DIVISION ONE
FILED: 10/20/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

| | | |
|---|---|---|
| In re the Marriage of: | ) | No. 1 CA-CV 10-0576 |
| | ) | |
| NOIKO ARAI, | ) | DEPARTMENT C |
| | ) | |
| Petitioner/Appellee, | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - |
| v. | ) | Rule 28, Arizona Rules |
| | ) | of Civil Appellate |
| JASON DAY, | ) | Procedure) |
| | ) | |
| Respondent/Appellant. | ) | |
| | ) | |
| | ) | |

Appeal from the Superior Court in Maricopa County

Cause No. FN2010-000508

The Honorable Robert E. Miles, Judge

**AFFIRMED**

---

Stephen G. Campbell, P.C. — Phoenix
By Stephen G. Campbell
Attorney for Petitioner/Appellee

Bill Spence, LTD — Chandler
By William M. Spence
Attorney for Respondent/Appellant

---

**B R O W N**, Judge

**¶1** Jason Day ("Husband") appeals the trial court's decree of dissolution of marriage, asserting that the court failed to

make an equitable distribution of property. For the following reasons, we affirm.

**BACKGROUND**

**¶2** Noiko Arai ("Wife") and Husband were married in 2001. In February 2010, Wife filed a petition for dissolution. During the marriage, the couple acquired various assets, including a house and a car. At the same time, they incurred debts for student loans for Husband's flight school training and for the purchase of the house in 2007. All of the funds used to buy the house were obtained from Wife's parents. Wife received $110,000 from her mother ("Mother") for the down payment on the home and signed a promissory note and repayment plan for that amount. Husband received $100,000 from Wife's father ("Father") to help pay off the existing mortgage on the home and signed a promissory note and repayment plan for that amount. Because the couple ultimately purchased a home more expensive than initially planned, Wife received an additional $150,000 from her mother in 2008 to pay off the remaining mortgage. Wife signed a promissory note for this amount and agreed to pay a three-percent interest rate as part of this repayment plan.

**¶3** Wife testified that her parents wished to be repaid by deposits into a United States "account" to avoid international money transfer fees, but because her parents are Japanese citizens they were unable to open an account in the United

States. To facilitate repayment, Husband and Wife opened IRA accounts where Husband listed Father as his beneficiary and Wife listed Mother as her beneficiary.

**¶4** In 2009, Husband and Wife borrowed $133,000 on a home equity line of credit, using it to buy a Corvette automobile and refinance a prior home equity loan which had been used to pay $93,474.69 for Husband's student loans. Husband later sold the Corvette and retained the $25,500 proceeds.

**¶5** At trial, the only contested issues involved how to divide the proceeds from the sale of the Corvette and whether the funds obtained from Wife's parents constituted a gift to the community. The court later issued its decree dissolving the marriage and classifying the approximately $350,000 received from Wife's parents as community debt. The court gave Wife the house and ordered her responsible for the debt owed to her parents. The court allocated the home equity loan to Husband and ordered that the proceeds from the sale of the Corvette be applied toward that debt. Husband timely appealed.

## DISCUSSION

**¶6** Husband argues that the trial court's characterization of the $350,000 provided by the Wife's parents as a loan to the community, rather than as a gift, resulted in an inequitable division of property. We disagree.

**¶7** The trial court has broad discretion in apportioning an equitable division of community property between the parties in a dissolution case. *Boncoskey v. Boncoskey*, 216 Ariz. 448, 451, ¶ 13, 167 P.3d 705, 708 (App. 2007). "In reviewing the trial court's apportionment of community property, we consider the evidence in the light most favorable to upholding the superior court's ruling and will sustain the ruling if it is reasonably supported by the evidence." *Id.* (citation omitted). We also defer to the trial court's determinations of witness credibility. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998).

**¶8** To constitute a valid *inter vivos* gift "there must be *donative intent*, delivery, and the vesting of irrevocable title upon such delivery." *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970) (emphasis added). Wife's testimony and the promissory notes admitted at trial support the conclusion that this was not a gift. Husband and Wife signed separate documents agreeing to repay the money that was transferred to them by Wife's parents. Also, Wife testified that she made payments of $3,100 and $950 directly to Mother in addition to a number of other smaller payments deposited into the IRA accounts.

**¶9** Moreover, Husband presented no evidence that either of Wife's parents ever communicated to him or Wife that the money transfers were intended as gifts. The only evidence Husband

offered was his own testimony that the retirement accounts were set up with Wife's parents as beneficiaries not to enable repayment of the money, but because the parents wanted Husband and Wife "to have a secure future for [their] retirements." Husband also testified that he did not believe the money deposited into the accounts would ever be paid to Wife's parents. However, the $100,000 "promissory note" shows Husband's signature below a written assertion that the retirement account was opened to facilitate payment to Father. Also, Husband testified that the money for the purchase of their home was *"borrowed* from [Wife's] parents," a statement he explicitly confirmed on cross-examination. On this record, Husband did not establish there was any donative intent by Wife's parents. Therefore, although relatively little of the debt has been repaid, and the repayment schedule has not been strictly followed, the trial court had sufficient evidence before it to determine that the transfer of funds to Husband and Wife for purchase of the house was not a gift. *See id.* at 288, 463 P.2d at 822 (finding no gift where there was no "clear intention" on the part of the purported donor).

**¶10** After finding that the funds obtained from Wife's parents were a community debt, the trial court allocated the assets and debts. Husband was assigned the home equity loan, offset by the proceeds from the Corvette, and Wife was assigned

the remaining debt owed to her parents. Due to recent economic factors, the house has devalued from $329,000 to $242,000. Based on the evidence before it, the trial court did not abuse its discretion in its equitable division of the community property.

**¶11** Husband argues that the promissory notes fail to comply with the statutory requirements for negotiable instruments and therefore no enforceable obligation exists for repayment of the funds to Wife's parents. He further asserts that the statute of limitations will bar Wife's parents from recovery. Husband, however, did not raise these arguments in the trial court and we decline to consider them. *See K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268, 941 P.2d 1288, 1293 (App. 1997) (noting appellate court does not consider arguments "raised for the first time on appeal").

**¶12** Husband also argues that the trial court erred by failing to appoint a translator to interpret the promissory notes and payment information found in trial Exhibit 6, some of which were written in Japanese. Although Husband's counsel initially objected to the introduction of the documents because some of them were in Japanese, he then commented: "Your Honor, it's probably best I [know] less of what it says." Shortly thereafter he told the court "I've got no objection to the Exhibit." Accordingly, Husband waived his right to challenge

the admissibility of Exhibit 6 on appeal. *See State v. McDaniel*, 136 Ariz. 188, 196, 665 P.2d 70, 78 (1983) ("It has long been the law in Arizona that failure to object to an offer of evidence is a waiver of any ground of complaint against its admission.").

**¶13** Both parties have requested attorney's fees pursuant to Arizona Revised Statutes section 25-324. In our discretion, we decline to award fees to either party. Wife is entitled to an award of costs upon compliance with Arizona Rules of Civil Appellate Procedure 21.

**CONCLUSION**

**¶14** For the foregoing reasons, we affirm the decree of dissolution.

/s/
_____
MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Judge

/s/
_____
PHILIP HALL, Judge