

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In Re The Marriage of:) 1 CA-CV 10-0243
)
THEO CHRISTODOULAKIS,) DEPARTMENT B
)
Petitioner-Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
QUYNH CHI VU,) Civil Appellate Procedure)
)
Respondent-Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC2007-092203

The Honorable James P. Beene, Judge

REVERSED IN PART; AFFIRMED IN PART; REMANDED

Theo Christodoulakis, Appellee Chandler
In Propria Persona

Quynh Chi Vu, Appellant Chandler
In Propria Persona

W E I S B E R G, Judge

¶1 Quynh Chi Vu ("Mother") appeals from an order designating Theo Christodoulakis ("Father") as the primary residential parent of the parties' two minor children, ordering her to pay child support in the amount of \$470 per month, and

entering a judgment against her for child support arrearages in the amount of \$119,000. For the reasons stated, we reverse the custody order and the judgment on arrearages, affirm the child support order, and remand the matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶12 The parties were divorced in New Jersey in 1999. At the time the decree was entered, the parties were living together. Father was designated the primary residential parent, and Mother was ordered to pay \$1,500 per month until September 2000 and \$1,000 per month thereafter in child support. The final decree provided that the custody and child support terms would not take effect until the parties separated.

¶13 Father moved to Arizona in 1999, but returned to visit the family. Mother and the children moved to Arizona in 2001 and the parties lived together until either 2005 or 2006. When the parties finally separated, both children lived with Father. However, two months later, the daughter moved in with Mother and the son stayed with Father. Mother has not paid any child support to Father.

¶14 Mother filed a petition to modify child custody, parenting time, and child support orders. Father responded and filed a cross-petition seeking to hold Mother in contempt for

retaining custody of the daughter and failing to pay child support as ordered in the decree.

¶15 The court set an evidentiary hearing on the custody issues and ordered conciliation services to interview the children. The court temporarily designated Mother as the primary residential parent for the daughter, and Father remained the primary residential parent for the son. Child support issues were deferred until the evidentiary hearing. After receiving the conciliation services report, the court appointed a custody evaluator. Prior to the evidentiary hearing, Father filed an emergency motion for custody of the daughter because she had been caught drinking alcohol at a school function and Mother could not be reached. The court awarded Father temporary sole legal custody of the daughter.

¶16 The trial court held an evidentiary hearing on custody, child support, and arrearages. The parties were given joint legal custody, and Father was named primary residential parent of both children. The court found that Mother earned \$3,000 per month and Father earned \$3,200 per month, and ordered Mother to pay child support in the amount of \$470 per month. The court found that Mother owed child support arrearages in the amount of \$119,000. Mother filed a motion for reconsideration,

which the court denied. Mother filed a timely notice of appeal.¹ We have jurisdiction pursuant to Arizona Revised Statutes section 12-2101(C) (2003).

DISCUSSION

Custody

¶7 Mother argues that the court abused its discretion in awarding primary physical custody to Father because the court did not consider the children's wishes. She also argues that it is not in the children's best interest to limit Mother's parenting time and to give Father final authority on major parenting issues. We review the trial court's decision regarding child custody for an abuse of discretion. *In re Marriage of Diezsi*, 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1190 (App. 2002).

¶8 One factor the trial court must consider in determining the best interests of the children is "the wishes of the child as to the custodian." See A.R.S. § 25-403(A)(2) (Supp. 2010). The trial court found there was no evidence

¹Father contends that Mother's appeal was untimely. Because Mother filed her notice of appeal less than thirty days from the entry of final judgment, the appeal is timely. See ARCAP 9(a). Father also claims that Mother did not send him a copy of the opening brief. However, Mother's brief contains a signed certificate of service stating that the brief was mailed to Father at the address of record. Also, Father failed to raise this issue when he received notice from this court that his answering brief was overdue and that he had not paid his filing fee. Therefore, Father's objection is untimely.

presented regarding this factor. Mother contends that the court failed to consider the conciliation services report and the custody evaluation. We agree.

¶19 The conciliation services report was admitted into evidence. It includes a summary of the children's interviews in which the son expressed a desire to live with Father and the daughter expressed a desire to live with Mother. The court's findings do not refer to this evidence. Indeed, the court seems to have overlooked it because it found that there was "no evidence" regarding the children's wishes.

¶10 Additionally, there was a custody evaluation prepared approximately five months before trial. Father objected to the report, but the court did not rule on his objection. The custody evaluation is in the record on appeal as an exhibit to Mother's motion for reconsideration. It was not offered as an exhibit at the evidentiary hearing, and Mother did not provide a transcript of the hearing. Therefore, we cannot ascertain if the court considered the custody evaluation at the evidentiary hearing.

¶11 Generally an appellant is responsible for making certain that the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. See ARCAP 11(b) (appellant is responsible for

ordering all relevant transcripts). When a party fails to do so, we assume the missing portions of the record would support the trial court's findings and conclusions. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). However, in this case, at least the conciliation services report was part of the record, and it is apparent that the court failed to consider evidence regarding the children's wishes as required by A.R.S. § 25-403(A)(2). For this reason, we reverse the order regarding physical custody. We remand to the trial court for reconsideration of its order in light of evidence regarding the children's wishes.²

Child Support

¶12 Mother next contends that the child support order was based on erroneous findings regarding the parties' incomes. Mother claims she earns far less than \$3,000 per month and that Father earns more than \$3,200 per month as found by the trial court. The only evidence in the record regarding Mother's income is her tax returns from 2003 through 2008. With the exception of 2007, these returns reflect that Mother has an earning capacity of \$3,000 per month. Additionally, given the absence of a trial transcript, we will presume that the evidence

²Although Mother challenges the custody order on other grounds as set forth above, because we are remanding this matter for further proceedings, we need not address those arguments.

offered at the trial supports the trial court's findings and conclusions regarding the parties' incomes. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Therefore, as to the child support order, there was no abuse of discretion. We note, however, that if the trial court modifies the primary residential parent designation, the current child support order must be reexamined as well.

Child Support Arrearages

¶13 The trial court found that Mother owed child support arrearages of \$119,000 for unpaid child support from April 1, 1999 through June 30, 2007. Mother did not dispute that she has not paid any child support since the decree was entered. Mother contends, however, that pursuant to the terms of the decree, her child support obligation did not begin until the parties separated, which Mother alleges was in July 2006.

¶14 Mother also relies on a prior ruling by a commissioner entered after the Arizona Department of Economic Security made an appearance in the case and moved for an arrears determination. The commissioner found that "the parties agree that they lived together from the time of the divorce in 1999 until 2006" and that "between August 2006 through April of 2007," they divided custody equally. The commissioner concluded that Mother did not owe Father past due child support. Father

filed a motion for reconsideration of the commissioner's ruling, but the commissioner never ruled on that motion. The trial court did not refer to this earlier ruling in its order, nor did it make specific findings regarding the parties' living arrangements during this period.

¶15 On appeal, Mother argues that the evidence shows the parties lived together "most of [the] time" between April 1, 1999 and June 30, 2007. The pleadings in the record contain different dates regarding when the parties claim they were separated. Father has alleged that he lived with Mother and the children in Arizona from 2001 until December 2005 or 2006, while Mother has claimed that they lived together until July 2006. Because Father has conceded that the parties resided together from sometime between 2001 until at least 2005, and pursuant to the terms of the divorce decree, Mother was not obligated to pay child support to Father during such period. The trial court's conclusion regarding arrearages, therefore, was based on a factual assumption that was clearly erroneous. See *Hrudka v. Hrudka*, 186 Ariz. 84, 91, 919 P.2d 179, 186 (App. 1995) (we will sustain a trial court's factual finding unless it is clearly erroneous). Thus, we remand the matter to the trial court to determine when the parties were permanently separated, with whom

each child then resided, and to redetermine child support arrearages accordingly.³

Costs on Appeal

¶16 Mother requests an award of costs on appeal. Mother was only partially successful on her appeal. Therefore, we deny her request. Each party shall bear his or her own costs.

CONCLUSION

¶17 For the foregoing reasons, we reverse the order appointing Father as primary residential parent and the judgment on arrearages. We affirm the child support and all other provisions of the trial court's order. We remand the matter to the trial court for further proceedings consistent with this court's decision.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
DONN KESSLER, Presiding Judge

/s/ _____
DIANE M. JOHNSEN, Judge

³Mother also argues that the trial court did not have jurisdiction to reconsider the commissioner's prior ruling on arrearages because the prior ruling was law of the case. However, because of our resolution of this matter, we need not decide this issue.