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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GRETCHEN H. QUINN, Petitioner/Appellee, v. JAMES T. SHERMAN, Respondent/Appellant.	2 CA-CV 2009-0033 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. DO-200601206

Honorable Brenda E. Oldham, Judge

AFFIRMED IN PART; VACATED IN PART; AND REMANDED

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B R A M M E R, Judge.

¶1 Appellant James Sherman appeals from the trial court's order dividing assets following a dissolution decree ending his marriage to appellee Gretchen Quinn. Sherman argues the court erred by awarding Quinn spousal maintenance, in its division of property, ordering Sherman to maintain a long-term care insurance policy, and awarding Quinn her attorney fees. We vacate in part the court's division of certain property, and its attorney fee award, but affirm the judgment in all other respects.

Factual and Procedural Background

¶2 Sherman fails to provide citations to the record on appeal to support most of the facts asserted in his brief and thus has not complied with Rule 13(a)(4), Ariz. R. Civ. App. P. We therefore disregard his unsupported statements and draw our recitation of the facts from Quinn's answering brief and the record on appeal. *See Ariz. Dep't Econ. Sec. v. Redlon*, 215 Ariz. 13, ¶ 2, 156 P.3d 430, 432 (App. 2007). We view those facts in the light most favorable to upholding the trial court's ruling. *See Kohler v. Kohler*, 211 Ariz. 106, ¶ 2, 188 P.3d 621, 622 (App. 2005).

¶3 Sherman and Quinn married in February 1973. Quinn filed a petition for dissolution in October 2006. The trial court signed a consent decree in January 2008 dissolving the marriage but several issues remained unresolved and were left to be determined at trial. The issues ultimately relevant to this appeal were: (1) whether Sherman had contributed his separate funds for the construction of a cabin the parties had later sold, and thus whether Sherman properly could impose a lien against the sale proceeds;

(2) whether a vacant lot (the Linden Lot) was community property or Sherman's separate property; (3) whether the court should award Quinn spousal maintenance; (4) whether several investment and bank accounts, specifically "the 8300 account" and the "AXA, Northbrook, Best of America, ING, Pacific Life, and . . . First Penn Pacific" insurance accounts, were Sherman's separate property; (5) the value of the marital residence; (6) whether either party should be awarded some or all of their attorney fees; and (7) whether any commission paid or owed to Sherman pursuant to a contract listing for sale a parcel of real estate (the Pikes Contract) was community property or Sherman's separate property.

¶4 The crux of Sherman's position that the investment and insurance accounts were his separate property was that, during the marriage, he had purchased and sold several real estate parcels to which Quinn had disclaimed any interest. Sherman reasoned the proceeds from the sales of those parcels were his separate property and, because he had used those proceeds to purchase the investment and insurance accounts, they remained his separate property. He also claimed he had used those funds to construct the cabin and was therefore entitled to reimbursement from the community, and that Quinn had signed a disclaimer deed regarding the Linden Lot, making it his separate property. Sherman asserted any commission paid regarding the Pikes Contract was his separate property because the contract was "an executory contract[] [that] has not yet been executed[]" and he is therefore not yet entitled to any commission "and may never be."

¶5 On the final day of trial, Sherman admitted that the ING and Northbrook accounts were community property. In the findings of fact and conclusions of law the trial court entered in March 2008 (March 21 ruling), about two months after trial, the court determined the disclaimer deeds Quinn had signed created a presumption the real estate parcels to which they applied were separate property. But the court also found Quinn had rebutted that presumption with evidence that Sherman had financed the purchases with community lines of credit and had deposited the proceeds from the sales of those parcels into the 8300 account, which the court found was community property, and claimed the sale profits "as income on the couple[s'] federal joint income tax return." The court also found Sherman had failed to present evidence "from which [the court could] trace which portion of the combined funds was separate and which was community. In addition, the funds that [Sherman] claims were his sole and separate funds, when traced, are traced back to debts owed by the community as community lines of credit."

¶6 Thus, the trial court concluded the investment and insurance accounts and the Linden Lot were community property, as were the funds used in the cabin's construction. It awarded each party half the value of the 8300 account, the ING, Northbrook, AXA, and Best of America accounts, and half the proceeds from the sale of the cabin. The court also ordered Sherman to remove any lien he had asserted on those proceeds and to pay Quinn $25,000 for her share of the Linden Lot. The court awarded the First Penn account to Sherman and the Pacific Life account to Quinn. It determined any commission earned on the

Pikes Contract was community property and ordered Sherman to pay Quinn half of any amount he received. The court also determined the value of the marital residence to be $630,000 and ordered Sherman to refinance the home and "buy [Quinn] out of her 50% interest in the amount of $315,000.00." It stated that if Sherman was unable to refinance the marital residence within sixty days, it would appoint "a Real Estate Commissioner to have the house appraised and to list and manage the sale of the home." Finally, the court ordered Sherman to pay Quinn $1,250 per month in spousal maintenance and awarded her attorney fees and costs of $45,000.[1] This appeal followed.

Discussion

Spousal Maintenance Award

¶7 Sherman first asserts the trial court erred in awarding Quinn spousal maintenance because the court failed to consider "income-producing property [Quinn] was awarded[,]" assets she retained and her ability to earn an income. He also contends, excluding consideration of the spousal maintenance award, the parties' monthly incomes would be roughly equivalent. We review an award of spousal maintenance for an abuse of discretion and view the evidence in the light most favorable to sustaining the trial court's ruling. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998). We will

[1]The March 21 ruling awarded Quinn her attorney fees and costs but did not determine the amount. Sherman nonetheless appealed the ruling, and we dismissed the appeal for lack of jurisdiction. The court entered a final judgment determining the amount of attorney fees and costs in November 2008.

affirm the court's judgment if there is any reasonable evidence to support it. *Id*. "[W]e first consider whether the spouse 'meets the statutory requirements for maintenance set out in A.R.S. § 25-319(A). Second, we must review the amount and duration of the award to determine whether the trial court properly considered the factors listed in A.R.S. § 25-319(B)'" *Id.* ¶ 15, *quoting Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984).

¶8 Section 25-319(A) permits a trial court to award spousal maintenance "for any of" four enumerated factors, including whether the spouse seeking spousal maintenance "[h]ad a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient." § 25-319(A)(4). In its March 21 ruling, the trial court found Quinn was entitled to an award of spousal maintenance pursuant to § 25-319 because "[t]he marriage was one of long duration and [Quinn] is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient in light of the standard of living during the marriage." § 25-319(A)(4). Sherman does not dispute his marriage to Quinn, which lasted over thirty years, was one of long duration. But he asserts Quinn, who was sixty years old at the time of trial, was nonetheless able to earn an adequate income.

¶9 Quinn testified at trial that she and Sherman mutually had agreed Quinn would retire from teaching in 2002. Her teaching certificate had since expired and she would have needed to take an additional semester of classes to resume teaching full time, although she

could, "if [she] had to," substitute teach without renewing her certificate. She suffered from health problems, including high blood pressure and a recent knee replacement surgery, and was taking medications daily, but conceded these health issues probably would not preclude her from teaching.[2] When asked whether she felt there were sufficient employment opportunities for her outside the home, Quinn had replied "there are jobs out there" and "there are things that I could do." She similarly acknowledged that there was a demand for bilingual teachers, and she "speak[s] Spanish pretty well." She indicated, however, that she did not feel that she could return to teaching full time. Viewing this evidence in the light most favorable to upholding the trial court's ruling, we cannot say the court erred.

¶10 Sherman suggests the trial court erred in finding Quinn was of an age that may preclude her from finding adequate employment, because she and Sherman "were only nineteen months different in age," she "voluntarily retired from her employment early" when she was "fully capable of continuing to work and, to this date, remains fully capable of employment" and the spousal maintenance award forces Sherman out of a "true retirement." The record reflects, however, Sherman and Quinn had mutually agreed that Quinn would retire in 2002 and her teaching certificate had since expired. The record also reflects that,

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[2]Sherman seems to be arguing that it was inequitable for the trial court to award maintenance because Quinn "specifically testified that her health issues probably did not preclude her from teaching," and Sherman "testified that he has had heart problems for at least six years, and that they had worsened over the past months." This argument ignores other evidence in the record indicating Quinn's certificate had expired, and Sherman was employed part-time at the time of trial. In any event, this evidence does not compel reversal of the court's maintenance award.

even though Sherman had retired from teaching, he had engaged in other income-producing activities since his retirement. The record thus supports the court's determination that Quinn was eligible for spousal maintenance. To the extent Sherman argues the maintenance award punishes him for not retiring early, he ignores that, in determining spousal maintenance, a trial court may consider the standard of living the marriage afforded the parties. § 25-319(B)(1). The court did not abuse its discretion in determining Quinn was of an age that may preclude her from gaining adequate employment, and was therefore entitled to spousal maintenance pursuant to § 25-319(A)(4).

¶11 Upon initially finding a spouse eligible for spousal maintenance pursuant to § 25-319(A), a trial court may then determine the amount and duration of the maintenance award by evaluating "all relevant factors," including the thirteen factors enumerated in § 25-319(B). The maintenance order must be in an amount and duration that the court "deems just." § 25-319(B). Even if a court does not explicitly provide the basis for its judgment, we presume the court fully considered the evidence before issuing its decision. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004).[3]

[3]Sherman appears to argue that, because one of the trial court's findings in its March 21 ruling echoed the language of § 25-319(A)(4), it necessarily failed to consider the relevant factors enumerated in § 25-319(B). This argument fails to account for the evidence in the record supporting the court's maintenance award, as well as the presumption that the trial court considered all the evidence before it. *See Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d at 880-81.

¶12 In its March 21 ruling, the trial court ordered Sherman to pay Quinn $1,250 in spousal maintenance per month commencing May 1, 2008, and terminating upon Quinn's death or remarriage. Previously, on September 6, 2007, the court had ordered Sherman to pay Quinn temporary spousal maintenance in the amount of $2,000 per month, which commenced retroactively on June 1, 2007. In ordering temporary spousal maintenance, the court considered "all of the facts, exhibits and testimony, including the standard of living the couple established during the marriage, the duration of the marriage, the age, employment history and earning ability of [Quinn], and the ability of [Sherman] to meet his needs while meeting the needs of [Quinn]." *See* § 25-319(B)(1)-(4).

¶13 The facts noted above in support of the trial court's March 21 ruling that Quinn was eligible for spousal maintenance pursuant to § 25-319(A)(4) similarly support the amount and duration of the maintenance the court ultimately awarded. *See* § 25-319(B)(2) (marriage duration), 25-319(B)(3) (age, employment history, and earning ability of spouse seeking maintenance), and 25-319(B)(10) (time necessary to acquire sufficient education to enable party seeking maintenance to find appropriate employment). In setting the amount of temporary spousal maintenance, the court explicitly considered the factors enumerated in § 25-319(B)(1)-(4). The court then awarded a lesser amount of spousal maintenance in its March 21 ruling, indicating it had reweighed the evidence in light of the division of community assets. *See* § 25-319(B)(5) (comparative financial resources of spouses, including comparative earning abilities), 25-319(B)(9) (financial resources of spouse seeking

maintenance, including marital property apportioned to that spouse and ability to meet own needs).

¶14 Sherman asserts his and Quinn's incomes were roughly equal following the court's March 21, 2008 division of assets, and that the court thus erred in ordering spousal maintenance. But his references to the record in support of that conclusion are either incorrect, incomplete, or entirely absent. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument must contain citation to parts of record supporting it); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (claims unsupported by authority or citation to record waived on appeal), *citing State v. Moody*, 208 Ariz. 424, 425 n.9, 94 P.3d 1119, 1147 n.9 (2004). We are therefore unable to verify his assertion that "[a]s a result of the court's award of spousal maintenance, [Quinn] will have monthly income of approximately $4,274.16 and [Sherman] will be left with $1,898.68." "Judges are not like pigs, hunting for truffles buried in [the record]." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). In any event, there is ample evidence in the record that Sherman had income sources Quinn did not. Sherman earned commissions from real estate listing agreements, had bought and sold real estate, is part owner of a football camp, and works part time doing energy audits.

¶15 Sherman refers us to his testimony that his tax returns show that he earned an average of only $3,000 per year from the football camp, but fails to specify where in the record we might find these returns. He also refers us to his testimony that he suffered a loss on real estate investments in three out of the previous four years, but does not refer us to

evidence in the record demonstrating the amounts of either his losses or profits. Finally, he refers us to his testimony that, at the time of trial, he had no other income aside from his part-time employment and equally divided retirement accounts. This testimony, however, fails to acknowledge the relevance of the other income-producing activities he engaged in before trial. In short, Sherman has failed to direct us to anything in the record that would compel us to reverse the trial court's award of spousal maintenance to Quinn.

¶16 Citing *Lindsay v. Lindsay*, 115 Ariz. 322, 565 P.2d 199 (1977), Sherman argues the trial court erred in awarding Quinn spousal maintenance because she had "made no effort to seek employment during the pendency of the trial."[4] But our supreme court in *Lindsay* did not characterize a spouse's effort to obtain employment after separation as dispositive, but rather evaluated such effort as one factor among many to be considered. *Id.* at 326, 565 P.2d at 203. Sherman additionally notes that, in determining the duration of a maintenance award, the trial court may tailor the award to "prevent an able-bodied spouse from living off the labors of the former spouse." *Nelson v. Nelson*, 114 Ariz. 369, 373, 560 P.2d 1276, 1280 (App. 1977), *citing Porreca v. Porreca*, 13 Ariz. App. 340, 341, 476 P.2d 684, 685 (1970). He agrees, however, that furthering the goal of financial independence through fixed-term, transitional maintenance, must be balanced "'with some realistic appraisal of the probabilities that the receiving spouse will in fact subsequently be able to support herself in some

[4]*Lindsay* was overruled on other grounds by *Schroeder v. Schroeder*, 161 Ariz. 316, 323, 778 P.2d 1212, 1219 (1989).

reasonable approximation of the standard of living established during the marriage.'" *Hughes v. Hughes*, 177 Ariz. 522, 523-24, 869 P.2d 198, 199-200 (App. 1993), *quoting Rainwater v. Rainwater*, 177 Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993). Accordingly, a trial court may award maintenance "until death or remarriage" in appropriate circumstances. *Id.* at 523, 869 P.2d at 199. The record here indicates that this is one such appropriate circumstance, and supports the trial court's award of indefinite spousal maintenance. Thus, neither the amount nor duration of the spousal maintenance ordered here constituted an abuse of the court's discretion.

Valuation of Marital Residence

¶17 Sherman next asserts the trial court erred both in valuing the marital residence at $630,000 based on "outdated appraisals" and in ordering Sherman to pay Quinn half that amount. However, Sherman again fails to cite either evidence in the record supporting his arguments or any relevant legal authority. *See* Ariz. R. Civ. App. P. 13(a)(6). Nothing in the record suggests the appraisals the court relied upon were inaccurate and, indeed, the court noted in its March 21 ruling that the parties had agreed another appraisal should not be performed. We therefore do not address this argument further. *See Ritchie*, 221 Ariz. 288, ¶ 62, 211 P.3d at 1289 (claims unsupported by authority or citation to record may be waived on appeal), *citing Moody*, 208 Ariz. at 425 n.9, 94 P.3d at 1147 n.9; *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App. 2000) (declining to consider "bald

assertion . . . offered without elaboration or citation to any constitutional provisions or legal authority").

¶18 Sherman also contends the value of the residence has dropped precipitously since the trial court entered its March 21 ruling and the residence "is [now] not even worth" the amount he has been ordered to pay Quinn for her share. Rather than cite to the record in support of his argument, however, Sherman cites to documents contained in an appendix included with his opening brief. But he does not tell us where, or if, those documents may be found in the record on appeal. We therefore disregard them. In any event, Sherman did not request the court to reconsider its valuation of the residence before entering final judgment. Nor did he seek relief from the judgment pursuant to Rule 60(c), Ariz. R. Civ. P. Accordingly, there is nothing for us to review.[5]

[5]After Sherman failed to refinance the marital residence and pay Quinn her share as ordered, the trial court appointed a real estate commissioner to manage the residence's sale. Sherman argues the court erred in failing to apply a homestead exemption to any proceeds from that sale when it occurs. *See* A.R.S. §§ 33-1101 through 33-1105. Because Sherman failed to raise this argument below, we do not address it. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007). We additionally reject his suggestion the court actually intended that Quinn receive half the proceeds from a sale irrespective of the final sale price, instead of $315,000 as the court had ordered. Even assuming the March 21 ruling was unclear, Sherman never requested clarification. Moreover, after appointing the real estate commissioner, the court issued writs of garnishment for an amount including the $315,000 it ordered Sherman to pay Quinn for the marital residence, which suggests the court intended Sherman pay Quinn that amount irrespective of the residence's ultimate sale price.

Effect of Disclaimer Deeds

¶19 During the marriage, Sherman purchased several real estate parcels using, at least in part, community assets or lines of credit. Quinn, however, signed documents disclaiming any interest in those parcels. Sherman apparently sold all but one of those parcels—the Linden Lot—and asserts he used the proceeds to purchase the AXA insurance account and pay for the construction of the cabin.[6]

¶20 The trial court determined the disclaimer deeds Quinn had signed "create[d] a presumption that the property [was] intended to be [Sherman's] sole and separate property. . . ." The court found, however, that the evidence at trial had rebutted that presumption because

> the Community was liable for the tax consequences on the property investments[,] . . . the tax consequences of the profits from the sale of the property[,] . . . [and] the debt used to finance the property investments[, and because] the profits from the sale of the property investments w[ere] deposited into a community bank account and later used to purchase the assets currently [in dispute].

¶21 As we understand his argument, Sherman does not dispute the relevant factual findings, but asserts instead the trial court erred as a matter of law by concluding the

[6]In the trial court, Sherman also asserted the proceeds of the real estate sales were used to fund several other accounts. He does not, however, argue on appeal that the trial court's characterization of those accounts as community property was error.

disclaimer deeds created only a presumption the parcels were Sherman's separate property.[7] Sherman argues the disclaimer deeds conclusively establish the real estate parcels were his separate property. Thus, he reasons, any property he purchased with the proceeds from the sales of those parcels—specifically the AXA account and the Linden Lot—is also his separate property. He also asserts the funds used to construct the cabin were the proceeds of the real estate sales and he is therefore entitled to reimbursement of those funds.

¶22 "[A]ll property acquired during marriage, except that acquired by gift, devise or descent, is presumed to be community property." *Am. Express Travel Related Svcs. Co. v. Parmeter*, 186 Ariz. 652, 653, 925 P.2d 1369, 1370 (App. 1996), *citing Sommerfield v. Sommerfield*, 121 Ariz. 575, 577, 592 P.2d 771, 773 (1979). A party may rebut that presumption by presenting clear and convincing evidence of the property's separate nature. *Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995). "'Property takes its character as separate or community at the time [of acquisition] and retains [that] character' throughout the marriage." *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, ¶ 5, 169 P.3d 111, 113 (App. 2007)*, quoting Honnas v. Honnas*, 133 Ariz. 39, 40, 648 P.2d 1045, 1046 (1982); *see also Everson v. Everson*, 24 Ariz. App. 239, 243, 537 P.2d 624, 628 (1975) ("[P]roperty retains [its] separate status, though exchanged during marriage for other property."). Although we review a trial court's division of property for an abuse of discretion, the court's

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[7]Sherman again fails to provide complete references to the record in support of this argument. But, because his argument primarily presents a question of law, we will address its merits.

characterization of property as community or separate is a conclusion of law, which we review de novo. *See In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000).

¶23 We agree with Sherman that the trial court erred when it found the disclaimer deeds created a rebuttable presumption the real estate parcels were his separate property. The disclaimer deeds state the real estate parcels were Sherman's separate property purchased with his separate funds. Absent fraud or mistake, valid disclaimer deeds like the ones Quinn signed rebut the community property presumption and establish the identified property's separate character. *See Bell-Kilbourn*, 216 Ariz. 521, ¶ 11, 169 P.3d at 114; *Bender v. Bender*, 123 Ariz. 90, 92-93, 597 P.2d 993, 995-96 (App. 1979).[8] Thus, even after Sherman sold those properties, the proceeds retained their separate character unless subsequently altered by agreement of the parties or operation of law.[9] *See Armer v. Armer*, 105 Ariz. 284, 287, 463 P.2d 818, 821 (1970); *Bell-Kilbourn*, 216 Ariz. 521, ¶ 5, 169 P.3d at 113.

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[8]Quinn does not argue the disclaimer deeds she signed are materially different than those addressed in *Bell-Kilbourn* and *Bender*, nor do they appear to be. *See Bell-Kilbourn*, 216 Ariz. 521, n.2 & ¶ 10, 169 P.3d at 113 n.2 & 114; *Bender*, 123 Ariz. at 93, 597 P.2d at 996.

[9]When separate property is commingled with community property, as the proceeds from the sale of the real estate parcels were here, the burden falls on Sherman to prove he used his separate funds from the commingled account to purchase the properties. *See In re Marriage of Cupp*, 152 Ariz. 161, 164, 730 P.2d 870, 873 (App. 1986). Although the trial court found Sherman had failed to show he had used his separate funds to purchase the investments and other property, it is not clear how much of that finding was dependent on the court's determination that the disclaimer deeds, if valid and enforceable, did not render the real estate sale proceeds Sherman's separate property. Thus, we cannot affirm the court's ruling based on that finding.

¶24 Quinn argues *Bell-Kilbourn* is distinguishable because Sherman's real estate purchases were financed with community lines of credit and also because the only purpose of the disclaimer deeds here was to "facilitate the ease of transfer." But the court in *Bell-Kilbourn* made clear that the underlying reasons for disclaiming the property and whether the assets—or debts—used to purchase the property were separate or community property are not relevant to whether a valid, unambiguous disclaimer deed makes the property separate. *See* 216 Ariz. 521, ¶ 10, 169 P.3d at 114; *cf. Potthoff v. Potthoff*, 128 Ariz. 557, 561, 627 P.2d 708, 712 (App. 1981) (property purchased on credit that acquires status of separate property retains that status regardless whether community or separate funds used to pay debt). Extrinsic evidence of the parties' intent and the character of the property used to purchase the real estate parcels is relevant to whether the deeds are voidable for fraud or mistake, but not to whether a disclaimer deed establishes the property's character. *See Bender*, 123 Ariz. 90, 93-94, 597 P.2d 993, 996-97 (App. 1979) (fraud and mistake must be pleaded affirmatively).

¶25 Quinn additionally relies on our decision in *Bourne v. Lord*, 19 Ariz. App. 228, 231, 506 P.2d 268, 271 (1973), to support her argument that a trial court is permitted to look beyond a deed's unambiguous language to determine a property's true status. But *Bell-Kilbourn* is the most recent authority on the effect of unambiguous, enforceable disclaimer deeds and does not permit a trial court to consider other evidence of the parties' intent. "Absent a decision by the Arizona Supreme Court compelling a contrary result, a decision

by one division of the Court of Appeals is persuasive with the other division." *Scappaticci v. Sw. Sav. & Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983). We will depart from our prior decisions only if they were "'based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.'" *Id.*, *quoting Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974). Quinn does not argue *Bell-Kilbourn* or its predecessor, *Bender*, were wrongly decided.[10] In any event, although we broadly stated in *Bourne* that "[r]ecitals in a deed are merely prima facie evidence of ownership[,]" there, the deed apparently conveyed to both spouses real property purchased with only one spouse's separate funds. 19 Ariz. App. at 231, 506 P.2d at 271. This created a rebuttable presumption the transfer was a gift. *See In re Marriage of Cupp*, 152 Ariz. 161, 164, 730 P.2d 870, 873 (App. 1986). Here, according to the disclaimer deeds,

[10]We nonetheless are troubled by several aspects of the reasoning in these cases. Division One describes disclaimer deeds as contracts, binding on both parties. *Bell-Kilbourn*, 216 Ariz. 521, ¶ 11, 169 P.3d at 114; *Bender*, 129 Ariz. at 94, 597 P.2d at 997. Whatever these deeds are, they are not contracts, as they apparently lack consideration or any indication of mutual assent. *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, ¶ 10, 132 P.3d 825, 828 (2006). We recognize that appellate courts will typically not look beyond the language of unambiguous deeds to determine parties' true intent, *see Spurlock v. Santa Fe Pac. R.R. Co.*, 143 Ariz. 469, 474, 694 P.2d 299, 304 (App. 1984), but observe that courts have done so to determine whether property is separate or community because a conveyance between married parties creates a presumption of a gift. *See Armer*, 105 Ariz. at 288, 463 P.2d at 822; *Marriage of Cupp*, 152 Ariz. at 164, 730 P.2d at 873; *Bourne*, 19 Ariz. App. at 231, 506 P.2d at 271. If Quinn had, as the trial court found, an interest in the assets used to purchase the real estate parcels, the disclaimer deed effectively conveyed that interest to Sherman. When a disclaimer deed essentially acts as a quit-claim deed, it is, in our view, more sensible to treat it as a presumed gift, as the trial court apparently did here. *Bell-Kilbourn* and *Bender*, however, suggest that is not the law.

there was no conveyance of property between Sherman and Quinn and therefore no presumption arose.[11]

¶26 We also find unavailing Quinn's reliance on our supreme court's decision in *Armer*. The court stated, albeit in dicta, that the quit-claim deed in question did not constitute a gift because it was signed solely for tax purposes and the signer had no intention "to alienate her interest." *Armer*, 105 Ariz. at 288, 463 P.2d at 822. But, unlike a disclaimer deed, a quit-claim deed is a conveyance and therefore presumptively a gift; considering whether there was donative intent was appropriate. *See Bender*, 123 Ariz. at 94, 597 P.2d at 997; *Marriage of Cupp*, 152 Ariz. at 164, 730 P.2d at 873.

¶27 Despite Sherman's assertion to the contrary, however, Quinn did not sign a disclaimer deed for the Linden Lot. Although the deed Quinn signed for that lot is titled "Disclaimer Deed," it states that Quinn quitclaimed her interest in that property to Sherman. Unlike the other disclaimer deeds she signed, this one did not purport to disclaim any past interest in the property and therefore does not fall under the rule of *Bell-Kilbourn* and *Bender*. A quit-claim deed, unlike a disclaimer deed, does not establish the property's separate character, but instead merely creates a presumed gift. *See Armer*, 105 Ariz. at 288, 463 P.2d at 822; *Bender*, 123 Ariz. at 94, 597 P.2d at 997. Thus, the trial court did not err in determining the Linden Lot was community property. Although Sherman further argues

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[11]The trial court found the funds used to purchase the properties here were, in fact, community debts. We leave to the trial court to consider on remand whether the deeds' contrary recitation supports a finding of fraud or mistake.

the court's valuation of the Linden Lot was incorrect, he asserts only that the court should have chosen his estimate of the property's value over Quinn's. We must defer to the court's conclusion. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004) (trial court, as fact finder, "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts").

¶28 For the reasons stated, we conclude the trial court erred by determining the disclaimer deeds created only a rebuttable presumption the property was Sherman's separate property. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 23, 97 P.3d 876, 881 (App. 2004) ("An abuse of discretion exists when the trial court commits an error of law in the process of exercising its discretion."). If valid and enforceable, the disclaimer deeds instead conclusively establish that fact. The court also did not address Quinn's argument the deeds were voidable for fraud or mistake. Accordingly, we vacate the trial court's division of the AXA account and its determination the funds used to build the cabin were community property to the extent those decisions depended on the court's finding the proceeds from the sales of the real estate parcels were community property. We remand this matter to the trial court to determine whether the disclaimer deeds are voidable for fraud or mistake and, if necessary, whether the character of any property determined to be Sherman's separate property was subsequently changed by agreement or operation of law.

Pacific Life Account

¶29 Sherman asserts the trial court abused its discretion by awarding Quinn the Pacific Life insurance policy. He contends that policy was covered by a "Beneficiary Agreement" entered into by the parties, and the court erred by awarding the Pacific Life policy to Quinn in contravention of that agreement. His entire argument, however, is devoid of relevant record references. He fails to direct us to where the Beneficiary Agreement is in the record, and thus we are unable to evaluate his contention that it "gave each party the right to assign and designate the beneficiaries of their individual policies and also designated that each party would be responsible for the payment of the premium of their policies." Accordingly, he has waived this argument and we do not address it further. *See Ritchie*, 221 Ariz. 288, ¶ 62, 211 P.3d at 1289, *citing Moody*, 208 Ariz. at 452 n.9, 94 P.3d at 1147 n.9.

Pikes Contract

¶30 Sherman contends the trial court erred in determining any commission due Sherman under the Pikes Contract was community property. The court concluded that "Real Estate commissions are not executory in nature," and Sherman therefore "has a fully enforceable right to the commission if all other conditions in the contract are met." Thus, because the contract "was entered into during the marriage," any commission received under that contract was community property. Sherman argues that, because the commission is conditional on the sale of the underlying property becoming final, and the sale of the subject

property did not occur until after the marriage was dissolved, the commission is his separate property.

¶31 Sherman testified he agreed to serve as a real estate agent for Scott and Jennifer Pike in their purchase of a new home. He stated he would not receive any commission on the sale of the subject property until the sale was completed. The contract between Sherman and the Pikes is apparently not in the record on appeal. In his testimony, however, Sherman refers to the "Lot Purchase and Building Contract" between the Pikes and the seller that lists him as a real estate agent to whom a commission will be due "only after [close of escrow] or as negotiated." Sherman testified the subject property was still in escrow at the time of trial.

¶32 Sherman relies primarily on *Barrett v. Duzan*, 114 Ariz. 137, 141, 559 P.2d 693, 697 (App. 1976), where Division One of this court determined a real estate broker had no right to his commission until all of the contractual conditions were met. But nothing in *Barrett* discusses whether that commission would be community property. The mere fact that a spouse will not be paid under a conditional contract entered into during the marriage until after the marriage is dissolved does not mean the payment is necessarily that spouse's separate property. Because the community has a property interest in the contract before any commission is paid, that determination is instead based on "the percentage of the time

expended" to fulfill duties under the contract by the contracting spouse during the marriage. *Garrett v. Garrett*, 140 Ariz. 564, 567-68, 683 P.2d 1166, 1169-70 (App. 1983).[12]

¶33 As noted above, the trial court determined the Pikes Contract was not an executory contract. An executory contract is one that "remains wholly unperformed or for which there remains something still to be done on both sides." *Black's Law Dictionary* 344 (8th ed. 2004). Thus, implicit in the court's conclusion the contract was not executory is a finding that Sherman had no duties left to perform under the contract—making any proceeds community property. *See Garrett*, 140 Ariz. at 568, 683 P.2d at 1170. Nothing in the record suggests Sherman had to perform any additional duties in order to receive his commission. Nor does Sherman cite to anything in the record suggesting he had to or did do anything after the marriage was dissolved to earn that commission. *See id.* Thus, particularly given Sherman's failure to provide either the trial court or this court with a copy of his agreement with the Pikes, we cannot disagree with the trial court's conclusion that the contract was not executory. The court therefore did not err in finding the commission due under the Pikes Contract to be community property.

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[12]*Garrett* discussed a contingent attorney fee contract, not a real estate commission. But we see no analytical difference here. Both require the contracting party to "perform[] . . . continuing services" in order to earn the commission or contingent fee. *Garrett*, 140 Ariz. at 567, 683 P.2d at 1169.

Long-Term Care Insurance Policies

¶34 Immediately following the filing of Quinn's petition for dissolution of marriage on October 25, 2006, the presiding judge of the superior court entered a preliminary injunction pursuant to A.R.S. § 25-315(A). The preliminary injunction enjoined Sherman and Quinn from "removing, or causing to be removed, the other party or the children of the parties from any existing insurance coverage, including medical, hospital, dental, automobile and disability insurance." *See* § 25-315(A)(1)(c). The injunction also ordered both parties to "maintain all insurance coverage in full force and effect." *See id.*

¶35 The trial court found in its March 21 ruling that the long-term care policies in Quinn's name were a community asset. The court further found that "an extreme hardship will be created on [Quinn] if the shared Long Term Care Policies held by the couple are canceled or divided." At trial, Quinn testified that if Sherman canceled the long-term care policies in his name, Quinn would be unable to afford, without spousal maintenance, the long-term care policies in her name because her rates would increase. The court ordered that Quinn's long-term care policies were to remain in effect, and that Quinn was responsible for making the monthly premium payments on those policies.

¶36 Because the trial court's order did not explicitly address Sherman's long-term care policies, on August 8, 2008, Quinn requested the court clarify that its March 21 ruling required both parties to maintain their long-term care policies. In response, Sherman asserted "there was no Order requiring [Sherman] to maintain his policies," and that he permitted his

policies to lapse because he was financially unable to maintain those policies in light of the court's other rulings. Agreeing with Quinn, the court ordered, in a September 23, 2008 hearing on the motions, that "it is the Court[']s intention that both parties['] long term policies are to remain in effect."

¶37 Sherman now asserts on appeal that the trial court's March 21 ruling "requires [him] to do something that he cannot possibly do as his policy cannot be reinstated, and a new policy would place an incredible financial burden on [him]." We note initially that, contrary to Sherman's suggestion otherwise, the preliminary injunction issued upon Quinn's initiation of dissolution proceedings required Sherman to maintain his long-term care policies. *See* A.R.S. § 25-315(A)(1)(c). Moreover, the court's March 21 ruling clearly noted that Quinn would suffer extreme hardship if the "*[p]olicies*" owned by the couple were cancelled or divided. (Emphasis added.) Finally, although Sherman tersely instructed the court that "it cannot be ordered [that Sherman maintain his long-term care policies] at this time as [he] does not hold his policies anymore," he did not, as he does now, assert that "a new policy would be an incredible financial burden on [him]." Sherman does not explain his failure to comply with the preliminary injunction. He did not ask the court to reconsider its decision, nor did he file a Rule 60(c), Ariz. R. Civ. P., motion after the judgment, which would have been the appropriate avenue to obtain the relief he now seeks on appeal. *See* Ariz. R. Civ. P. 60(c) (permitting relief from judgment or order on motion and finding, among other things, that "it is no longer equitable that the judgment should have prospective

application" or "any other reason justifying relief from the operation of judgment"). Thus, we have nothing to review.

Attorney Fee Award

¶38 Last, Sherman argues the trial court erred by awarding attorney fees to Quinn. The court awarded fees to Quinn pursuant to A.R.S. § 25-324, finding "that many of the positions taken by [Sherman] in this case have been unreasonable." Sherman asserts his positions were, in fact, reasonable. Because we vacate portions of the court's order, however, we also vacate the attorney fee award and need not address this argument. Nothing precludes the court, however, from awarding attorney fees, if appropriate, after considering the case on remand.

Attorney Fees on Appeal

¶39 Quinn requests an award of attorney fees on appeal pursuant to § 25-324, asserting that Sherman's "unreasonable positions entitle[] [her] to an award of attorney's fees." That statute allows an award of attorney fees after consideration of "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." § 25-324(A). We agree several positions Sherman advances on appeal are unreasonable due to his failure to support his arguments with citations to the record and relevant authority. We recognize it is Sherman's attorney and not Sherman, however, who is responsible for this deficiency. But, § 25-324 only permits an award to be made against a "party," not a party's counsel. Accordingly, other than those fees and costs

incurred addressing Sherman's disclaimer deed argument, we award Quinn her reasonable attorney fees and costs on appeal against Sherman.

Disposition

¶40 For the reasons stated, we vacate the trial court's order dividing the AXA account and the funds used to construct the cabin to the extent those decisions rest on the court's determination the disclaimer deeds did not make the real estate parcels Sherman's separate property. We also vacate the trial court's attorney fees award to Quinn. We affirm the remainder of the order, award Quinn her reasonable attorney fees on appeal as described above pending her compliance with Rule 21(c), Ariz. R. Civ. App. P., and remand the case to the trial court for further proceedings consistent with this decision. Nothing in this decision should be interpreted to preclude the court from reconsidering the amount of spousal maintenance awarded to Quinn in light of any changes in the division of property it makes consistent with this decision.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge