NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	2 CA-CV 2010-0184
GRETCHEN H. QUINN, Petitioner/Appellee,	DEPARTMENT A
v.	<u>MEMORANDUM DECISION</u> Not for Publication Rule 28, Rules of Civil Appellate Procedure
JAMES T. SHERMAN, Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100DO200601206

Honorable Brenda E. Oldham, Judge

AFFIRMED

Rose Law Group, P.C.
By David L. Rose and Carissa K. Seidl — Scottsdale
Attorneys for Petitioner/Appellee

William Wingard — Tempe
Attorney for Respondent/Appellant

B R A M M E R, Presiding Judge.

¶1 Appellant James Sherman appeals from the trial court's ruling adopting appellee Gretchen Quinn's proposed findings of fact and conclusions of law, affirming its

prior orders finding certain of their assets to be community property, and awarding Quinn attorney fees. He argues the court erred in determining disclaimer deeds Quinn signed were void for fraud or mistake and there was no basis in the record for its attorney fee award. We affirm.

Factual and Procedural Background

¶2 We view the 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). Sherman and Quinn were married in 1973. In 2006, Quinn filed a petition for dissolution of marriage. The parties entered into a consent decree in December 2007, but had a three-day trial in January 2008 to determine the distribution of assets, spousal maintenance, and attorney fees. The court equitably divided the parties' assets, ordered Sherman to pay Quinn spousal maintenance, and awarded Quinn attorney fees. Following a motion for reconsideration, the court granted Sherman's motion as to the distribution of the cash value of an insurance policy but denied reconsideration of the award of spousal maintenance and grant of attorney fees.

¶3 After Sherman appealed the trial court's ruling, this court issued a memorandum decision affirming in part, but vacating in part and remanding for reconsideration of one issue. *Quinn v. Sherman*, No. 2 CA-CV 2009-0033 (memorandum decision filed Oct. 14, 2009). We concluded the court had erred in determining disclaimer deeds signed by Quinn created only a rebuttable presumption that the property was Sherman's separate property, holding instead that the deeds conclusively established that fact if valid and enforceable. *Id.* ¶ 28. We therefore vacated the court's division of

certain property to the extent the decision was based on the court's erroneous determination, and remanded for the court to determine whether the disclaimer deeds were voidable for fraud or mistake. *Id.* We also vacated the attorney fee award, but stated "[n]othing precludes the court, however, from awarding attorney fees, if appropriate, after considering the case on remand." *Id.* ¶ 38.

¶4 The trial court subsequently ordered both parties to submit proposed findings of fact and conclusions of law "regarding the issues remanded from the Court of Appeals." The court then adopted Quinn's proposed findings and affirmed its prior ruling, including the attorney fee award. The court's findings determined the disclaimer deeds were voidable for fraud or mistake and, therefore, the assets in question were community property. This appeal followed.

Discussion

Disclaimer Deeds

¶5 Sherman alleges the trial court erred in concluding the disclaimer deeds were voidable for fraud or mistake and affirming its prior ruling classifying the parties' community property. He argues there was no evidence of fraud or mistake to support the proposed findings of fact and conclusions of law the court adopted and that Quinn had never properly pled fraud. We will not set aside findings of fact unless clearly erroneous, Ariz. R. Fam. Law P. 82(A), but review questions of law de novo, *In re Marriage of Pownall*, 197 Ariz. 577, ¶ 15, 5 P.3d 911, 915 (App. 2000).

¶6 If enforceable, a disclaimer deed rebuts the presumption that property acquired during marriage is community property. *See Bell-Kilbourn v. Bell-Kilbourn*,

216 Ariz. 521, ¶ 11, 169 P.3d 111, 114 (App. 2007). A disclaimer deed, however, is not enforceable when procured by fraud or mistake. *Id.* ¶ 7; *Bender v. Bender*, 123 Ariz. 90, 93-94, 597 P.2d 993, 996-97 (App. 1979). Although there is no "magic language" required to establish a claim of fraud, a party must show nine elements:

> (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.

Green v. Lisa Frank, Inc., 221 Ariz. 138, ¶ 53, 211 P.3d 16, 33-34 (App. 2009). In addition, a deed may be voided where there was a unilateral mistake induced by misrepresentation and the other party knew or should have known of the mistake. *See Parrish v. United Bank of Ariz.*, 164 Ariz. 18, 20, 790 P.2d 304, 306 (App. 1990).

¶7 Quinn testified Sherman had not told her that, by signing disclaimer deeds, she would be giving up any right to money earned from investment properties purchased with funds from a community line of credit. She stated Sherman had told her she was signing the disclaimer deeds because it made it easier for him to buy and sell property; he also told her the wife of one of his business partners always signed them. He had not told her she would be relinquishing community funds and would have no interest in the properties. She also testified that, when she read the disclaimer deed for the first time, she "knew what the wording was" but had not sought legal advice because she had trusted her husband. Although Quinn knew the documents stated she was giving up any

claim to the properties, she said Sherman, who had superior real estate knowledge, had assured her the statement was not true. She further testified she would not have agreed to the lines of credit had she known she would not benefit from the investment properties purchased with their proceeds.

¶8 Quinn presented other testimony supporting her allegation of fraud and mistake. Her daughter testified Sherman had told her Quinn only signed the deeds "to help ease the business" and that Quinn otherwise "was protected." The wife of one of Sherman's business partners testified she also had signed disclaimer deeds in the course of purchasing investment properties and was told by her husband it was "just a formality" so that "things could be done more quickly." She further testified she did not understand the documents disclaimed any interest she had in the properties because her husband told her they did not.

¶9 Sherman argues no "specific testimony about fraud or mistake . . . was ever presented" and the issue never was raised until after remand.[1] We disagree.[2] Although the word "fraud" does not appear in Quinn's testimony or filings, she was not required to

[1]As part of his argument there was no evidence of fraud in the record, Sherman suggests the trial court wrongly considered the proposed findings of fact and conclusions of law as evidence. However, Sherman points to nothing in the record suggesting the court considered the findings as evidence. Indeed, the court's ruling explicitly states it adopted the proposed findings based on its "review of the testimony given at the Non-Jury Trial in this matter regarding the issues on remand from the Court of Appeals."

[2] Sherman's assertion that Quinn "never made this argument until she submitted her Findings of Fact and Conclusions of Law" after remand is incorrect. We remanded the case specifically for the trial court to address "Quinn's argument the deeds were voidable for fraud or mistake." *Quinn v. Sherman*, No. 2 CA-CV 2009-0033, ¶ 28 (memorandum decision filed Oct. 14, 2009).

use that specific term. *See Green*, 221 Ariz. 138, ¶ 53, 211 P.3d at 33-34 ("magic" words not required to establish fraud). Her testimony clearly reflects an allegation of fraud or mistake and evidence thereof, and the joint pre-trial statement foreshadowed her testimony by stating she had "never intended to relinquish any interest in the property, other than to facilitate the transfer or sale of the property pursuant to [Sherman]'s request." And although Sherman alleges parties are "required to specifically plead all claims they intend to pursue," Rule 34(B), Ariz. R. Fam. Law P., states that issues not raised by the pleadings but tried by express or implied consent of the parties "shall be treated in all respects as if they had been raised in the pleadings." Sherman did not object to the portions of Quinn's testimony relating to fraud and mistake; indeed he cross-examined her on those issues.

¶10 Sherman mischaracterizes Quinn's testimony about the disclaimer deeds. Although Quinn did testify she knew what these deeds said, including their stated effect, her testimony also indicates Sherman led her to believe the purpose and effect of signing the documents were something different. We acknowledge Sherman testified he had told Quinn the intent of the disclaimer deeds was "that she would have no interest in the property whatsoever," but we will "defer to the [family] court's determination of witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998); *see also* Ariz. R. Fam. Law P. 82(A) ("[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."). The trial court's adopted findings explicitly state Sherman's testimony was not credible. Moreover, Sherman does not specify anything

else in the adopted findings of fact and conclusions of law that is contradicted by the record, and we find none.

¶11 The record supports a determination that Sherman procured the disclaimer deeds through fraud or mistake. Although the testimony in this regard was not extensive, it is for the trial court and not this court to determine how much weight to give the evidence presented and to judge the credibility of witnesses. *See Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004). Therefore, the court did not err in affirming its prior ruling designating the parties' community property based on its conclusion the disclaimer deeds were voidable because of "fraud and mistake surrounding the signing of the disclaimer deeds."

Attorney Fee Award

¶12 Sherman also asserts the trial court erred in affirming on remand its prior award of attorney fees to Quinn because the award was not supported by the evidence. He argues "his position was not unreasonable and . . . not subject to an award of fees." He also argues the adopted findings of fact and conclusions of law do not address the attorney fee award and, because the court did not "specifically address how it came to the conclusion that attorney[] fees were appropriate . . . , there is no basis for the attorney fee award."

¶13 Section 25-324, A.R.S., authorizes a trial court to award attorney fees in a dissolution proceeding "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." The court evaluates each party's legal position using an objective standard of reasonableness.

In re Marriage of Williams, 219 Ariz. 546, ¶ 10, 200 P.3d 1043, 1045 (App. 2008). We review the court's award of attorney fees for an abuse of discretion. *In re Marriage of Pownall*, 197 Ariz. 577, ¶ 26, 5 P.3d at 917.

¶14 The trial court did not abuse its discretion when it determined that "many of the positions taken by [Sherman] in this case have been unreasonable." The fact this court agreed with one of the positions Sherman took in the prior appeal does not mean the trial court was required to find his other positions were reasonable. The court found "many" of Sherman's positions unreasonable, and affirmed that ruling on remand. The record reveals various positions taken by Sherman that the court could have found unreasonable. For example, he waited until the last day of trial to concede that two of the contested annuities were community property. In addition, the court heard testimony Sherman was planning to delay the trial intentionally and that he would only accept Quinn's offers during the course of litigation if their daughter would guarantee him time to visit his grandchildren.

¶15 Moreover, the trial court was not required to make specific findings unless requested. *See* A.R.S. § 25-324 ("On request of a party or another court of competent jurisdiction, the court shall make specific findings concerning . . . any award of fees . . . ."). Although Sherman asked the court to reconsider its award of attorney fees to Quinn, he failed to ask it to make specific findings regarding its reasonableness determination. Nor did this court direct the trial court to make specific findings on remand. Therefore, Sherman now cannot allege the attorney fee award was improper because the court failed to make specific findings. *See In re Marriage of Pownall*, 197

Ariz. 577, ¶ 27, 5 P.3d at 917 (failure to object below to lack of findings precludes raising issue on appeal).

¶16 When there is no request for specific findings, we will assume the trial court found every fact necessary to sustain the award, and affirm it so long as there is reasonable supporting evidence in the record. *See Bender*, 123 Ariz. at 92, 597 P.2d at 995. As stated above, the record contains evidence from which the court could have determined Sherman took unreasonable positions throughout the course of trial. Therefore, we cannot say the court abused its discretion in awarding Quinn her attorney fees.

Disposition

¶17 For the foregoing reasons, we affirm. Both parties request an award of attorney fees and costs on appeal pursuant to A.R.S. § 25-324. We deny Sherman's request and grant Quinn reasonable attorney fees and costs upon her compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge