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.

FILED BY CLERK
NOV 26 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	)	2 CA-CV 2008-0002
	)	DEPARTMENT A
RHONDA DENISE SMITH,	)	
	)	SUPPLEMENTAL
Petitioner/Appellant,	)	MEMORANDUM DECISION
	)	Not for Publication
and	)	Rule 28, Rules of Civil
	)	Appellate Procedure
HOWARD EDWARD SMITH III,	)	
	)	
Respondent/Appellee.	)	
	)	

ON MOTION FOR RECONSIDERATION

Cause No. D-20040862

Honorable Deborah Ward, Judge Pro Tempore

MOTION TO SUPPLEMENT GRANTED; AFFIRMED

Schwanbeck & Present, P.L.L.C.
By Victor R. Schwanbeck and René S. Alcoverde, Jr. — Tucson
Attorneys for Petitioner/Appellant

Erika L. Cossitt, P.C.
By Erika L. Cossitt — Tucson
Attorney for Respondent/Appellee

H O W A R D, Presiding Judge.

¶1 In a memorandum decision, this court affirmed the trial court's ruling that appellee Howard Smith III (Trey) had rebutted the presumption that appellant Rhonda Smith had intended a resulting trust to arise when she purchased a home taking title in joint tenancy with Trey. *See Smith v. Smith*, No. 2 CA-CV 2008-0002, ¶¶ 1-2 (memorandum decision filed Aug. 26, 2008). This court had not been provided with a relevant transcript on which the trial court had relied in rendering its decision and we therefore presumed it supported the trial court's decision. *Id.* ¶ 8.

¶2 Rhonda now has filed a Motion to Supplement Record on Appeal, attaching the relevant transcript. Rhonda should have ensured that the transcript was included in the record on appeal before filing her opening brief. Having failed to do that, Rhonda should at least have checked the record after receiving this court's decision noting that the transcript was not in the record on appeal. She failed to do so and instead filed a motion for reconsideration assuming that the transcript was available to the court. Her present motion is untimely as the court has already decided the case and denied her motion for reconsideration. Furthermore, it constitutes in substance a motion for reconsideration of the denial of a motion for reconsideration and she did not seek permission from the court to file such a motion. *See* Ariz. R. Civ. App. P. 22(d). Therefore, the motion is procedurally improper.

¶3 However, both parties cited the first trial transcript in their briefs and Rhonda could have *initially* been misled by the entry in the record on appeal numbered fifty-two.

Accordingly, under these peculiar circumstances, this court grants Rhonda's motion to supplement the record with the transcript from the first trial and to review it and the remainder of the record to address the merits of Rhonda's claim.

¶4 Rhonda argues that no substantial evidence supports the trial court's finding that Trey had rebutted the presumption that the Sierra Nevada property was held in joint tenancy in trust for Rhonda. We review the trial court's order for an abuse of discretion, *see Sharp v. Sharp*, 179 Ariz. 205, 209, 877 P.2d 304, 308 (App. 1994), and defer to that court's factual findings unless they are clearly erroneous, *see Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919 P.2d 179, 187 (App. 1995). Factual findings are not clearly erroneous if supported by substantial evidence, even if conflicting evidence also exists. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 9, 18 P.3d 85, 89 (App. 2000).

¶5 Aside from the "subsidiary evidentiary fact" addressed in our memorandum decision, *see Smith*, No. 2 CA-CV 2008-0002, ¶¶ 9-10, substantial evidence supports each of the trial court's findings of fact. Rhonda cites other evidence that could be interpreted to support her claim that she had not intended to gift half the property to Trey but that she had instead intended to create a trust. The existence of such evidence, however, does not detract from the substantial evidence that supports the trial court's decision. *See In re $26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 9, 18 P.3d at 89 ("If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support [a] . . . decision that elects either conclusion."), *quoting Smith v. Ariz. Dep't of Transp.*, 146 Ariz.

430, 432, 706 P.2d 756, 758 (App. 1985) (alteration in *In re $26,980.00 U.S. Currency*). The trial court did not abuse its discretion in determining that Trey had rebutted the presumption that the Sierra Nevada property was being held in trust for Rhonda.

¶6 Granting Rhonda's motion, we vacate paragraphs one, six, and eight of our prior memorandum decision and supplement that decision as stated above. And we again affirm the trial court's ruling.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
J. WILLIAM BRAMMER, JR., Judge