DIVISION ONE
FILED: 7/11/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	)	1 CA-CV 11-0712
	)	
NATHANIEL R. LEAS,	)	DEPARTMENT E
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
CHERYL F. LEAS,	)	
	)	
Respondent/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. FN2010-002523

The Honorable Thomas L. LeClaire, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

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B R O W N, Judge

¶1 Cheryl Leas ("Wife") appeals (1) from a dissolution decree that assigns mortgage, tax, and loan balances to her, and

(2) from the denial of her Rule 85(C)(1)(b) motion to set aside the decree. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings consistent with this decision.

BACKGROUND

¶2 Wife and Nathaniel Leas ("Husband") married in April 1989. During the marriage, Wife obtained student loans to fund both tuition and living expenses while she pursued a master's degree in management at Cornell University. She resided in Ithaca, New York, while studying for the degree.

¶3 Following graduation, Wife returned to Arizona and, in 2004, became Vice President for Brand Strategy and Marketing Research at SHR Perceptual Management, Inc. ("SHR"). Wife's starting salary was $77,000, a $30,000 increase from her pre-Cornell earnings; eventually, her salary rose to $137,000.

¶4 After five years at SHR, Wife co-founded CSK Strategic Marketing Group, Inc. ("CSK"), a Colorado corporation, with two former SHR colleagues. At trial, Frank Pankow, a business valuation expert, estimated Wife's reportable share of CSK to be $229,000, and subsequent to his evaluation Wife received a $50,000 bonus.

¶5 The parties owned residences in Phoenix and Colorado Springs, Colorado as joint tenants. The parties were jointly responsible for the mortgage on the Colorado Springs residence,

as well as the mortgage and home equity line of credit ("HELOC") for the Phoenix residence. At the time of trial, the Colorado Springs residence had an estimated $46,474.21 in equity, and the combined mortgage and HELOC debt on the Phoenix residence exceeded its estimated value by $125,168.37.

¶6 Husband petitioned for dissolution on July 2, 2010. As set forth in their joint pretrial statement, the parties stipulated to an equitable allocation of their bank accounts, IRAs, and vehicles and an equitable division of their credit card debts. As pertinent here, the primary contested issues at trial were: (1) the valuation of CSK, (2) the classification and allocation of Wife's student loan debt, (3) the allocation of 2010 tax liability, (4) the allocation of a promissory note executed by the parties in favor of CSK, and (5) the allocation of the real properties with the related debts. In its decree of dissolution, the trial court awarded the Phoenix residence to Husband, and the Colorado Springs residence to Wife. The parties were assigned the indebtedness associated with their respective properties, but the court ordered the parties to "share equally" the net "negative equity" on the properties in the amount of $78,694.16 ($125,168.37 "negative equity" in the Phoenix residence less $46,474.21 equity in the Colorado Springs residence).

¶7 The decree characterized the student loans as Wife's sole and separate debt and required Wife to pay the entire balance. Wife received her interest in CSK, which the trial court valued at $239,000, and Husband received $119,500 for his community share in that interest. Finally, the trial court entered a judgment against Wife for a $70,630.80 equalization payment to Husband, reflecting the court's balance of the assets and debt, and required each party to bear their respective attorneys' fees and costs.[1]

¶8 Addressing Wife's post-trial motions, the trial court amended the decree, correcting some mathematical errors and finding that because Husband was "starting at a negative equity of ($47,847.13), Wife shall pay to Husband a sum of $181,107.60," which would result in each party having "50% of the total equity of $133,260.47 each." The court corrected the business valuation to $229,000 and ordered each party to bear their own 2010 income taxes, without filing a joint return or obtaining contribution from the other party. The amended decree further directed that "Husband shall have until 120 days after

[1] Following trial, Wife's former employer, SHR, filed suit against the parties and CSK, among others, in Maricopa County Superior Court. Additionally, the parties entered a stipulation, adopted by the trial court in the dissolution decree, that the personal property in Husband's possession "shall be attributed a value of $30,000 more than the property in Wife's possession, which shall be included in the property equalization."

the date of the final payment on the judgment to refinance the house into his own name, or list the house for sale, under the same provisions in the Decree."

¶9 Wife appealed, but subsequently filed a timely motion to set aside the decree under Rule 85(C)(1)(b) of the Arizona Rules of Family Law Procedure based upon the SHR lawsuit. This court stayed the pending appeal and revested jurisdiction in the trial court to allow consideration of the motion. Following the denial of Wife's motion, she filed an amended notice of appeal and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) and (A)(2).

DISCUSSION

I. Phoenix and Colorado Springs Residences

¶10 Wife does not contest the valuation or award of the Phoenix residence to Husband. Instead, she argues the trial court abused its discretion by ordering her to share in the net "negative equity" of the residences. Specifically, Wife asserts that Husband is currently receiving all the benefits of owning the Phoenix property and may be "unjustly rewarded" if he is able to sell the property at a future time when the real estate market recovers.[2]

[2] Wife also makes a cursory reference to *Valento v. Valento*, 225 Ariz. 477, 240 P.3d 1239 (App. 2010), but does not explain its application here, and did not do so in the trial court. Therefore, we do not address it.

¶11 Pursuant to A.R.S. § 25-318(A), the trial court is obligated to "divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind[.]" The court "may consider all debts and obligations that are related to the property[.]" A.R.S. § 25-318(B).

¶12 "In apportioning community property between the parties at dissolution, the superior court has broad discretion to achieve an equitable division, and we will not disturb its allocation absent an abuse of discretion." *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13, 167 P.3d 705, 708 (App. 2007). "[T]he court may abuse its discretion if it commits an error of law in the process of exercising its discretion." *Id*. (internal quotation omitted). We will consider the evidence in the light most favorable to upholding the court's ruling and will sustain that ruling if the evidence reasonably supports it. *Id.*

¶13 Dividing jointly held property into equal shares generally is the most equitable approach, unless a sound reason exists for making a different division. *Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997). Relevant considerations include "the length of the marriage; the contributions of each spouse to the community, financial or otherwise; the source of funds used to acquire the property to be divided; the allocation of debt; as well as any other factor that may affect the

outcome." *In re Marriage of Inboden*, 223 Ariz. 542, 547, ¶ 18, 225 P.3d 599, 604 (App. 2010).

¶14 Here, it is undisputed that the parties jointly owned the residences and used community funds to pay the mortgages. Each party was awarded a house with a value of $240,000. The parties were also assigned the debts associated with their respective homes. At the time of the decree, the combined debt on the Phoenix residence totaled $365,168.37 while the debt on the Colorado Springs residence equaled $193,525.79. Even accounting for the equal division of the net "negative equity" ordered by the family court in the amount of $39,347.88 to each party (net "negative equity" of $78,694.26 divided equally), Wife's combined real property debt obligation is notably less than Husband's corresponding debt obligation. Wife's Colorado Springs mortgage obligation ($193,525.79) plus her one-half share in the net "negative equity" ($39,347.08) equals $232,872.87, whereas Husband's combined Phoenix mortgages ($365,168.37) less Wife's net "negative equity" equalization payment on the properties ($39,525.79) equals $325,642.58. Thus, to the extent the family court's allocation of the real property (each party receiving a parcel of equal value) and associated indebtedness was not substantially equal, any inequity arguably inured to the benefit of Wife. Under these unique circumstances, we find no abuse of discretion relating to

the trial court's division of the marital debt associated with the parties' residences.[3]

¶15 Wife alternatively argues that the family court abused its discretion by failing to either order the Phoenix residence sold or include an indemnification provision in the decree protecting Wife from liability in the event Husband defaulted on the Phoenix residence mortgages. As noted by Husband, Wife did not request either form of relief in the trial court. Rather, in the joint pretrial statement, Wife advocated that the parties "remain co-owners" of both properties, with Wife paying Husband $565 per month "as the difference in the mortgage payments related to the respective properties," until the Phoenix real estate market values "stabilize." Therefore, Wife waived these claims and we do not address them. *See Trantor*, 179 Ariz. at 300-01, 878 P.2d at 658-59.

[3] Citing *Kohler v. Kohler*, 211 Ariz. 106, 118 P.3d 621 (App. 2005), Wife argues that the trial court also erred by dividing the net "negative equity" because the property valuations used at trial were "mere speculation." *Kohler* stands for the proposition that it is inequitable to deduct future costs that may be incurred with the sale of a property unless the sale is imminent, and is therefore inapposite here. 211 Ariz. at 107-08, ¶¶ 5-7, 118 P.3d at 622-23. Moreover, Wife stipulated to the property valuations at trial and therefore cannot challenge those valuations on appeal. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (1994) (holding a party waives any argument not properly presented in the trial court).

II. Husband's Interest In CSK

¶16 Wife also challenges the trial court's failure to revalue the parties' respective community interests in CSK in light of the SHR lawsuit filed within weeks of the decree's entry. In addition, she argues that the trial court erroneously failed to allocate the $10,000 promissory note (the "Note") she had executed in favor of CSK during the marriage.

A. SHR Lawsuit

¶17 Wife moved to set aside the dissolution decree based upon "newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 83(D)." *See* Ariz. R. Family L. P. 85(C)(1)(b). She asserts that the post-decree lawsuit warrants a re-evaluation of CSK's value. We review the trial court's denial of Wife's request for Rule 85 relief for an abuse of discretion. *See Birt v. Birt*, 208 Ariz. 546, 549, ¶ 9, 96 P.3d 544, 547 (App. 2004) (applying the same standard of review to a denial of Rule 60(c) motion); *see also* Rule 85, committee cmt. (stating that Family Law Rule 85 is based upon Civil Procedure Rule 60).

¶18 To qualify for relief, "the evidence must be 'newly discovered' but not 'new.'" Leslie Kyman Cooper & Kevin M. Judiscak, Arizona Trial Handbook § 33:31, (1997) (analyzing analogous Rule 60(c)(2) of the Arizona Rules of Civil Procedure). The evidence "must have existed at the time of

trial" and cannot include events occurring after entry of judgment. *OPI Corp. v. Pima Cnty.*, 176 Ariz. 625, 626-27, 863 P.2d 917, 918-19 (Ariz. Tax Ct. 1993) (denying relief under Rule 60(c)(2) and holding that the taxpayer's failure to pay the second half of taxes for 1992 post-dated the judgment and did not support relief). In addition, a court will not consider the evidence newly discovered if it could have been obtained through reasonable diligence prior to trial. *Catalina Foothills Ass'n, Inc. v. White*, 132 Ariz. 427, 428-29, 646 P.2d 312, 313-14 (App. 1982) (holding that a party failed to exercise due diligence to discover that an unnamed title company would receive attorneys' fees instead of the appellees).

¶19 Although the SHR complaint may have been newly discovered, it did not support Rule 85(C)(1)(b) relief. A complaint filed after entry of the dissolution decree is not evidence that existed at the time of trial. *See Birt*, 208 Ariz. at 549, ¶ 11, 96 P.3d at 547 (holding that the husband's post-decree bankruptcy filing did not provide grounds for Rule 60(c)(2) relief). Therefore, the trial court did not abuse its discretion by denying Wife's request for Rule 85(C)(1)(b) relief.

B. Promissory Note

¶20 Wife argues that the trial court erroneously failed to allocate liability for a $10,000 promissory note to CSK. Wife

is the only maker on the promissory note, which she executed on April 30, 2010, before the community ended. According to Wife, the parties incurred this debt to show cash assets in their accounts when preparing to purchase the Colorado Springs residence.

¶21 We presume that the promissory note is a community obligation, and Husband's failure to execute it does not overcome that presumption. *See Donato v. Fishburn*, 90 Ariz. 210, 213, 367 P.2d 245, 246-47 (1961) (holding that the husband executed a promissory note in an effort to protect the community's interest in the corporation and therefore the note was a community obligation); *see also* A.R.S. § 25-215(D) ("[E]ither spouse may contract debts and otherwise act for the benefit of the community.").

¶22 Husband nonetheless argues that Pankow already accounted for the Note in the CSK valuation. We disagree. Although Pankow's report contains a balance sheet reflecting the $10,000, he did not use that information to calculate CSK's value. Moreover, Husband informed the trial court that he did not object to Wife's request to include the CSK loan in the equalization chart. By subjecting the debt to the equalization balance, Husband conceded it is a community liability. Therefore, on remand Wife is entitled to contribution from

Husband for this community obligation. *See Fischer v. Sommer*, 160 Ariz. 530, 532-33, 774 P.2d 834, 836-37 (App. 1989).

III. Student Loans

¶23 Wife argues that the trial court abused its discretion in allocating the student loan debt, incurred during the marriage, as her sole and separate obligation. The balances remaining on the student loans include $30,413.46 from Sallie Mae and $30,783.56 from ACS Education.

¶24 "A debt incurred by a spouse during marriage is presumed to be a community obligation[.]" *Hrudka v. Hrudka*, 186 Ariz. 84, 91-92, 919 P.2d 179, 186-87 (App. 1995). The party contesting the community nature of the debt must overcome this presumption with clear and convincing evidence. *Id.* at 92, 919 P.2d at 187.

¶25 Husband failed to meet this burden. Indeed, he repeatedly acknowledged that the parties used the loan proceeds not only for tuition, but also for rent and "community bills." Wife testified that the funds also covered living expenses for school. On this record, we conclude that the trial court abused its discretion in allocating the debt solely to Wife and failing to treat it as a community obligation of the parties subject to equitable division.[4]

[4] In determining that the student loans constitute Wife's "sole and separate debt," the trial court found "that the

IV. 2010 Tax Liability

¶26 Wife further argues that the parties should share the 2010 tax burden accruing between January 1, 2010 and August 31, 2010, the date Wife was served with the petition. Because this liability was incurred before the community terminated, we presume that the debt is a community obligation. *See Hrudka*, 186 Ariz. at 91-92, 919 P.2d at 186-87. Contrary to Husband's assertion, Wife did not have the burden to prove what portion of tax liability during this period constituted community debt.

¶27 It is indisputable that income tax was accruing on community funds during the first eight months of 2010, and interest deductions for the mortgages also were being earned. Moreover, requiring Husband to pay tax on CSK-related earnings through August 31, 2010 is further warranted because he received a community share of Wife's interest in CSK.

¶28 On remand, the trial court is directed to determine an appropriate allocation of the 2010 tax liability. In making this determination, the court should consider whether any portion of the tax liability on Wife's $50,000 bonus, paid in December 2010, may be appropriately allocated to Husband.

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community derived no actual benefit from the degrees." The record shows, however, that the community enjoyed Wife's increased post-graduate earnings for more than five years before dissolution and the most substantial asset subject to community division, the CSK business, was a result of Wife's education.

V. Interest Rate

¶29 Wife also argues that the trial court erroneously applied a ten percent annual interest rate to the amended dissolution decree. The ten percent rate applied until July 20, 2011. A.R.S. § 44-1201(A) (2003 & Supp. 2012). Since July 20, 2011,[5] however, the effective rate has been the lesser of ten percent or "one per cent plus the prime rate." A.R.S. § 44-1201(B) (Supp. 2012); *see* 2011 Ariz. Sess. Laws, ch. 99, § 15 (1st Reg. Sess.). The rate "applies to . . . all judgments that are entered on or after the effective date of this act." 2011 Ariz. Sess. Laws, ch. 99, § 17(B) (1st Reg. Sess.).

¶30 Husband agrees that the amended dissolution decree, filed on September 1, 2011, is subject to the rate of one per cent plus the prime rate. *See* A.R.S. § 44-1201(B). Husband argues, however, that the issue is not ripe because he has not attempted to collect the interest from Wife. We disagree. The amended dissolution decree requires Wife to make monthly payments on her equalization obligation. Further, in the interest of judicial economy, we direct the trial court to

[5] The 2011 amendment does not specify an effective date. The governor signed the amendment on April 13, 2011. 2011 Ariz. Sess. Laws, ch. 99 (1st Reg. Sess.). An act containing no specific date takes effect on the ninety-first day after the Legislature adjourns the session in which it was enacted. *True v. Stewart*, 199 Ariz. 396, 397 n.1, ¶ 3, 18 P.3d 707, 708 n.1 (2001). In this case, the session adjourned on April 20, 2011, and accordingly the effective date is July 20, 2011. *See id.*

correct the interest rate while addressing the other issues on remand.

VI. Attorneys' Fees

¶31 Both parties request attorneys' fees on appeal pursuant to A.R.S. § 25-324(A), which authorizes fee awards after consideration of "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." In the exercise of our discretion we deny both fee requests. *See Chopin v. Chopin*, 224 Ariz. 425, 432, ¶ 23, 232 P.3d 99, 106 (App. 2010).

¶32 We also deny Wife's request for a fee award pursuant to A.R.S. § 12-349. Wife is entitled, however, to recover her costs on appeal upon her compliance with Arizona Rule of Civil Appellate Procedure 21(a).

CONCLUSION

¶33 For the foregoing reasons, we affirm the trial court's decree of dissolution regarding allocation of the debt for the houses in Phoenix and Colorado and the court's denial of Wife's motion to set aside the decree. We vacate the portions of the

decree relating to the promissory note, the student loans, the 2010 tax liability, and the interest rate on amounts owed under the decree and remand for further proceedings consistent with this decision.

_____/s/_____
MICHAEL J. BROWN, Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

_____/s/_____
JOHN C. GEMMILL, Judge