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UNDER ARIZ. R. SUP. CT. 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

In re the Marriage of: LILLIAN MUZYKA, *Petitioner/Appellee*,

v.

ROBERT HERKO, *Respondent/Appellant*.

No. 1 CA-CV 12-0794
FILED 12-12-2013

Appeal from the Superior Court in Yuma County
No. S1400DO200701747
The Honorable Lisa W. Bleich, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Hunt and Gale, Yuma
By Jeanne Vatterott-Gale

Counsel for Petitioner/Appellee

Robert Herko, Whitehouse Station, New Jersey

Respondent/Appellant, In Propria Persona

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Margaret H. Downie and Judge Jon W. Thompson joined.

W I N T H R O P, Presiding Judge:

¶1 Robert Herko ("Husband") appeals the family court's dissolution decree ("the Decree"). Finding no abuse of discretion or legal error, we affirm.

BACKGROUND

¶2 After fifteen years of marriage, Lillian Muzyka ("Wife") petitioned for divorce in December 2007. While the petition was pending in Yuma County Superior Court, Husband notified the family court he had sustained injuries in a September 2010 car accident. According to letters from two neurologists, Husband's injuries limited his ability to travel from his New Jersey home and sit or stand for long periods.

¶3 The family court set the case for trial on August 6, 2012, and denied Husband's August 3, 2012 motion for a continuance. With the court's permission, Husband participated in the trial via telephone from New Jersey between approximately 9:00 a.m. and noon on August 6.

¶4 After trial resumed in the afternoon, the family court received a call from a self-identified physician's assistant, who stated that Husband would not be calling back in to the court. The caller hung up before the court could obtain further information. The court proceeded with the trial, took the matter under advisement, and ultimately issued findings and orders.

¶5 Husband filed a motion for new trial and stay pursuant to Rules 83(A)(1) and 87(A) of the Arizona Rules of Family Law Procedure. After briefing, the family court denied the motion in a signed order filed

simultaneously with the Decree. We have jurisdiction over Husband's timely appeal.[1] *See* Ariz. Rev. Stat. ("A.R.S.") § 12-2101(A)(1) (West 2013).[2]

ANALYSIS

I. *This Court May Review Whether The Family Court Erred In Refusing To Re-Open The Trial.*

¶6 We first consider whether this court may review the denial of Husband's motion for new trial. Rule 8(c), ARCAP, requires a notice of appeal to designate the judgment from which the appellant appeals. In general, we do not review matters an appellant fails to identify in the notice. *See, e.g., Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 561, 578 P.2d 985, 990 (1978).

¶7 Husband's notice of appeal designates only the Decree, and does not include the denial of his motion for new trial. Nevertheless, "[i]f a motion for new trial was denied, the court may, on appeal from the final judgment, review the order denying the motion although no appeal is taken from the order." A.R.S. § 12-2102(B).[3] Accordingly, we may review the issue even though Husband failed to appeal from the order denying his motion for new trial.

II. *The Family Court Did Not Abuse Its Discretion By Conducting A Portion Of The Trial In Husband's Absence.*

¶8 Husband contends the family court abused its discretion and denied him a fair trial by conducting a portion of the trial in his absence. "When an action has been set for trial, hearing or conference on a specified date by order of the court, no continuance of the trial, hearing or conference shall be granted except upon written motion setting forth

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[1] For reasons outlined in this court's April 16, 2013 order, Husband's appeal was timely.

[2] We cite the current version of the applicable statutes where no changes material to our decision have since occurred.

[3] *See also* A.R.S. § 12-2102(A) (stating that the reviewing court "shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment, . . . whether a motion for a new trial was made or not").

sufficient grounds and good cause, or as otherwise ordered by the court." Ariz. R. Fam. L.P. 77(C)(1). We will not disturb a ruling on such motions absent an abuse of discretion. *Dykeman v. Ashton*, 8 Ariz. App. 327, 330, 446 P.2d 26, 29 (1968).

¶9 The record reflects the family court proceeded with the trial after receiving a message that Husband would not be calling back. The caller hung up before the court could make inquiries. The court, having already continued the trial twice in the nearly five years this case had been pending, did not halt the proceeding based on this cryptic communication.

¶10 Three days later, the family court received a faxed "HMC WORK RELEASE" for Husband stating:

> RESTRICTIONS: Patient may return to work without restriction when cleared by patients [sic] neurologist. Limited waist bending Limited climbing No prolonged walking or sitting Limited kneeling Limited reaching No operating mobile equipment No extended travel by conveyance Avoid all stressful situations[.]
> DIAGNOSIS:
> ADDITIONAL INSTRUCTIONS: Followup [sic] with personal neurologist or return to emergency department if symp[t]oms persist[.]

¶11 Husband filed no motion to stay the August 6 trial until August 20, 2012. An affidavit attached to the belated motion stated only that Husband was in "physical distress" and went to the emergency room on August 6. Although the family court had received the work release, that document was unsworn and contained no presenting complaints or physical findings, and no diagnosis.

¶12 This court has found a doctor's note recommending a plaintiff "have two weeks rest" insufficient for the purpose of a motion for continuance on the ground of illness. *Modla v. Parker*, 17 Ariz. App. 54, 58, 495 P.2d 494, 498 (1972); *accord Gramma v. Gramma*, 557 N.Y.S.2d 464, 465 (A.D. 1990) (upholding a refusal to continue a proceeding based on a doctor's unsworn and conclusory letter stating that the defendant was unable to go through a trial). Similarly, we cannot say the family court abused its discretion in this case by refusing to re-open the trial and stay

its rulings based on Husband's information. *See Modla*, 17 Ariz. App. at 58, 495 P.2d at 498; *Gramma*, 557 N.Y.S.2d at 465.

¶13 Not only did the family court deem Husband's request unsubstantiated, but it also found his argument for resuming trial "lacks credibility and is without merit," and his failure to appear during the latter portion of the trial "was a last ditch effort to thwart these proceedings." To the extent the family court based its rulings on Husband's credibility, we defer to its judgment. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48, ¶ 13, 972 P.2d 676, 680-81 (App. 1998).

¶14 Finally, we acknowledge and emphasize the family court has discretion over the control and management of the trial. *See Hales v. Pittman*, 118 Ariz. 305, 313, 576 P.2d 493, 501 (1978). "We will not interfere in matters within the [family] court's discretion unless we are persuaded that the exercise of such discretion resulted in a miscarriage of justice or deprived one of the litigants of a fair trial." *Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, 308, ¶ 31, 173 P.3d 463, 472 (App. 2007) (citation omitted). On this limited record, we find no evidence that the court abused its discretion or denied Husband a fair trial when it conducted a portion of the trial in his absence.[4]

III. Husband Fails To Substantiate Prejudice Resulting From The Family Court's Findings.

¶15 Husband also disputes the family court's factual findings on a variety of issues. Generally, we review findings of fact for clear error. *Sabino Town & Country Estates Ass'n v. Carr*, 186 Ariz. 146, 149, 920 P.2d 26, 29 (App. 1996) (citation omitted).

¶16 According to Husband, the family court miscalculated the length of the parties' marriage by ten years, as well as the length of time Wife operated her business. Because he fails to specify, however, exactly how these or other alleged errors prejudiced him, we find no basis for reversal. *See Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987) (declining to develop an argument for a party).

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[4] Further, to the extent Husband argues the family court was biased, the record contains no extra-judicial source of bias to support his argument.

IV. The Family Court Did Not Abuse Its Discretion In Allocating The Parties' Property And Debts.

¶17 Husband also contests the family court's allocation of certain property and debts. We review the court's apportionment of property for an abuse of discretion. *Valento v. Valento*, 225 Ariz. 477, 481, ¶ 11, 240 P.3d 1239, 1243 (App. 2010). Because neither party requested findings of fact and conclusions of law under Rule 82(A) of the Arizona Rules of Family Law Procedure, we presume the family court found every fact necessary to support its judgment. *See Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977) (construing analogous Rule 52(a) of the Arizona Rules of Civil Procedure (citations omitted)).

A. Medicare Settlement And Tax Debt

¶18 According to Husband, the family court erred in allocating to him half the liability for a $60,000 settlement of debt owed to Medicare arising out of Medicare "overpayments" made to Lillian Muzyka, M.D., P.C., a Subchapter S corporation, between January 1, 2004, and October 31, 2008. Husband characterizes this medical practice corporation as a community asset.

¶19 There is a strong presumption that property acquired during marriage is community property and debts incurred during marriage are community obligations. *See Cockrill v. Cockrill*, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979); *Hrudka v. Hrudka*, 186 Ariz. 84, 91-92, 919 P.2d 179, 186-87 (App. 1995); *see also* A.R.S. § 25-211(A) (providing that, with certain exceptions, "[a]ll property acquired by either husband or wife during the marriage is the community property of the husband and wife"). A spouse seeking to establish the separate character of a debt or property must overcome the presumption with clear and convincing evidence to the contrary. *See Cockrill*, 124 Ariz. at 52, 601 P.2d at 1336; *Hrudka*, 186 Ariz. at 91-92, 919 P.2d at 186-87.

¶20 We find no basis to hold that Husband carried his burden on this issue. *See Hrudka*, 186 Ariz. at 91-92, 919 P.2d at 186-87. We are hampered by the lack of a transcript, which would allow us to evaluate the basis for Husband's assertions. As the appellant, Husband had the burden to provide this court with a trial transcript necessary to the resolution of this appeal. *See* ARCAP 11(b)(1). Because Husband has failed to do so, we assume the record supports the family court's findings

and conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Given that assumption, we find no error.

¶21 Relying on *Harasym v. Harasym*, 614 A.2d 742 (Pa. Super. Ct. 1992), Husband nevertheless argues the settlement of the Medicare fraud claim does not qualify as marital debt. The Pennsylvania Superior Court held in *Harasym* that a $10,000 settlement the husband entered with the federal government based on alleged Medicare fraud and conspiracy might include a penalty, and thus did not necessarily represent an amount that may have inured to the wife. *Id.* at 746.

¶22 Pennsylvania is not a community property state. Further, the *Harasym* court placed the burden on the settling spouse to prove the debt was a shared liability, and not in any respect a penalty. *Id*. That is not the law in Arizona. Arizona law includes the presumption that debts incurred during marriage are community liabilities, and a party must produce clear and convincing evidence to overcome the presumption. *See Hrudka*, 186 Ariz. at 91-92, 919 P.2d at 186-87. As a result, we decline to follow *Harasym*.[5]

¶23 The presumption of community liability also applies to the parties' 2006 tax debt. *See Hrudka*, 186 Ariz. at 91-92, 919 P.2d at 186-87. Husband did not submit, and the record does not contain, any clear and convincing evidence that this debt was Wife's sole obligation, and in the absence of a transcript, we affirm the family court's ruling that each party pay half the tax debt. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.

B. Valuation Of Medical Practice

¶24 Equally unavailing is Husband's assertion that the family court had inadequate information with which to value Wife's medical corporation and failed to consider the impact of Wife's deductions from business accounts. The court found Wife's medical practice had no value

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[5] Even if *Harasym* applied, without a trial transcript, we would infer the family court made the additional findings necessary to sustain its judgment, including a finding that the Medicare debt settlement represented funds from which Husband had benefitted, as opposed to a penalty. *See Elliott v. Elliott*, 165 Ariz. 128, 135, 796 P.2d 930, 937 (App. 1990); *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984) (holding that the evidence supported a spousal maintenance award).

because she "walked away from" it in July 2011, and cited Wife's testimony that "she could no longer make ends meet and could no longer pay her employees."

¶25 The valuation of assets is a factual determination. *See, e.g., Lee v. Lee*, 133 Ariz. 118, 122, 649 P.2d 997, 1001 (App. 1982). In the absence of a transcript, we assume the record supports the family court's finding. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. We also assume the family court considered all relevant information in the record, including both parties' use of the business accounts. *See Aguirre v. Robert Forrest, P.A.*, 186 Ariz. 393, 397, 923 P.2d 859, 863 (App. 1996).

¶26 The family court noted that, although Wife provided Husband funds to obtain an expert evaluation of the practice's value, Husband never disclosed an expert report. Husband directs us to a letter in the record from an alleged expert critiquing Wife's valuation position, but that document was not an exhibit at trial. On this record, we affirm the valuation.

C. Property Disposition

¶27 Husband also contests the family court's award of the guitar collection to Wife, as well as the court's non-specific award to each party of "any other property in their possession." Husband complains the court failed to properly account for firearms and other property, including some music and photography equipment, allegedly held by Wife. He is not entirely specific about what property he believes was errantly left to Wife, however, and thus does not demonstrate error or show he was prejudiced. Moreover, to the extent his complaint is more specific, we find no error.

¶28 According to the court, the testimony and evidence established that, between 1997 and 2006, Husband incurred $1.7 million in credit card charges to purchase more than one hundred guitars and numerous other items. Husband paid off all the charges with checks drawn on the medical practice account. In light of this evidence, the family court held that Wife had "made a prima facie showing of [Husband's] waste and fraudulent disposition of community property." Because the guitars and other purchased items were community property, the family court had discretion under A.R.S. § 25-318(A) to award the guitars to Wife to offset Husband's waste and fraud. *See Martin v. Martin*, 156 Ariz. 452, 457-58, 752 P.2d 1038, 1043-44 (1988) (upholding a monetary award to the wife in compensation for the husband's dissipation of

assets); *Hrudka*, 186 Ariz. at 93-94, 919 P.2d at 188-89 (upholding the husband's receipt of more assets based on the wife's waste). We find no abuse of discretion in the court's apportionment.

¶29 Husband nevertheless argues the family court mischaracterized some of the firearms as community property and impermissibly awarded them to Wife. We review *de novo* the family court's characterization of property as separate or community. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). At the same time, we view "all evidence and reasonable conclusions therefrom in the light most favorable to supporting" the family court's decision regarding the nature of the property. *Sommerfield v. Sommerfield*, 121 Ariz. 575, 577, 592 P.2d 771, 773 (1979).

¶30 As noted, the Decree does not specifically address the firearms, and instead generally awards each party the personal property in his or her possession. Husband's claim is premised on Wife's alleged possession of some portion of his firearms collection, which he claims "includes pre-marital firearms purchased/registered to Respondent in [New Jersey]." In support of his argument, he provides an inventory of the firearms, but he cites no evidence either that (1) Wife possessed them at the time of dissolution, or (2) any of them qualified as his separate property. Indeed, another list, showing five firearms registered to Husband in New Jersey, does not reflect when they were acquired or where they were located. Further, the record does not reflect that these hearsay documents were among the exhibits admitted at trial.

¶31 In the absence of a transcript, we assume the record supports the family court's rulings, and therefore decline to reverse its award of assets. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. We also assume the family court considered all relevant factors. *See Aguirre*, 186 Ariz. at 397, 923 P.2d at 863. We decline to address Husband's assertion that Wife unlawfully possessed the firearms in violation of a restraining order issued in New Jersey five years ago because he fails to cite the necessary supporting evidence in the record. *See* ARCAP 13(a)(6) (providing that an argument shall contain citations to the "parts of the record relied on"); *Prairie State Bank v. I.R.S.*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987) (declining to consider assertions unsupported by record evidence).

D. Community Interest In Contribution To Separate Asset

¶32 Husband also claims the community had an interest in payments made on the marital residence. Wife took title to the residence as a married woman dealing with sole and separate property, and Husband disclaimed any interest in the residence.

¶33 A valid disclaimer deed rebuts the presumption that property acquired during marriage is community property. *See Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 524, ¶¶ 10-11, 169 P.3d 111, 114 (App. 2007). Nevertheless, the marital community is entitled to reimbursement when the parties spend community funds to increase one spouse's equity in separate property. *See Tester v. Tester*, 123 Ariz. 41, 43, 597 P.2d 194, 196 (App. 1979).

¶34 Husband's evidence of a community contribution is his own spreadsheet of payments allegedly made from the medical corporation account. This hearsay document was not among the exhibits admitted at trial. In the absence of a transcript, we assume the existing record supports the family court's decision to award the residence to Wife without crediting the alleged contribution to the community. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Moreover, we note that Husband did not preserve the issue, as he failed to list post-purchase community contributions to this residence's mortgage as an issue in either the pre-trial statement or the proposed resolution statement.

V. The Family Court Did Not Abuse Its Discretion By Awarding Attorneys' Fees To Wife.

¶35 Finally, Husband contends the family court abused its discretion by awarding attorneys' fees to Wife pursuant to A.R.S. § 25-324(A). We review the court's award of fees for an abuse of discretion. *See Mangan v. Mangan*, 227 Ariz. 346, 352, ¶ 26, 258 P.3d 164, 170 (App. 2011).

¶36 The family court had the discretion to award fees based on the parties' financial resources and the reasonableness of their positions throughout the litigation. *See* A.R.S. § 25-324(A). In this case, the court found that Husband had filed an excessive number of supplemental pleadings and motions, thereby forcing Wife to incur unnecessary fees over the course of four and a half years. Consequently, the court awarded Wife $30,000 in fees.

¶37 With respect to resources, the family court found that Husband had gross receipts of $132,794 in 2006, and made no express findings concerning Wife's resources. Husband contends the court did not account for Wife's alleged reduction of her income by expensing and deducting her legal fees from the medical corporation's earnings, but he cites no record evidence in support of his contention. We therefore do not address it. *See Prairie State Bank*, 155 Ariz. at 221 n.1A, 745 P.2d at 968 n.1A. In addition, we infer the family court made all findings necessary to support its award. *See Thomas*, 142 Ariz. at 390, 690 P.2d at 109. On this record, we find no abuse of discretion with respect to the family court's fees award.[6]

CONCLUSION

¶38 We affirm the family court's rulings in all respects. In the exercise of our discretion, we deny Wife's request for attorneys' fees on appeal. Wife is entitled to her costs on appeal contingent on her compliance with Rule 21(a), ARCAP.[7]

Ruth A. Willingham · Clerk of the Court
FILED: mjt

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6 Husband does not attempt to address the court's additional award of $500 in fees to Wife in the order denying his motion for new trial.

7 *See* Ariz. Supreme Ct. Order No. R-12-0039 (amending ARCAP 21 effective Jan. 1, 2014).