

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 15, 2009 Session

PATRICIA NICHOLSON v. JOHN F. NICHOLSON

**Appeal from the Circuit Court for Rutherford County
No. 55295 Robert E. Corlew, III, Chancellor**

No. M2008-00006-COA-R3-CV - Filed October 29, 2009

The parties married after executing a prenuptial agreement. The wife filed for divorce less than a year later. Both parties agreed that the prenuptial agreement should be enforced, but they disagreed as to whether the marital home should be sold and as to their respective ownership rights to a rental check generated by the wife's separate property. After a hearing, the trial court declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129, ordered the home sold, and awarded the rental check to the wife. The husband appealed, arguing among other things that the wife violated the prenuptial agreement and that the trial court should have awarded him his attorney fees in accordance with a provision in that agreement. We affirm the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Aaron Scott Guin, Nashville, Tennessee, for the appellant, John F. Nicholson

Heather R. Knott, Stephen Walker Pate, Murfreesboro, Tennessee, for the appellee, Patricia Nicholson.

OPINION

I. A PRENUPTIAL AGREEMENT AND A MARRIAGE

Fifty-four year old Patricia Irwin ("Wife") and fifty-seven year old John Nicholson ("Husband") had known each other for about ten years before they decided to marry. They entered into a prenuptial agreement on September 19, 2006. The agreement included a provision that in the event of divorce, neither party would be entitled to alimony, each party would be entitled to retain his or her separate property, and that if the parties could not agree on the division of marital property,

the property would be sold “as quickly as possible” and the net proceeds would be equally divided between the parties.

The agreement specifically addressed the content of any divorce pleading: “to the extent feasible the divorce shall be filed on a non fault basis, such as irreconcilable differences, it being the intention of the parties that the granting of a divorce to the parties shall not be at issue and that the actual reasons for such divorce shall be kept private to the extent possible.” The agreement further provided that if one party breached the prenuptial agreement, the other party would be entitled to any attorney fees incurred in the attempt to enforce it.

The parties married on September 29, 2006. Shortly after marrying, they bought a home which was deeded to them as tenants by the entireties. The parties financed more than 100% of the purchase price of \$220,000, resulting in a joint mortgage obligation of over \$227,000. Unfortunately, the parties were unable to make the marriage work, and they agreed that they needed to divorce, but found themselves at odds on some questions regarding division of property.

II. DIVORCE PROCEEDINGS

On April 26, 2007, Wife filed a Complaint for Absolute Divorce in the Chancery Court of Rutherford County, and she moved out of the marital home shortly thereafter. The grounds for divorce stated in the complaint were irreconcilable differences and inappropriate marital conduct. Wife attached a copy of the prenuptial agreement to her complaint, and asked the court to enforce it. She also asked that she be allowed “to reside in the marital home both pendente lite and permanent,” with her minor daughter from a prior marriage and that Husband be ordered to establish a residence elsewhere.

With some exceptions, the parties agreed on their separate personal property, such as vehicles, furniture and tools, as well as the division of the relatively meager amount of personal property they had acquired during their brief marriage. Their dispute largely involved the disposition of the marital home, the equity therein, to the extent any equity actually existed, and any deficit if the indebtedness on the home exceeded its value.

The Chancery Court appointed a Special Master to hear questions related to the marital home. Both parties appeared with their counsel for a hearing before the Master on May 30, 2007. The parties announced an agreement as to the marital home, and the terms of that agreement were set out in the order entered June 21, 2007, and signed by the trial judge, not the Special Master. While the parties later disagreed as to the exact terms of the agreement, it appears they did agree that Wife would move back into the home and undertake responsibility for mortgage payments and utilities. Although the order stated it was the result of a hearing on pendente lite issues, it also contained a provision that Wife would refinance the house to free Husband from any legal obligation on the mortgage, and that Husband relinquished any interest he had in the home. Shortly thereafter, Husband moved out of the marital home and Wife moved back in.

Wife filed a motion to enforce the agreement on August 15, 2007. Husband responded with a *pro se* notice of objection to any change in his marital or equitable interest in the real property, which was filed on August 27, 2007. The trial court granted Wife's motion on October 5, 2007, ordering Wife to refinance the mortgage, divesting Husband of his interest in the property, and reserving other issues for the final hearing on the divorce.

The final hearing was conducted on October 11, 2007. The only witness to testify aside from the parties was a real estate appraiser named Rucker Collier. The parties both declared at the outset that they wanted the prenuptial agreement to be enforced. Wife acknowledged that the prenuptial agreement provided that the marital property would be sold if the parties could not reach agreement, but she contended that on May 30, 2007 the parties did reach an agreement on the disposition of the marital home. Husband argued that the disposition of the property remained in dispute, and that he wanted the marital home to be sold, even if the sale did not leave the parties with any equity to divide.

Husband did not deny that he had testified under oath that he understood the agreement which was announced before the Clerk and Master. But he said that he thought the agreement was only for temporary, or pendente lite, possession of the house, and that he was in favor of Wife occupying the house because he could not afford the house payment. He also testified that he did not pay any attention to the negotiations and did not hear anything that Wife's attorney said because "I had been repeatedly assured this was gobbledygook." (There was some indication in the record that Husband had a hearing problem.) He further stated that he had tried to discuss the possibility of requesting the court to overturn the order, but that his attorney did not want to talk about it.

Rucker Collier testified that he had performed an appraisal of the marital home and had concluded that it had a value of \$229,000. He also explained in detail the process he had used to reach that valuation. He further testified that the cost of selling the home could include a real estate broker's fee amounting to 6% of the selling price. Husband testified that in his opinion the house was actually worth \$240,000. He further declared that he was prepared to pay \$5,000 into the court to cover one-half of the deficiency if the house sold for less than the total of the mortgage amount and the cost of sale.

The trial court also heard testimony about a \$1,700 check for rental income generated by Wife's separate property. Wife argued that the check was hers alone, while Husband argued that he was entitled to half of the face amount because both parties were named as payees on the check. The proceeds from that check had been deposited into the court for a determination of the true ownership of the funds prior to the final hearing.

At the conclusion of proof, the trial court declared the parties divorced under Tenn. Code Ann. § 36-4-129. The court announced that it would enforce the prenuptial agreement, and it discussed in detail the application of the agreement to the marital home. The court held that while the parties did reach an agreement at one point to let Wife keep the home, they were entitled under the Rules of Civil Procedure to change their minds before the court's order became final, and it

found that they did not reach a final agreement on the matter. The court concluded that it was bound to enforce the prenuptial provision requiring all marital property to be sold if the parties do not otherwise agree.

The court found that the best evidence regarding the value of the home was presented by Mr. Rucker, and stated that accordingly “the sale of the property is not wise” and “the house will likely be sold at a loss.” Nonetheless, the court ordered the sale of the house in compliance with the prenuptial agreement. The court announced that it would appoint a special commissioner to supervise the sale and ordered each party to deposit \$5,000 with the court to cover any possible deficiency. The court also declared that the entire proceeds from the disputed \$1,700 check was Wife’s separate property, and ordered that the money be turned over to her. The court’s determination was memorialized in a final decree which was filed on October 29, 2007. This appeal followed.

III. HUSBAND’S THEORIES OF BREACH

Tenn. Code Ann. § 36-3-501 makes prenuptial agreements enforceable in this state and binding on the court “if such agreement is determined, in the discretion of such court, to have been entered into by such spouses freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse.” *See Solomon v. Murrey*, 103 S.W.3d 431 (Tenn. Ct. App. 2002). In this case, the parties do not dispute the validity and enforceability of the prenuptial agreement, but only whether the trial court gave proper effect to its terms.

On appeal, we review the trial court’s findings of fact *de novo* with a presumption of correctness, unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *Blair v. Brownson*, 197 S.W.3d 681, 684 (Tenn. 2006). We also review questions of law *de novo*, but without the presumption of correctness. *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006). When there is no conflict in the evidence as to any material fact, the question on appeal is one of law. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993).

Husband’s arguments on appeal are based on the theory that Wife breached the prenuptial agreement. He hopes to benefit from Paragraph 11 of the agreement, which states that in the event that either party should try to invalidate any provision of the agreement or should breach or contest any provision, the other party is entitled to collect an award from the breaching party for any attorney fees and costs incurred to enforce the agreement. Since the legal fees expended by both parties in this case far exceed the net value of the marital property in dispute, Husband’s attorney candidly acknowledged during oral argument that obtaining those fees is the primary goal of this appeal.

Husband argues that Wife breached the prenuptial agreement in two ways: first, by alleging in her complaint for divorce the ground of inappropriate marital conduct by Husband, and second, by seeking to have the court award her the marital home instead of agreeing to its sale.

A. The Divorce Complaint

Husband argues that Wife breached the prenuptial agreement by including a claim of inappropriate marital conduct in her divorce complaint. Paragraph 8(e) of the agreement states that if either party should file for divorce, both parties will agree that a divorce will be granted, and that “. . . to the extent feasible the divorce shall be filed on a non fault basis, such as irreconcilable differences, it being the intention of the parties that the granting of a divorce to the parties shall not be at issue and that the actual reasons for such divorce shall be kept private to the extent possible.”

Both parties agreed that it was necessary for them to divorce. Although Wife referred to inappropriate marital conduct in her complaint, she did not allege any details of such conduct on Husband’s part, and she cited the ground of irreconcilable differences as well. She explains that her choice of grounds was compelled by Tenn. Code Ann. § 36-4-103(b), which prohibits the court from granting a divorce on the ground of irreconcilable differences unless the parties have reached a written agreement “for the equitable settlement of any property rights between the parties.” Our courts have indeed held that the court lacks the authority to grant an irreconcilable differences divorce without a written marital dissolution agreement. *Blackburn v. Blackburn*, 270 S.W.3d 42, 48 (Tenn. 2008); *Earls v. Earls*, 42 S.W.3d 877, 897 (Tenn. Ct. App. 2000). Thus, had Wife not added the additional ground, the court would not have had a legal basis to grant the parties a divorce, even by declaring them divorced.

As we noted above, the parties did not present a marital dissolution agreement to the court, and in addition to the dispute over the marital home, there were several other pieces of marital property upon which they were unable to reach agreement. The trial court correctly acknowledged that under the circumstances it could not grant the parties an irreconcilable differences divorce. Instead, after a full hearing it declared the parties divorced under Tenn. Code Ann. § 36-4-129.

Under paragraph 8(e) of the prenuptial agreement, both parties agreed that a divorce would be granted if one party wanted it, and that the divorce would be filed on a non fault basis, such as irreconcilable differences “to the extent feasible.” Since the parties were unable to agree on the division of marital property, a divorce on the ground of irreconcilable differences simply was not feasible. The agreement specifically stated that it was “the intention of the parties that the granting of a divorce to the parties shall not be at issue.” Consequently, Wife did not breach paragraph 8(e) of the prenuptial agreement.

Wife agreed that the divorce should be granted, and in none of her pleadings or other filings did she allege any facts as to the reasons for the divorce that would violate the parties’ privacy.¹ Thus, it does not appear to us that Wife breached either the letter or the spirit of paragraph 8(e) in the drafting of the divorce complaint or in any subsequent legal proceeding. Instead, it appears to us that Wife’s divorce complaint was drafted in such a way as to promote the outcome that was the

¹In fact, the only allegations in the record as to specific inappropriate conduct by one of the parties are found in Husband’s response to Wife’s interrogatories.

purpose of paragraph 8(e) of the prenuptial agreement. The trial court also furthered that goal in fashioning its decision.

We conclude that Wife did not breach the prenuptial agreement in her complaint.

B. The Sale of the Marital Home

Paragraph 8(b) of the prenuptial agreement states that in the event of divorce, “the Marital Property shall be divided equally between the parties. If such division cannot be agreed upon, then the Marital Property shall be sold as quickly as possible, and the net proceeds shall be divided equally between the two parties.” In her complaint for divorce, Wife asked the court to allow her to continue to reside in the marital home “both pendente lite and permanent,” and to allow her to obtain exclusive title to the property while assuming the mortgage debt. Husband claims that by doing so, Wife breached the agreement. We disagree.

Wife’s request in her complaint does not establish the disagreement necessary to trigger the sale provision. In essence, she was proposing what she considered an equal distribution of the marital asset, a zero to negative equity in the marital home. Husband could have agreed that Wife’s proposal accomplished an equal distribution.

In fact, at one point it appeared that the parties had reached agreement, although Husband later claimed that he did not really understand the plan and had not agreed that Wife would receive the equity in the house, if any existed. These circumstances beg the question of when the parties are deemed to have conclusively reached the point of being unable to agree on the division of an item of marital property such that the sale provision of the prenuptial agreement is triggered.

The prenuptial agreement is silent on that issue; it establishes no deadline by which agreement must be reached. It allows the parties to agree on disposition of marital property other than by sale, and it does not discourage agreement during any stage of the proceedings.

The trial court ultimately found that the parties had been unable to reach agreement on the division of the marital home, and it ordered the property sold in accordance with the prenuptial agreement. We do not believe, however, that Wife breached the contract by refusing to give up in her effort to persuade Husband to agree on a division of marital property that would not result in a cash loss to both parties.

C. No award of Attorney’s Fees to Husband

We conclude that Wife did not breach the prenuptial agreement and, consequently, Husband was not entitled to attorney’s fees for “enforcing” the agreement. The trial court is affirmed in its denial of attorney’s fees to Husband. Further, as discussed more fully below, certain of Husband’s actions required Wife to seek enforcement of the agreement. Therefore, even if Wife is deemed to have breached the agreement, Husband’s breach would have resulted in neither party being eligible

under the agreement for an award of attorney's fees. The trial court correctly concluded that each party should be liable for his or her own fees.

IV. THE RENTAL CHECK

Wife was a long-time real estate investor who owned eight rental properties at the time of the final hearing. It is undisputed that Wife acquired those properties before the marriage. One of Wife's tenants was behind on the rent, and the Tennessee Department of Children's Services agreed to pay. According to Wife's testimony, the Department required the owner of the property to fill out a W-9 form before it would pay rent for a client. Wife had filled out a blank form with her own name on it, but Husband submitted a different form to the Department, which listed him as the owner of the property. A copy of Husband's substitute form was entered into the record, and it confirms Wife's testimony. When Wife learned of Husband's action, she called the Department to inform them that she was the owner of the property. The Department declined to choose between the parties, but made out a check on May 17, 2007 in the amount of \$1,700 to "Fred & Patricia Nicholson."

Husband argued that the check was marital property and that he was accordingly entitled to half of the check amount. He relies on Paragraph 4 of the prenuptial agreement, which is captioned "Title Controls Whether Property is Separate or Marital Property," and states that jointly titled property will be deemed to be marital property, regardless of what funds were used to acquire it, or whether it was acquired prior to or during the marriage. Thus, he claims that since the rental check was made out to both parties, it was jointly owned.

However, Husband's argument overlooks the fact that Husband's name is on the check as a direct result of his misrepresentation that he was the sole owner of that property. As a general rule, a party cannot take advantage of his own wrong. *Brown v. Ogle*, 46 S.W.3d 721, 727 (Tenn. Ct. App. 2000); *Best v. Best*, 773 S.W.2d 260, 261 (Tenn. Ct. App. 1989). We do not interpret the prenuptial agreement as allowing one party to convert clearly separate property into marital property by misrepresentation. Certainly, the courts are not required to apply the "title controls" provision of the agreement without examining true ownership and the circumstances surrounding the titling.

Husband was only able to successfully mislead the state agency because of the marital relationship. His refusal to turn over the proceeds of the check to Wife was therefore a violation of paragraph 5 of the prenuptial agreement, which is captioned "Freedom to deal with Separate Property." It reads,

Each party shall have the unrestricted right to control and dispose of his or her Separate Property, free of any claim of the other party that made be made by reason of their marriage and with the same effect as if no marriage had been consummated between them. During their marriage each party agrees that he or she will, upon request of the other party, execute such additional documents as may be necessary

or appropriate to waive any rights that he or she might have in the assets of the requesting party by virtue of their marriage.

Husband tries to justify his claim and his actions by arguing that Wife owed him the money because he collected the rent and mowed the lawn on some of her rental properties. For her part, Wife testified that she worked long hours without pay helping Husband in his hot dog vending business. The court found the allegations and counter-allegations as to work uncompensated for to be unproved and contrary to a provision in the prenuptial agreement stating that any amendment or modification of the agreement be in writing and signed by both parties.

It is undisputed that the rental check was generated by Wife's separate property. Accordingly, the proceeds from the check were Wife's separate property. Husband has established no basis in fact for departure from that principle established in the prenuptial agreement.

We therefore affirm the trial court's holding that the entire proceeds of the check belong to Wife as her separate property.²

V. WIFE'S ISSUE

Wife raises one issue of her own on appeal. She contends that the trial court erred in setting aside its previous orders of May 30 and October 5, 2007, allowing her to retain possession of the marital home and to assume sole responsibility for the mortgage. She complains that as a result of the trial court's action, she was required to deposit \$5,000 into the court to be applied to any deficit remaining after the sale of the home. She asserts that she should be able to recover that deposit from Husband based upon the parties's agreement entered into the court record.

Shortly before oral argument, Husband filed with this court a motion to consider post-judgment facts. The facts he wanted us to consider involved the details of the sale of the marital home.³ Husband acknowledged that these facts "are mostly unrelated to the merits of this appeal," but he stated that he believed it necessary to offer them "to keep the record of this matter up to date."

Wife filed an objection to Husband's motion to consider post-judgment facts pursuant to Tenn. R. App. P. 14. This court reserved ruling on the motion and objection. This court's jurisdiction is appellate only. Our review is generally confined to those facts established by the evidence in the trial court and set forth in the record on appeal. Tenn. R. App. P. 13(c). We may

²Husband's actions in regard to the rental check appear to be a breach of the prenuptial agreement. Consequently, he would likely not be entitled to attorney's fees even if we had held Wife's actions to have constituted a breach. In that situation, neither party would be entitled to fees.

³According to Husband's motion, the home was auctioned for \$219,000. The costs associated with the sale left a deficit on the mortgage loan of \$9,967.37, which was satisfied by the \$5,000 payments the parties deposited into the court. The purchaser of the home, a Murfreesboro attorney, subsequently executed a quitclaim deed in favor of Wife, thereby giving her ownership of the former marital residence.

not act as a fact finding court, *Lewis v. Donoho*, App. No. 02S01-9901-CV-00006, (Tenn. May 21, 1999)(order on petition to rehear), or consider evidence that was not heard by the trial court. *Duncan v. Duncan*, 672 S.W.2d 765, 768 (Tenn. 1984). Consideration of post-judgment facts is contemplated only when those facts occur after the judgment is appealed, are unrelated to the merits and are not genuinely disputed. Tenn. R. App. P. 14, *Advisory Commission Comments*. Tenn. R. App. P. 14 does not permit a party to relitigate disputed issues by placing before the appellate court evidence not heard by the trial court. *Duncan v. Duncan*, 672 S.W.2d at 768. Likewise, post-judgment changes in the circumstances of the parties should not be considered pursuant to Tenn. R. App. P. 14. *Wade v. Wade*, 897 S.W.2d 702, 722 (Tenn. Ct. App. 1994). We deny Husband's motion to consider post-judgment facts.

The disposition of marital property in this case is governed by the prenuptial agreement, including the provision that if the parties cannot reach agreement on the division of a piece of such property, it must be sold and the proceeds equally divided between them. The trial court found that the parties could not reach final agreement on the home, and it accordingly ordered it sold.

Wife argues that the parties had reached agreement regarding the home, which agreement was reflected in orders entered previously in this matter. She contends that the orders of May 30 and October 5, 2007 were binding on the court and that it did not have the authority to set them aside.

The order reflecting the May 30 hearing, actually entered on June 21, stated that the hearing was conducted before the Special Master "upon the motion for pendente lite relief filed by [Wife]." It continued that the parties announced to the court that they had reached an agreement "resolving all pendente lite issues." It further reflected that the parties acknowledged the agreement under oath. While most of the order dealt with the details of Husband's leaving the home and Wife's moving back in, matters that appear to be temporary or pendente lite in nature, two sentences created some ambiguity regarding the temporary or permanent status of the agreement.

The order stated, "Husband hereby relinquishes any and all legal, marital and equitable interest in said real property to wife, and in particular, wife shall retain any equity in said real property. All further issues regarding wife's responsibility to refinance the mortgage owing on said real property are reserved."

In the October 5 order, the court granted Wife's motion to enforce the parties' agreement by ordering Wife to refinance the mortgage within thirty days and by divesting Husband's interest in the real property and vesting it in Wife. The order also stated, "The parties acknowledge that a dispute remains as to whether the value of the property shall be further considered by the court in making a division of the marital estate, if any." This issue was reserved by the court.

In a second order also entered October 5, the court granted Wife's motion for summary judgment only to the extent of finding that the parties entered into a prenuptial agreement and that its terms were binding on them.

In its ruling from the bench after the final hearing, the court recognized that the parties had, “on a couple of occasions,” announced that division of the marital home was complete. Nonetheless, the court stated that “parties have the opportunity, until an order is final and complete, to change their minds, and when proper cause is shown, to ask the court to revisit those issues.”

Because the orders relied upon by Wife were interlocutory and dealt with only some of the claims, rights, and liabilities involved in this divorce action, the court had authority to modify them or set them aside under Tenn. R. Civ. P. 54.02, which provides in pertinent part:

. . . any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision **is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.** (emphasis added.)

In the present case, the court’s orders regarding the disposition of the marital home did not adjudicate all the claims of the parties, as the granting of the divorce, the true ownership of the rental check, and a few other issues remained to be adjudicated. Thus, the trial court retained the right to revise any of its previous orders.⁴

VI.

The judgment of the trial court is affirmed. We remand this case to the Chancery Court of Rutherford County for any further proceedings necessary. Tax the costs on appeal to the appellant, John F. Nicholson.

PATRICIA J. COTTRELL, P.J., M.S.

⁴We do not address whether the parties had an enforceable contract regarding the disposition of the marital home. This action does not involve a contract claim.