

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

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COURT OF APPEALS  
DIVISION TWO

In re the Marriage of: )  
)  
TRACY L. O'KEEFE, ) 2 CA-CV 2006-0141  
) DEPARTMENT B  
)  
Petitioner/Appellee, )  
)  
and ) MEMORANDUM DECISION  
) Not for Publication  
) Rule 28, Rules of Civil  
JEFFREY N. FINNELL, ) Appellate Procedure  
)  
)  
Respondent/Appellant. )  
\_\_\_\_\_ )

APPEAL FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. FC2005-001213

Honorable Sally S. Duncan, Judge

AFFIRMED IN PART; REMANDED IN PART

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V Á S Q U E Z, Judge.

¶1 Appellant Jeffrey Finnell appeals from the trial court's order dissolving his marriage to appellee Tracy O'Keefe. Finnell argues the trial court erred by failing to make findings of fact and conclusions of law under Rule 52(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, to support its spousal maintenance award of \$5,000 per month, and it abused its discretion in awarding spousal maintenance for an indefinite duration and in classifying certain assets as community property. We affirm in part and remand for the trial court to state its findings regarding spousal maintenance on the record.

### **FACTS AND PROCEDURAL BACKGROUND**

¶2 Jeffrey Finnell and Tracy O'Keefe were married on February 14, 1999. The marriage produced two children, one of whom was born during the pendency of the proceedings below. O'Keefe filed for divorce on January 28, 2005, and the trial court entered its order dissolving the marriage on May 31, 2006. The court awarded sole custody of the children to O'Keefe and ordered Finnell to pay \$1,912 per month in child support. The trial court also awarded O'Keefe \$5,000 per month in spousal maintenance, pursuant to A.R.S. § 25-319. In addition, the court entered detailed factual findings and legal conclusions regarding its classification and division of the parties' assets. On appeal Finnell challenges the amount and duration of maintenance the court ordered him to pay and its classification of certain assets as community rather than as his separate property.

## DISCUSSION

### Spousal maintenance

¶3 Finnell contends the trial court abused its discretion when it attributed to him \$30,000 of income per month, arguing that decision was “arbitrary and clearly erroneous.” The trial court based this determination on deposits to the parties’ joint checking account, Finnell’s personal non-business accounts, and the employment benefits he received from his business. Finnell asserts the trial court erred because it did not consider “expenditures and withdrawals from those accounts, and ignor[ed] loans and other sources of deposits.”

¶4 We review a trial court’s order awarding spousal maintenance for an abuse of discretion. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 14, 972 P.2d 676, 681 (App. 1998). Finnell does not develop this argument or otherwise point to any evidence of specific transactions or amounts he believes were improperly included in the trial court’s calculation of his income. The portions of the record relating to the parties’ finances are complex and convoluted. There is a business line of credit, a home equity line of credit, and at least five loan transactions, all relating to the disputed income and acquisition of property involved in this case. And the trial court expressly found Finnell failed to establish the source of funds in his business and personal bank accounts. We will not determine for him which amounts, if any, the trial court improperly attributed to him as income. This is his responsibility on appeal, and we decline to consider this argument further. *See Gangadean v. Byrne*, 16 Ariz. App. 112, 114, 491 P.2d 501, 503 (1971) (“[A]ppellant must specify with particularity and with transcript reference such rulings of the trial court as he desires to

question on appeal.”); *see also Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, n.2, 972 P.2d 658, 659-60 n.2 (App. 1998).

¶5 We agree with Finnell, however, that, as a matter of law, the trial court’s findings of fact and conclusions of law are insufficient to support both the amount and duration of the spousal maintenance award. Finnell timely requested that the court issue factual findings pursuant to Rule 52(a), Ariz. R. Civ. P. Under the rule, a trial court’s findings supporting its spousal maintenance award “must encompass all . . . facts . . . necessary to resolve the disputed issues in the case” and must “apprise [the reviewing court] of the statutory factors that the court . . . considered . . . or of the mathematical basis” for the award. *Elliott v. Elliott*, 165 Ariz. 128, 132, 796 P.2d 930, 934 (App. 1990); *see also Hughes v. Hughes*, 177 Ariz. 522, 525, 869 P.2d 198, 201 (App. 1993) (trial court must explicitly address every maintenance factor at issue when Rule 52(a) findings are requested).

¶6 Here, the trial court stated that it had considered the factors in § 25-319, but it only specifically addressed the ages of the children, the parties’ incomes, and O’Keefe’s earning ability in its order. The parties presented evidence on a number of other factors in § 25-319(B), which the trial court did not mention in support of its spousal maintenance award. Although the court apparently considered evidence relating to these factors on other disputed issues, there is no indication it also considered them on the maintenance issue. This is not sufficient. *See Kelsey v. Kelsey*, 186 Ariz. 49, 51, 918 P.2d 1067, 1069 (App. 1996) (In Rule 52(a) context, “[i]f the trial court’s basis for a conclusion is unclear, this Court may not affirm simply because we may find some possible basis for that conclusion

in the record.”); *Elliott*, 165 Ariz. at 133, 796 P.2d at 935 (“In the absence of the findings in question, we are unable to examine the basis for the trial court’s decision.”). The trial court’s findings do not satisfy Rule 52(a); therefore, we must remand this matter so that it may supplement its findings to specify the additional bases for the amount and duration of the award.<sup>1</sup>

### **Community property**

¶7 Finnell next claims the trial court erred in determining that certain assets were community property rather than his separate property. Property acquired during marriage is presumed to be community property unless acquired by gift, devise, or descent. *See Sommerfield v. Sommerfield*, 121 Ariz. 575, 577, 592 P.2d 771, 773 (1979); A.R.S. § 25-211. When community and separate property are commingled, the entire amount is presumed community property. *Cooper v. Cooper*, 130 Ariz. 257, 259, 635 P.2d 850, 852 (1981). To rebut this presumption, the spouse claiming separate property must “prove that fact and the amount [of separate property] by clear and satisfactory evidence.” *Id.* at 260, 635 P.2d at 853.

¶8 We review a trial court’s division of property for an abuse of discretion. *Spector v. Spector*, 94 Ariz. 175, 181, 382 P.2d 659, 663 (1963). We view the facts and

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<sup>1</sup>Among other factors, Finnell claims the trial court failed to consider the income O’Keefe would receive as a result of the division of property. *See* A.R.S. § 25-319(B)(9). *Deatherage v. Deatherage*, 140 Ariz. 317, 321, 681 P.2d 469, 473 (App. 1984) (trial court required to consider “income potential” of property awarded to the parties). Because it is unclear from the record whether and to what extent the trial court considered this factor, on remand, we direct the trial court to specify its findings on this issue.

all reasonable inferences derived therefrom in the light most favorable to upholding the trial court's decision. *Id.* at 179, 382 P.2d at 661. Before the parties were married, Finnell acquired Tri-City Enterprises (Tri-City), doing business as Alma Imports, for the purpose of operating an automobile salvage yard that purchased and sold wrecked vehicles and vehicle parts. At the time, the salvage yard was the only business conducted by Tri-City. However, during the marriage Finnell began to purchase and sell vehicles, make loans to businesses and friends, and purchase and sell investment properties. Although some of these business activities were conducted under Tri-City's and Alma Import's names, O'Keefe contended they were community ventures and that Tri-City had received substantial community funds relating to the transactions. The parties also ran an on-line pharmacy for a short period of time, which Finnell concedes had been a community property business venture.

¶9 It is undisputed that before trial O'Keefe stipulated that Tri-City was Finnell's sole and separate asset and waived any community property claim to the Tri-City business entity. However, as she did below, she nonetheless claims she is entitled to share in the income generated by the business and certain assets titled in Tri-City's and Alma Import's names. She contends the income, and the property purchased with the income, were attributed to Finnell's efforts and therefore constituted community money. Finnell contends O'Keefe waived any claim to the income and assets by virtue of having waived her claim to the business.

¶10 The trial court determined that certain income and assets from the disputed transactions were community property after finding "[Finnell] could not, during the course

of the litigation or at trial, state how to determine how monies were exchanged between the business and the community during the marriage.” It also found “[Finnell]’s claimed income to be inconsistent with the evidence produced at trial, the standard of living during the parties’ marriage, and [his] lifestyle and expenditures during the pendency of this action.” The court found Finnell did not prove the income generated from the business during the marriage was his sole and separate property. The court concluded Finnell had not met his burden of proving that the income had been earned by the inherent nature of the business rather than his skill and management, *see Cockrill v. Cockrill*, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979), and that “monies have been transferred, mixed, and are not traceable.” *See also Morgan v. Bruce*, 76 Ariz. 121, 124, 259 P.2d 558, 560 (1953) (“[W]hen a husband is engaged in business, even though the capital thereof is his separate property, the profits therefrom are either community or separate depending on whether they result from individual effort or the inherent qualities of the business.”). This provides the backdrop for our discussion of Finnell’s challenges to the trial court’s findings on seven categories of assets. Because he makes specific claims regarding each asset, we discuss his claims individually below.

## **1. Bank accounts**

### **Bridgeview/Heritage account**

¶11 Finnell challenges the trial court’s designation of a Bridgeview/Heritage bank account, which was opened solely in his name, as community property. He argues the account is his sole and separate property because it contained only proceeds from the “rents,

and business related transactions” of Tri-City. He contends O’Keefe is not entitled to anything in the account because she waived any claim to Tri-City, and, therefore, waived her interest in any income beyond that expressly identified as his earned wages.

¶12 The trial court found that Finnell did not sustain his burden of proving the funds contained in the account were his sole and separate property. At trial, the only evidence Finnell produced in support of this claim was his uncorroborated testimony that no “W-2 funds” ever went into the account and that it was “business-related.” However, the only documentation Finnell produced were bank statements showing various deposits and withdrawals from the account. He did not provide any evidence of the sources of the deposits or the purposes for which the withdrawals were made. On the other hand, as the trial court noted, there was extensive evidence that Finnell had commingled community property, business income, and business assets. Thus, without further evidence from Finnell, there was no way for the trial court to determine the nature of the funds contained in the bank account.

¶13 Furthermore, Finnell’s argument that O’Keefe waived her claim to any income other than wages is entirely without merit. O’Keefe stipulated that Tri-City was Finnell’s sole and separate asset. She did not stipulate that Finnell’s income above and beyond his stated salary was also his separate property. *See Morgan*, 76 Ariz. at 124, 259 P.2d at 560 (Capital of spouse’s business remains separate property, but profits therefrom “are either community or separate depending on whether they result from individual effort or the inherent qualities of the business.”). In any event, the extent of O’Keefe’s stipulation

regarding a claim to Tri-City is irrelevant because Finnell could not prove this account, or any other account, contained only the assets of Tri-City and not personal income from that business or other business endeavors. Therefore, the trial court did not abuse its discretion in finding that Finnell had failed to sustain his burden of proving the funds were separate property and in characterizing the account as community property.

#### World Savings account

¶14 Finnell argues an account at World Savings Bank should not have been designated as community property. He asserts that, because the account was opened after the petition for dissolution was filed, the presumption shifted to O’Keefe to prove that the funds it contained were community property, and that she had failed to do so. *See* A.R.S. § 25-211(2). In finding this account to be community property, the trial court noted that the account had been opened “shortly following the filing of this action” and relied on Finnell’s “failure to identify the source of the funds which were deposited, despite his apparent ability to do so . . . and . . . [his] history of secreting cash.”

¶15 Finnell appears to misunderstand the nature of the separate property presumption. Under § 25-211(2), only property *acquired* after service of a petition for dissolution is not presumed to be community property, provided the parties ultimately are divorced in that proceeding. *See also* A.R.S. § 25-213(B) (defining separate property). The opening of a bank account is not an acquisition of property, and its proceeds cannot be presumed separate property merely because the account was opened after the petition for dissolution had been served.

¶16 Whether property is presumed to be community property or is a spouse's separate property depends solely upon the date on which the property was acquired and whether the parties were married at that time. *Potthoff v. Potthoff*, 128 Ariz. 557, 561, 627 P.2d 708, 712 (App. 1981). However, the issue of when a particular item of property may have been acquired is a question of fact and the party asserting a particular fact has the burden of proving its truth. *See Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d 297, 304 (App. 1990). Finnell had the burden of proving that the proceeds used to open the account were generated by his separate property business after the petition had been filed.

¶17 At trial, O'Keefe established Finnell often held on to sums of money for lengthy periods of time before depositing them. The evidence showed the money used to open this account did not match any withdrawals from Finnell's business or personal bank accounts. Additionally, Finnell failed to produce any documentation of the source of these funds. Although he testified at trial the funds were derived from car sales, he did not specify when these transactions had occurred, and he further testified they did not come from any of his business accounts. The trial court concluded that although Finnell had asserted he would be able to produce evidence concerning the source of the funds and when he had obtained them, he had failed to do so. Therefore, we cannot say the trial court abused its discretion in concluding the funds in the World Savings Bank account were community property. *See Harvest v. Craig*, 195 Ariz. 521, 525, 990 P.2d 1080, 1084 (App. 1999)

("[W]hen proof of an assertion is peculiarly within the knowledge of a party, the burden of producing evidence . . . is properly assigned to that party.").

## **2. Mercedeses, Hummer, and Boat**

### 2003 Mercedes SL55

¶18 Finnell claims the Mercedes SL55 is his sole and separate property because the evidence clearly shows it was purchased by his business. To support his claim the vehicle was purchased with sole and separate funds, Finnell relies on the fact the vehicle is titled in the name of Alma Imports, a bank account statement showing Tri-City wrote a \$98,575 check that posted in October 2004, and an automobile auction's purchase receipt for the vehicle showing a purchase price of \$98,575.

¶19 That the car was titled in the name of Alma Imports, a business owned by Finnell, does not relieve him of the burden of proving the Mercedes was not purchased with community funds. *See Ariz. Cent. Credit Union v. Holden*, 6 Ariz. App. 310, 313, 432 P.2d 276, 279 (1967) (presumption of community property applies without regard to which spouse holds legal title). And, none of the documents on which Finnell relies states where Tri-City obtained the \$98,000 it paid to Alma Imports for the purchase of the vehicle.

¶20 Furthermore, Finnell admitted that the funds used to purchase the Mercedes SL55 were not generated by the business. He testified at trial, "there wasn't \$98,000 in cash in the business," so it "[a]bsolutely . . . came from one of the credit lines." From the record, it appears to us that, at his deposition, Finnell testified the car was purchased with funds taken from a \$150,000 credit line, guaranteed by both Finnell and O'Keefe. However,

O’Keefe’s accountant testified that Finnell could not have used funds from the \$150,000 credit line to purchase the vehicle because the money from the credit line was not deposited into the account until about two months after the car had been purchased. And, although Finnell suggested at trial the money came from a \$350,000 business credit line, he could not identify any specific transactions that had been used for that purpose.<sup>2</sup>

¶21 As the party arguing the separate property nature of the asset, and due to the extensive and well-documented commingling of funds between the community and the business, Finnell bore the burden of tracing the funds used to purchase the Mercedes SL55. He failed to sustain his burden of proof on this issue, and the trial court did not abuse its discretion in designating the Mercedes SL55 as community property.

#### 2003 Mercedes CL600

¶22 Finnell argues the trial court incorrectly classified the proceeds from the sale of a Mercedes CL600 as community property.<sup>3</sup> He relies on the fact that Tri-City held title

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<sup>2</sup>In his reply brief, Finnell asserts that \$53,000 transferred from the business credit line to Tri-City’s Arizona Business Bank account on September 20, 2004, was the sum needed for the purchase of the Mercedes. However, he makes this argument for the first time in his reply brief on appeal. We therefore will not consider it. *See Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987) (appellate court does not consider issues raised for first time on appeal).

<sup>3</sup>Finnell also challenges whether the trial court’s findings of fact and conclusions of law are adequate to support its findings on this issue. Because he raises this argument for the first time in his reply brief, it is waived. *See Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997). However we also note that the finding Finnell challenges—that the vehicle was sold outside the Alma Imports business—is not essential to the court’s ultimate conclusion that the profits from the sale were community property. That conclusion is adequately supported by the court’s additional factual finding that Finnell produced no documentation tracing the funds used to purchase the car to his sole

to the car at the time it was ultimately sold and that the buyer paid Alma Imports. He contends these facts demonstrate that “the trial court’s reversible error is undeniably apparent.”

¶23 However, Finnell admitted at trial that he had purchased and sold cars outside the regular business of Alma Imports and had passed the money made from those transactions back and forth between personal and business bank accounts. And, he did not provide any documentation for the source of the funds used to purchase the car. Furthermore, O’Keefe testified that Finnell had written checks for cars out of personal accounts, though always titling them in the name of the business and that he sold cars without putting the sales proceeds into business accounts. We cannot say the trial court erred in finding that Finnell did not sustain his burden of proof. The trial court properly awarded one-half of the Mercedes CL600 sale price to O’Keefe as her share of the community property.

#### Hummer

¶24 During the marriage, O’Keefe used the Hummer SUV as her personal vehicle. It was titled in Tri-City’s name, and the Aguila Family Limited Partnership held a lien on the vehicle. Finnell and O’Keefe each own a forty-seven percent interest in the partnership, their eldest daughter has five percent, and a Nevada corporation, of which Finnell is the managing partner, holds the remaining one percent. During the divorce proceedings, the title

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and separate property.

to the Hummer was transferred to O’Keefe so that she could continue to use the vehicle. And in its final minute entry, the trial court awarded the Hummer to O’Keefe.

¶25 Finnell argues the trial court erred in awarding the Hummer to O’Keefe. In his opening brief Finnell cites to two pages of trial transcript to support his argument that “[t]he trial court’s finding and conclusion cannot be reconciled with its contradictory trial pronouncements.” But he made no attempt to explain why this purported contradiction creates reversible error. In his reply brief, he further argues the trial court contradicted itself when, at trial, it expressed its intent to “put the title of the vehicle back in the limited partnership’s name” and then, in its minute entry, referred to the Hummer as having been “titled in [O’Keefe’s] name.” However, he still presents neither argument nor authority to establish that this alleged contradiction creates reversible error.

¶26 “A trial judge’s ruminations on the record, even when incorrect, are an insufficient ground on appeal to set aside the judgment entered in the trial court.” *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 308, 681 P.2d 390, 460 (App. 1983). The trial court never ordered the vehicle’s title to be transferred to the partnership. Immediately after the trial court made those statements, O’Keefe’s counsel informed the court that the partnership had not held title originally. And as the discussion continued, the court expressed confusion over the issue, admitted it was not aware of all the facts, and specifically declined to make any further rulings at that time. The trial court’s statements Finnell relies on in support of his claim were made in the context of the trial court’s ongoing

discussions with counsel, and as such, cannot be used to set aside an otherwise valid judgment. *See id.*

¶27 Finnell also contends the trial court lacked jurisdiction to determine ownership or allocate use of the Hummer because the Aguila Family Limited Partnership, which held a lien on the Hummer, had not been joined as a party in the litigation. The only legal authority Finnell cites to support this argument is Rule 33, Ariz. R. Fam. L. P., 17B A.R.S. However, this rule contains only the procedure by which a party may be joined; it provides no substantive basis to suggest joinder was necessary in this case. Because Finnell has failed to cite relevant legal authority and does not provide any argument for why joinder was necessary in this case, we decline to consider the issue further. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992) (“Arguments unsupported by any authority will not be considered on appeal.”).

#### Boat

¶28 Finnell challenges the trial court’s valuation of the boat. Prior to these proceedings the federal government had seized the boat and Finnell had purchased it back from the government for \$25,000. He claims there are inconsistencies in the court’s order relating to the trial court’s valuation of the boat and, in any event, the court erred in awarding O’Keefe half of the \$25,000 used to purchase the boat back from the government. Finnell does not contest the court’s general award to O’Keefe of half of the boat’s value.

¶29 First, we do not find the trial court’s minute entry inconsistent. In its factual findings the court stated the boat’s value was “approximately \$100,000.” Then, the trial court concluded:

The approximate value of the boat is \$125,000. [Finnell] claims to have utilized \$25,000 of his sole and separate funds to obtain the return of the boat from the Federal Government . . . . However, at trial [Finnell] failed to prove that the \$25,000 came from a source other than from funds generated by his labors during the marriage. Therefore, the *community value* of the boat . . . should be deemed to be \$125,000.

(Emphasis added.) Viewing the court’s order in context, it is apparent that when the court concluded the “community value” of the boat was \$125,000, it meant the total value to the community—the boat’s intrinsic value plus the amount spent to retrieve it from the government. The trial court’s order is not inconsistent.

¶30 Finnell also argues he should have been given “credit” for using his sole and separate monies to repurchase the boat from the government. He contends the funds came from the Tri-City business credit line rather than the joint credit line, as O’Keefe contends. The trial court found Finnell was unable to identify the source of the \$25,000 as his sole and separate property and therefore he failed to sustain his burden of rebutting the presumption that the boat was community property.

¶31 At trial Finnell stated the \$25,000 check was written on a Tri-City account and came from “the credit line.” Because the home equity credit line was not established until two months after the check had been written, we assume Finnell was referring to the business credit line. In any event, this shows only that the money was taken from a

particular account; it does not establish where the money in the account originated. Finnell had the burden of proving this expenditure was actually financed with his sole and separate business assets. And given the trial court's finding regarding the extensive commingling of funds, simply showing that a check had been written on the business account to repurchase the boat does not satisfy this burden.

¶32 Finnell's account statements merely list the amounts of money coming into and being taken out of the accounts. They do not show the sources of the deposits or the destinations of the withdrawals. The trial court found Finnell had failed to prove that the funds in the account used to pay for the boat were only business assets or that he had segregated community from separate property funds in the account. "If community and separate funds are mixed to the extent segregation is impracticable, the whole will be considered community funds." *Evans v. Evans*, 79 Ariz. 284, 286-87, 288 P.2d 775, 777 (1955). Thus, the trial court did not abuse its discretion in finding Finnell had failed to prove the \$25,000 were his separate funds and in awarding O'Keefe half of that amount.

### **3. Real Estate**

#### Fox Street property

¶33 Finnell argues the trial court improperly designated the property on Fox Street as community property because it had been purchased with his separate funds. In addition, Finnell claims the trial court erred in finding O'Keefe had been a guarantor on the equity line of credit used to purchase the house. In the alternative, he argues he should be

compensated fully for the repairs made to the house, which he claims were also paid with separate funds.<sup>4</sup>

¶34 The trial court designated the proceeds from the sale of the Fox Street property as community property after finding the house had been purchased during the marriage and that O’Keefe was a guarantor of the credit line used for its purchase. It also specifically found “[Finnell’s] corporate bank account was used as a pass through for the funds. [He] was also unable to identify whether or not personal monies that had been lent [to] the business were ever utilized to pay down the credit line.”

¶35 At trial Finnell admitted he had obtained funds from the business credit line, deposited the funds into the business checking account, and had written a check from that account to make the down payment on the Fox Street property. However, Tri-City was not in the business of investing in real estate. And at trial, Finnell apparently believed that O’Keefe was also a guarantor of this credit line,<sup>5</sup> which was secured by their marital residence. Additionally, the Fox Street property was titled in Finnell’s name personally, not the business’s. In an attempt to explain this, Finnell testified he did not have documents

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<sup>4</sup>In both his opening and reply briefs, Finnell also appears to assert the trial court erred in calculating the total amount of profit from the sale of the Fox Street property. However, these assertions are not supported by argument; therefore, we do not consider them. *See Wonders v. Pima County*, 207 Ariz. 576, n.1, 89 P.3d 810, 814 n.1 (App. 2004).

<sup>5</sup>Although Finnell challenges this finding on appeal, we note that through his counsel below he apparently accepted this proposition as true. And in his closing memorandum Finnell admitted that the business credit line was secured by the marital residence, an uncontested community asset. Therefore this argument is waived. *See Hawkins*, 152 Ariz. at 503, 733 P.2d at 1086.

with him that he claimed were necessary to have the property titled in the corporation's name, so he signed O'Keefe's name on a disclaimer deed and had the property titled in his name only. The trial court was not persuaded by Finnell's explanation. Furthermore, he could not prove that community funds had not been used to pay back the credit line. Taken together, this evidence supports the trial court's conclusion that Finnell used the corporation as a "pass through" for his personal purchase of the Fox Street property. The trial court did not abuse its discretion by finding this asset was community property.

¶36 Finnell asserts that, in the event this court upholds the trial court's designation of the Fox Street property as community property, he should have been given "additional and full credit" for the money expended to improve the house prior to sale and for the interest paid to Tri-City. He argues the trial court "erroneously stated" the repair cost was \$18,581.76, rather than \$35,045.76 as he had claimed.

¶37 The repairs were initially paid for with the business's credit card and from the business's checking account. However, of the repair claims Finnell made, he was only able to substantiate \$18,581.76 with receipts. And, the trial court included Finnell's interest payment to Tri-City in its determination of profit. Furthermore, Finnell was generally unable to trace what community monies went into the business and what they were used for. Thus, the trial court did not abuse its discretion by treating the repair costs and interest payment as an expenditure of community funds and by not redistributing them to Finnell as his separate property.

Maricopa/Palmen property and closing costs

¶38 Finnell contends the trial court erroneously designated the Maricopa/Palmen property as community property because it was acquired well after the petition for dissolution had been served. This argument misstates the trial court's holding. The trial court did not find the Maricopa/Palmen property to be community property. It merely found that because Finnell was unable to trace the source of the \$11,254.42 closing costs, O'Keefe was entitled to reimbursement of half of that expense.

¶39 Finnell again maintains that he was not required to trace the funds because property acquired after a petition for dissolution is served is presumed to be separate property. *See* § 25-211. However, as we noted above, the presumption only applies to assets that are acquired after service of a petition for dissolution. Finnell has the burden of establishing where and when he obtained the money used to pay the closing costs. Merely paying them after the petition was filed does not establish that the money used to make the payment was Finnell's sole and separate property.

¶40 Finnell paid the closing costs with a cashier's check from the National Bank of Arizona. However, there are no matching withdrawals from any particular business or personal bank account. And, Finnell could not identify any other source of those funds. Additionally, as we noted earlier, O'Keefe established Finnell's tendency to hold money for long periods of time without depositing it. The ability to prove or disprove whether community funds were used to pay the closing costs lies exclusively with Finnell, and he failed to produce any evidence on the issue. *See Harvest v. Craig*, 195 Ariz. 521, 525, 990 P.2d 1080, 1084 (App. 1999); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P.2d

297, 304 (App. 1990). Therefore, the trial court did not abuse its discretion in characterizing the closing costs as community property and awarding O’Keefe one-half of that amount.

#### **4. Loans to individuals**

¶41 Finnell next argues the trial court erred in finding O’Keefe was entitled to half the amount of the loans made to two individuals, Pat Dixon and Andrew Brown. He also argues that because she signed the checks, she cannot “feign ignorance” of the transactions. O’Keefe does not deny that the checks were written from the Compass Bank checking account and that she signed them. However, she argues the checks were not used for a community purpose, but instead were separate property payments to Finnell’s friends.

¶42 Finnell asserts the individuals were not his friends, as the court found, but rather O’Keefe’s business partners. However, during his deposition, Finnell testified that he had stayed with Dixon for three days after the parties separated and that he and Dixon co-owned a boat. At trial, Finnell testified that Brown “was a business partner of [Dixon], [Finnell], [and O’Keefe].” Finnell acknowledged that \$10,000 from the account went to Dixon, but he denied knowing how Dixon received it. And despite his claim that he, O’Keefe, and Brown were business partners, he did not know why she would have written Brown a check from “her checking account.” At trial O’Keefe testified generally about how Finnell often directed her to take specific actions with the money in the Compass account.

¶43 Although the trial court did not characterize the transactions as loans, it found that the money had been “paid” to people it characterized as Finnell’s friends and not used

for a community purpose. Essentially this was a credibility determination, and the trial court did not credit Finnell’s testimony that Dixon and Brown were O’Keefe’s business partners or that the money paid to them had been for a community purpose.

¶44 Appellate courts give great deference to a trial court’s determination of witness credibility. *Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72, 730 P.2d 245, 249 (App. 1986). “The credibility of witnesses is a matter peculiarly within the province of the trier of facts.” *Id.* And “[w]here reasonable men, from the evidence shown, might draw different inferences and conclusions, the reviewing court must accept those inferences drawn by the [trier of fact].” *Godwin v. Farmers Ins. Co. of Am.*, 129 Ariz. 416, 419, 631 P.2d 571, 574 (App. 1981). Here, the trial court heard conflicting testimony and found one witness’s testimony more credible than the other. Based on its expressed findings that Finnell lacked credibility during the trial, we cannot say the court abused its discretion in awarding O’Keefe half of the money given to these two individuals as her community share.

## **5. Attorney trust account**

¶45 Finnell argues the trial court “erred in ruling [O’Keefe] was entitled to judgment against [him] for \$62,500” as half of the amount “paid to an attorney trust account.”<sup>6</sup> He contends the entire amount was his sole and separate property. The trial court found that although Finnell identified car sales as the source of these funds, he also testified he sold cars both within his Tri-City business and as a side business. The court

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<sup>6</sup>We note that the trial court actually awarded O’Keefe \$62,000, half of the \$124,000 Finnell gave to his attorney and deposited into the attorney’s trust account.

designated the funds as community property after finding Finnell had failed to produce documentation of the sales at all. It awarded half of the total trust account funds to O’Keefe, concluding the funds had not been used to benefit the community.

¶46 The evidence adduced at trial supports the trial court’s conclusion. Finnell could not identify the source of the \$124,000 except to say it was from car sales. However, at his deposition, Finnell testified he had purchased and sold some cars with his personal funds outside of his car business. He also testified he had no way of determining how the community and the business exchanged money. He later testified at trial, as an example of how he keeps track of these transactions,

Say . . . I buy a Mercedes and I sell it and somebody writes me—a check . . . and I put it in . . . one of these receptacles, this Jeff Finnell account, the business is going to come up short at some point. And it’s going to need a loan from me to pay it back or whatever . . . . So I’ll have to write a check back to the company.

. . . .

It’s floating money back and forth is what I’m doing.

However, he still could not provide any details or documentation regarding the cars he claimed to have sold that produced the \$124,000. The trial court did not err in finding Finnell failed to meet his burden with respect to these funds and in characterizing them as community property.

¶47 In a related argument, Finnell contends that in the event this court upholds the trial court’s designation of the money as community property, it is “fundamentally inequitable” to hold him solely responsible for “any community . . . loss” unless waste has been established. But the fact that Finnell gave his attorney community funds to deposit in the trust account does not necessarily make the community liable for his subsequent disposition of the funds, even if waste was not specifically alleged.

¶48 Finnell does not dispute that he used the money to pay for the settlement of a lawsuit against his sole and separate business and for loans to other business entities. He offered no evidence that the community ever benefitted from these expenditures. Regarding one of the loans, the trial court found that Finnell said he had not been repaid because he “did not need [the money].” And Finnell maintained throughout the proceedings that the trust account funds had been used for his business and not for the community. Thus, his claim that the community is not entitled to reimbursement of the funds used for his separate property transactions is without merit. The trial court did not abuse its discretion in awarding O’Keefe her half of the community funds deposited in the attorney’s trust account.

## **6. Home Equity Line of Credit**

¶49 Finnell argues the trial court erred in determining the amount he was required to pay O’Keefe for the loan he had taken against the equity line secured by the family residence. Finnell borrowed \$150,000 against the equity line in February 2002. Although the parties disputed what he did with the total sum, the trial court found that Finnell had lost \$29,500 gambling; had made an \$18,000 loan with community money that was never

repaid to the community; had given \$40,000 cash to Steve Mack to hold, \$17,760<sup>7</sup> of which was later recovered from the ceiling at Finnell's business; spent \$6,000 during the dissolution proceedings; and, \$34,415 remained unaccounted for. The trial court found a total of \$110,155 of the \$150,000 had not been used to benefit the community and awarded O'Keefe one-half of: the gambling loss, the money spent by Finnell during the proceedings, the loan, and what was spent of the \$40,000 given to Mack. The trial court also awarded O'Keefe half of the money that remained unaccounted for.

¶50 Finnell argues the trial court erred by not giving him "credit" for an \$11,000 Rolex watch he purchased for O'Keefe and \$10,000 used to paint the marital residence against the \$34,415 "unaccounted" for funds. Finnell asserts that at his deposition he testified these amounts were part of the unaccounted for funds, and that testimony has not been contradicted. However, as the trial court specifically noted, Finnell's deposition testimony about these funds was entirely inconsistent with his initial accounting of the funds, in which he characterized the watch and painting costs as individual expenditures, separate from the \$34,415, which, at that time, he claimed was an unpaid loan. At trial, Finnell did not argue these expenditures came from the \$34,415. Because a crucial part of this argument is raised for the first time on appeal, it is waived, and we will not consider it further. *See Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503, 733 P.2d 1073, 1086 (1987).

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<sup>7</sup>The trial court ordered Finnell to pay these funds to O'Keefe as interim child support and spousal maintenance.

¶51 Next, Finnell argues O’Keefe was awarded substantially more than she was entitled to receive from the \$40,000 he had given to Mack. He apparently believes he was ordered to reimburse O’Keefe the sum of half the \$40,000 in addition to half of the \$22,240 he was found to have spent from the \$40,000. This belief is based on O’Keefe’s proposed Consolidated Judgment, which does appear to include judgments for half of both the amount Finnell spent and half of the full \$40,000. However, as O’Keefe acknowledges in her answering brief, the trial court only awarded half of the amount Finnell spent, or \$11,120. And, in any event, the judge did not sign the judgment O’Keefe had lodged. Therefore, only the signed minute entry represents the trial court’s judgment. *See* Ariz. R. Civ. P. 58(a), 16 A.R.S., Pt. 2 (“[a]ll judgments shall be in writing and signed by a judge”); *see also Hall Family Props., Ltd. v. Gosnell Dev. Co.*, 185 Ariz. 382, 387, 916 P.2d 1098, 1103 (App. 1995) (appeal must be from signed order).

¶52 Finnell was ordered to pay \$17,760 of the \$40,000 as interim child support and maintenance, and the court later found Finnell’s pendente lite maintenance obligations had been satisfied by that payment. The trial court determined that the entire \$40,000 was community property, and Finnell does not challenge that finding on appeal. Based upon the trial court’s finding that the community derived no benefit from \$22,240 of the \$40,000, we cannot say it abused its discretion in awarding O’Keefe one-half of the community funds not spent for the community’s benefit. *See Wick v. Wick*, 107 Ariz. 382, 385, 489 P.2d 19, 22 (1971) (“[T]he trial court is not required to make an absolutely equal distribution of the community property as long as it does not appear that the trial court’s disposition of the

community estate is inequitable or unfair.”); *Miller v. Miller*, 140 Ariz. 520, 522, 683 P.2d 319, 321 (App. 1984) (“[D]istribution [of community property] need not be in kind or exactly equal, but must result in substantial equality.”).

## **7. Loan to business**

¶53 Lastly, Finnell argues the trial court abused its discretion in awarding O’Keefe half the value of a personal loan he made to his business. Finnell contends he was merely loaning his sole and separate funds to his sole and separate business. However, at his deposition, Finnell testified the funds used to finance this loan came from the Heritage Bank account. And, at trial Finnell was not able to establish which transactions had produced the income used to fund the loans or how generally to differentiate community property from separate property in his personal accounts. We have already upheld the trial court’s determination that the Heritage Bank account contained community funds due to Finnell’s failure to establish the sources of that income. Accordingly, the trial court did not abuse its discretion in finding that the funds loaned to Finnell’s sole and separate business from this account were community property and in awarding O’Keefe her share of that amount.

### **Attorney Fees and Costs**

¶54 Both parties have requested attorney fees and costs on appeal. However, neither party has stated the statutory basis on which their requests are based. “When a party requests fees, it . . . must state the statutory or contractual basis for the award.” *See Roubos v. Miller*, 214 Ariz. 416, ¶ 21, 153 P.3d 1045, 1049 (2007); *see also* Ariz. R. Civ. App. P.

21(c). Therefore, we decline to award attorney fees to either party. However, as the prevailing party on appeal, O’Keefe is entitled to recover her appeal costs. *See McEvoy v. Aerotek, Inc.*, 201 Ariz. 300, ¶ 9, 34 P.3d 979, 981 (App. 2001) (court has discretion to determine prevailing party).

### CONCLUSION

¶55 We affirm the trial court’s division of community property assets. However, we remand the issue of spousal maintenance so that the trial court may enter its specific findings regarding each of the § 25-319(B) factors relevant to both the amount and duration of the award. We further direct the trial court to disclose the calculations for the maintenance award. *See Elliott v. Elliott*, 165 Ariz. 128, 137, 796 P.2d 930, 939 (App. 1990). O’Keefe is awarded her costs on appeal.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge