial

court was in the best position to make those determinations. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13 (App. 1998) (we defer to trial court for credibility determinations and weighing conflicting evidence); *Goats v. A. J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171 (1971) ("The trial court is in the best position to judge the credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom."); *see also Hurd v. Hurd*, 223 Ariz. 48, ¶ 16 (App. 2009) ("Even though conflicting evidence may exist, we affirm the trial court's ruling if substantial evidence supports it."). Accordingly, the court did not err by finding that Takako proved the disclaimer deeds were void by clear and convincing evidence.

¶12 Absent a valid disclaimer deed, we examine whether substantial evidence supported the trial court's finding that Bernard did not prove by clear and convincing evidence that he had purchased Mountain Pueblo "with only his sole and separate assets."[3] At trial, Bernard established that before the parties were married, he had purchased a condo in Seattle. He then testified he had sold the Seattle condo after the parties were married and had used the proceeds to purchase a property on Camino Padre Isidoro in Tucson. In support of his claim, Bernard produced an email from his loan officer in which she stated that she "will need a copy of the closing statement when [the Seattle property] closes." Bernard maintains that her request was relevant "[b]ecause she wanted to know where the down payment was coming from." However, this claim is only supported by his uncorroborated testimony that the purchase of Camino Padre Isidoro was "contingent upon the sale" of the Seattle condo because he "wanted to use the down payment from the sale." Bernard did not produce evidence, such as bank statements of relevant deposits and corresponding withdrawals, showing that the closing costs for Camino Padre Isidoro were funded by the proceeds from the Seattle condo. In addition, when asked what the sale proceeds were from the Seattle condo, he replied that he "d[idn't] recall accurately, but . . . would guess it's

[3]In designating Mountain Pueblo as community property, the trial court also found that Bernard failed to meet his burden of proving "community funds were not used to cover the costs of the properties." We do not address this finding because the use of community funds does not factor into the property's characterization but instead would give the community a right to an equitable lien against the property if it were characterized as separate. *See Drahos v. Rens*, 149 Ariz. 248, 249-50 (App. 1985) (community has right to equitable lien against separate property when it contributes community funds, "even though the character of that property has not changed").

probably right around $60,000 or more." He then testified that he had refinanced Camino Padre Isidoro and claimed he had used the proceeds to fund the deposit for Mountain Pueblo. However, he once again did not introduce any evidence indicating the source of the funds for Mountain Pueblo's closing costs, other than his testimony. Taken together, we cannot say the trial court erred by concluding that Bernard failed to rebut the community presumption for Mountain Pueblo.

Florida Properties

¶13 Bernard contends the Florida properties were his sole and separate properties because he could trace their purchase to funds he had prior to marriage. The trial court, however, found that he did not prove this by clear and convincing evidence,[4] and because the property was purchased during marriage, it was a community asset.

¶14 The evidence at trial showed that about a year after the parties were married, Bernard purchased a property on Water Street. He maintains that although the parties had discussed jointly owning Water Street, they ultimately decided against it because Takako "didn't want to be involved in the purchase of real estate." The trial court, however, specifically found "it was the intention of the parties to purchase [Water Street] as community property." Whether the parties intended to purchase Water Street jointly is a question of fact for the trial court to resolve. *See Chopin v. Chopin*, 224 Ariz. 425, ¶ 7 (App. 2010). Sufficient evidence supports the court's finding. Takako signed the purchase contract and loan application for this property. Emails between Bernard and the loan officer indicate that the parties had intended to add Takako to the title at a later date because she could not be added to the mortgage without a social security number. Although Bernard also claimed that he had used separate funds from two of his pre-marriage financial accounts to purchase Water Street, the court found he did not provide sufficient evidence to support this claim. We agree. The purchase contract does list the two accounts as Bernard's assets, but the only evidence

[4]Bernard sold the Water Street property and used the proceeds to purchase the Florida properties. Takako had signed a disclaimer deed for the Water Street property. As discussed above, a valid disclaimer deed would rebut the community presumption. *See Saba*, 250 Ariz. 492, ¶ 6. The court found the disclaimer deed was procured by fraud or mistake and therefore was not valid. Because Bernard does not challenge this finding on appeal, we will not address it. *See Torrez v. Knowlton*, 205 Ariz. 550, n.1 (App. 2003) (issue not raised on appeal deemed abandoned).

that these accounts had been funded with his sole and separate property was his uncorroborated testimony.

¶15 In 2019, Bernard purchased three properties in Florida using the proceeds from Water Street as a "1031 exchange."[5] Because the Florida properties were purchased during the marriage with community funds, the court did not err in characterizing the Florida properties as community property.

Japanese Bank Accounts

¶16 Bernard next argues Takako did not produce sufficient evidence to establish that the funds in her Japanese bank accounts were her separate property. He maintains that Takako failed to produce translated bank statements, as she was ordered by the trial court to do, and "can only surmise that the reason [she] failed to provide any documentation on these accounts is that there is significant community funds in the accounts." At trial, Bernard testified he was concerned when Bank of America called because it was trying to reach Takako to approve an $18,000 transfer to her bank in Japan. When asked if the Bank of America statements ever showed an $18,000 transfer, he answered in the negative, claiming the statements "didn't go back far enough." But he conceded that he subpoenaed them and could have requested earlier statements. Takako testified she never deposited these funds into another account and they were instead spent for the community's benefit. Although the court acknowledged that Takako failed to produce the Japanese bank statements it ordered relating to the transactions and current balances of these accounts, it found there was insufficient evidence to support Bernard's allegations that she had comingled community and separate funds. In light of the conflicting testimony, we defer to the trial court and do not reweigh the evidence on appeal. *See Hurd*, 223 Ariz. 48, ¶ 16.

¶17 Furthermore, in determining the two Japanese bank accounts were Takako's separate property, the trial court found that these accounts were funded from her pre-marital work, gifts from family, and an inheritance. Takako's testimony supports this finding. Bernard acknowledged that Takako's income from her work prior to marriage had been deposited into her separate accounts. He also confirmed that Takako received an inheritance from her grandmother. In light of this evidence, the

[5]A 1031 exchange is a transaction under 26 U.S.C. § 1031 "in which an asset is sold and the proceeds of the sale are then reinvested in a similar asset." *Jenkins v. Jenkins*, 215 Ariz. 35, ¶ 4 (App. 2007).

court did not err by characterizing the two Japanese bank accounts as Takako's sole and separate property.

Community Waste

¶18 Bernard contends the trial court erred by finding there was insufficient evidence to sustain his allegation that Takako engaged in community waste. In support of his argument, he essentially reasserts the same facts as his commingling claim relating to Takako's Japanese bank accounts. When apportioning community property, a court can consider "excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common." A.R.S. § 25-318(C); *Gutierrez*, 193 Ariz. 343, ¶ 6. The spouse alleging community waste has the burden to make a prima facie showing supporting the claim; the other spouse then has the burden to rebut the showing of waste "because all of the evidence relative to the expenditures is generally within the knowledge, possession, and control of the spending spouse." *Gutierrez*, 193 Ariz. 343, ¶ 7.

¶19 Bernard argues that in just under 3.5 years, Takako withdrew $109,869 from the Bank of America account in her name without his knowledge and without a "viable explanation" how the funds were spent. When asked about how the withdrawals were used, Takako testified that she had paid for most of the family's daily living expenses, as well as trips to Japan for her and Bernard, that she paid for in cash. And whenever a credit card had been required for payment, she used Bernard's card and then reimbursed him in cash. Bernard denied that Takako had ever reimbursed community expenses with cash. However, he did characterize the family's monthly spending as "unusual," and admitted it was not just Takako spending large amounts of money, they "were both doing it." Bernard also presented credit card statements showing Takako did not exclusively use cash for the family's day-to-day expenses. Given the conflicting evidence, we cannot say the trial court erred by finding Bernard failed to make a prima facie showing that Takako engaged in community waste. *See id.* ¶ 13 (we defer to trial court's resolution of conflicting evidence and affirm findings if supported by reasonable evidence).

Attorney Fees

¶20 Bernard argues the trial court erred in awarding Takako attorney fees because "[t]here is neither a substantial difference in financial resources that favors [him] nor was [he] unreasonable in his positions" as required by A.R.S. § 25-324(A). We review a trial court's award of attorney

fees under § 25-324(A) for an abuse of discretion. *Mangan v. Mangan*, 227 Ariz. 346, ¶ 26 (App. 2011).

¶21 The trial court expressly considered the financial resources of the parties and the reasonableness of their positions. *See* § 25-324(A). On appeal, Bernard challenges the court's finding that he had "substantially more resources than [Takako]." Although Bernard questions the court's findings relating to its award of spousal maintenance, he does not challenge the award of spousal maintenance on appeal. And in making that determination, the court also found that "[Bernard's] financial resources . . . far exceed that of [Takako's]." At trial, the parties provided evidence of their financial resources through their financial affidavits and testimony. Although the court did not detail the parties' financial resources in awarding attorney fees, we presume it considered the relevant evidence. *See In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 21 (App. 2011). Based on this evidence, we cannot say the court abused its discretion.

¶22 The trial court awarded Takako "only a portion of her attorney fees and costs," in part because she failed to disclose the statements from her Japanese bank accounts. Bernard contends that Takako's failure to disclose these documents should have precluded her from receiving any portion of her attorney fees. He does not cite any authority for his position. Section 25-324(A) requires the court to *consider* the "reasonableness of the positions each party has taken throughout the proceedings." Here, the court found both parties were deceptive and stated that this "affects [its] determination of an award and an amount of attorney fees." Once again, we defer to the court's findings in the face of conflicting evidence and do not reweigh evidence on appeal. *Hurd*, 223 Ariz. 48, ¶ 16. Because we see no abuse of discretion, we affirm its award of attorney fees to Takako.

Attorney Fees on Appeal

¶23 Both parties requested attorney fees on appeal under § 25-324 and Rule 21(a), Ariz. R. Civ. App. P. Reasonable attorney fees may be awarded pursuant to § 25-324(A) after considering the parties' financial resources and the reasonableness of their positions. However, "an applicant need not show both a financial disparity and an unreasonable opponent in order to qualify for consideration for an award." *Magee v. Magee*, 206 Ariz. 589, n.1 (App. 2004). In addition, the prevailing party is entitled to recover their costs. A.R.S. § 12-341.

¶24 On appeal, the parties did not provide current financial affidavits, and we therefore cannot determine if a financial disparity

remains between them. However, we agree with the trial court that Bernard's position below was unreasonable because he "participated in deceptive and misleading practices in the marriage with the goal or the result of depriving [Takako] of her community interest in property." He has continued to assert the same unreasonable positions on appeal. We therefore award Takako her reasonable attorney fees and costs on appeal upon her compliance with Rule 21. *See* § 25-324(A) (fees); § 12-341 (costs).

Disposition

¶25 For the foregoing reasons, we affirm the trial court's rulings.