

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



DIVISION ONE
FILED: 01/28/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 08-0782
)
JOSEFINA C. HORNE,) DEPARTMENT A
)
Petitioner-Appellant,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
MICHAEL W. HORNE,) Civil Appellate Procedure)
)
Respondent-Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2006-000275

The Honorable Peter C. Reinstein, Judge

AFFIRMED

Joseph W. Charles
Attorney for Petitioner-Appellant

Glendale

Michael W. Horne
Respondent-Appellee *In Propria Persona*

Ellensburg, WA

D O W N I E, Judge

¶1 Josefina Horne ("Wife") appeals from certain orders issued by the family court in her dissolution action against

Michael Horne ("Husband"). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Wife filed for dissolution in January 2006. The family court held a trial on January 10, 2007. It issued a decree of dissolution ("Decree") on January 19, 2007. The Decree allocated community debts as follows:¹

<u>To Husband:</u>	Chrysler Financial--\$21,498 ²
	American Express--\$18,867
	Capitol [sic] One--\$12,386
<u>To Wife:</u>	Chase Financial--\$20,922 ³
	Chase credit card--\$23,269

The Decree further stated: "The Parties have agreed that some of these debts be paid from the sale of the marital residence." The Decree did not, however, specify which debts would be paid with the sales proceeds. The Decree directed Husband to make mortgage payments on the marital residence until it was sold. Thereafter, Husband was to be "reimbursed one-half of any payments he has made with respect to the marital home."

¶3 The Decree did not expressly allocate the parties' two vehicles: a 2004 Nissan Maxima and a 2005 Chrysler Sebring. The record reflects, though, that the Nissan was in Wife's

¹ We have omitted the allocation of other debts that are not at issue in this appeal.

² This loan relates to a 2005 Chrysler Sebring.

³ This debt was to "Chase Auto Finance."

possession before and after the Decree, and Husband had the Chrysler.

¶14 The family court appointed a special commissioner to sell the marital residence. In April 2007, the special commissioner informed the court that a dispute had arisen about disbursement of the sales proceeds. Later, though, the parties resolved their dispute, and the court vacated a hearing that had been set to consider the issue.

¶15 In February 2008, Wife moved to amend the Decree. She identified one issue, which she framed as follows:

The Court, in disposition of the property and obligations of the marriage, assigned the Chase Financial obligation in the approximate sum of \$20,922.00 to [Wife]. Wife thereafter has been making payments on said obligation. Wife's vehicle is the security for said indebtedness. However, [Husband] holds the title to said vehicle, thereby obstructing Wife from refinancing and/or trading in said vehicle. Husband has taken an unreasonable position in that he is refusing to convey the title to Wife and is demanding possession of said vehicle.

¶16 Wife asked the court to amend the Decree "to convey and/or transfer the title of said vehicle into Wife's name alone and/or removing Husband's name from the vehicle title." She also asked the court to reaffirm "that Wife shall remain liable for the Chrysler [sic] financial obligation." Wife submitted an affidavit detailing her unsuccessful attempt to trade in the Nissan on a new Lexus. According to Wife's

affidavit, Husband improperly picked up the Nissan from the Lexus dealership and "stole" it from her.

¶17 In March 2008, Wife filed a petition for order to show cause ("OSC"). She sought relief relating to the Nissan, including "costs associated with the wrongful taking of [the] car."⁴ Wife filed a second OSC petition relating to various financial issues. Meanwhile, Husband also filed an OSC petition, alleging Wife had failed to abide by various financial orders included in the Decree.

¶18 The family court held a consolidated hearing on July 31, 2008, regarding the OSC petitions. Wife has not provided us with a transcript of this proceeding. By minute entry dated August 5, 2008, the court ruled that Wife had assumed responsibility for the \$20,922 debt to Chase Financial under the Decree and, "by inference," she was awarded the Nissan as her sole and separate property. The court then stated:

Wife attempted to purchase a new vehicle using the Nissan as a trade-in. Wife obtained a new vehicle, but had to return it when the dealership could not secure a valid title to the Nissan. Subsequently, Husband picked up the Nissan at the dealership and sold it for \$14,500. Husband used the \$14,500 to pay off part of the encumbrance on the vehicle and paid an additional \$4,977 to pay off the entire note on the vehicle to Chase Financial.

⁴ Wife also raised other issues that are not relevant to this appeal.

The Court finds that the \$9,523 realized from the sale of the Nissan is a community asset (\$14,500 - \$4,977). Consequently, each Party is entitled to \$4,761.50. This amount shall be subtracted from the money owed by Wife to Husband as described above.

With respect to Wife's conversion claim, the court ruled that "the consequential costs associated with the sale of the Nissan claimed by Wife are not recoverable."

¶9 Wife filed a motion for new trial, which the family court denied. Wife appealed from that ruling and the underlying judgment. We suspended the appeal to allow Wife to obtain a signed order, which she did. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(F)(1) (2003).

DISCUSSION

¶10 We review the family court's distribution of property and debts for an abuse of discretion. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 523, ¶ 4, 169 P.3d 111, 113 (App. 2007) (citation omitted). The same standard governs our review of the denial of a motion for new trial. *Drahos v. Rens*, 149 Ariz. 248, 251, 717 P.2d 927, 930 (App. 1985).

¶11 Neither party requested findings of fact and conclusions of law pursuant to Rule 82(A), Arizona Rules of Family Law Procedure. Accordingly, "we are constrained by the presumption that the Superior Court 'found every fact necessary to support the judgment, and such presumptive findings must be

sustained if the evidence on any reasonable construction justified it.'" *Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977) (citations omitted). See also *Berryhill v. Moore*, 180 Ariz. 77, 82, 881 P.2d 1182, 1187 (App. 1994). Moreover, as we have previously mentioned, Wife has not provided us with transcripts from any of the family court hearings. It is the duty of the appealing party to insure that the appellate court receives a complete record. *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 189, 680 P.2d 1235, 1250 (App. 1984). Where the record is incomplete, we must presume that the missing portions would support the findings of the lower court. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995); *Bee-Gee, Inc. v. Ariz. Dep't of Econ. Sec.*, 142 Ariz. 410, 414, 690 P.2d 129, 133 (App. 1984) (citation omitted). As we discuss below, the absence of a transcript from the OSC hearing makes it impossible to resolve many of Wife's claims.

¶12 Although Wife received the Nissan under the Decree as her sole and separate property, the debt associated with that vehicle far exceeded its value. According to Wife, the trade-in value of the car was \$14,500. Yet the auto loan held by Chase Financial, which Husband paid after retrieving the vehicle, exceeded \$19,000. We agree that allocating one-half the Nissan's trade-in value to Husband raises questions. However,

that issue cannot be considered and resolved in a vacuum.⁵ The family court resolved numerous financial issues between the parties at the OSC hearing. We can discern only some of the court's rationale from its minute entry. As noted *supra*, neither party requested findings of fact, and the court was thus not required to say more than it did. A review of the transcript would have allowed us to fully track the court's handling of the various financial matters to determine whether the overall result was fair and equitable.

¶13 Wife also contends the family court erred by rejecting her conversion claim. We disagree. Wife cites no authority for the proposition that she may recover conversion damages through post-dissolution proceedings, and we are aware of none. A conversion claim is an action at law, not equity. See *Weaver v. Weaver*, 131 Ariz. 586, 588, 643 P.2d 499, 501 (1982) (Gordon, J., concurring) (a spouse seeking damages for the destruction of separate property has stated a claim for conversion and must file an action at law). Among other things, litigants are

⁵ Moreover, the court's treatment of the Nissan could have disadvantaged Husband, not Wife. Husband paid off a debt that Wife owed which far exceeded the value of the Nissan. As we discuss herein, without a transcript, it is not possible to know whether the overall financial allocations between the parties were fair and equitable. We cannot tell from the record whether Husband personally paid the Nissan loan or if proceeds from the sale of the marital residence were used in part.

entitled to a jury trial on conversion claims--something that is not available in family court proceedings.

¶14 Wife also attacks the order that she make a \$7225 equalization payment to Husband. She attaches a document purportedly authored by Husband's attorney to her Opening Brief. Because that document is not in the trial court record, we disregard it. See *State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (holding that appellate courts generally do not consider materials outside the appellate record). See generally ARCAP 11(a)(3), (4). In addition, because we have no transcript and the parties did not request findings of fact, we presume the record supports the family court's ruling.⁶ *Bee-Gee, Inc.*, 142 Ariz. at 414, 690 P.2d at 133.

¶15 Finally, Wife challenges the denial of her attorneys' fee request pursuant to A.R.S. § 25-324(A) (Supp. 2009).⁷ We will not disturb the family court's decision absent an abuse of discretion. *Breitbart-Napp v. Napp*, 216 Ariz. 74, 83, ¶ 35, 163 P.3d 1024, 1033 (App. 2007) (citation omitted). Because we lack a transcript of the proceedings, we assume the record supports the family court's finding that neither party was entitled to

⁶ This reasoning also applies to Wife's contention that the family court erred in its treatment of sales proceeds from the marital residence.

⁷ We cite to the current version of this statute because no revisions material to this decision have occurred.

