

JAMES WAYNE BUSH,)
)
 Plaintiff/Appellee,)
)
 VS.)
)
 CARLA YVONNE HUFFMAN BUSH)
 (JAMES))
)
 Defendant/Appellant.)

Appeal No.
01-A-01-9604-CH-00181

Coffee Chancery
No. 89-260

FILED

October 18, 1996

**Cecil W. Crowson
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT OF COFFEE COUNTY
AT MANCHESTER, TENNESSEE

THE HONORABLE GERALD L. EWELL, SR., CHANCELLOR

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REVERSED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
LEWIS, J.
KOCH, J.

OPINION

The wife petitioned the trial court for an accounting of the proceeds her former husband received from the sale of their marital home. The trial court initially found that the husband owed the wife \$11,995 pursuant to the provisions of their Marital Dissolution Agreement. Following the husband's Motion to Reconsider, the trial court reversed itself and found that the husband owed nothing to the wife. We reverse the trial court because we can find no evidence in the record that the wife had waived her remaining rights to the equity, and we recalculate the wife's share.

I.

Carla Yvonne Bush and James Wayne Bush were divorced on February 9, 1990 on the basis of irreconcilable differences. The court ratified and approved the Marital Dissolution Agreement entered into by the parties. The relevant portions of the agreement read as follows:

6. REAL PROPERTY. The Husband shall be vested with title to the parties' residence located at Hillsboro, Tennessee, and all the major furnishings and appliances (not specifically listed below) in order to maintain a home for the minor children of the parties. The Husband shall pay to the Wife the sum of \$15,000.00 for her equity in said home, and the Wife shall convey to the Husband by Quitclaim Deed all her right, title and interest in and to said real property.

When the youngest child reaches the age of 18 years or if the Husband sells said real property prior to the youngest child reaching 18 years, the Wife shall be paid an additional sum to be computed as follows:

After deducting any real estate fees and commission, real property taxes, and mortgage balances, Husband shall pay to the Wife one-half of the fair market value of the property when the youngest child reaches 18 years of age or one-half of the proceeds from the sale of the residence if it is sold prior to the youngest child reaching 18 years of age, less the sum of \$25,000.000 (which represents the \$15,000.000 payment previously made to Wife and \$10,000 of the \$20,000 in joint bills paid by the Husband).

8. DEBTS. The Husband shall pay the Wife's medical expenses incurred to the date of this agreement. The Wife shall assume and agree to pay all her personal debts incurred in her name. The Husband will assume and agree to pay all his personal debts incurred in his name. Each other will hold the other harmless for the payment of said personal indebtedness.

The Husband shall pay the monthly payments on the home mortgage at Traders National Bank, and the loans at the ADC Federal Credit Union. The balance due on said loans along with the Wife's medical bills paid by the Husband total approximately \$20,000.00, one half of said sum (\$10,000.00) will be deducted from the sale of the parties residence before division of the equity.

In accordance with the above provisions, the wife conveyed her interest in the marital home to the husband by a quitclaim deed on February 7, 1990.

On March 15, 1990, the husband encumbered the residence with a new mortgage loan in the amount of \$42,000. From the proceeds of the loan, the husband paid the wife her \$15,000, and paid off the \$20,000 in debts mentioned in the agreement, which included the \$11,500 loan balance from the prior mortgage. The record does not contain any information on the disposition of the remaining \$7,000. The mortgage indebtedness on the \$42,000 loan was wiped out on June 4, 1994, when the husband refinanced again by taking out a \$52,000 mortgage loan.

The husband sold the marital home for \$88,500 on July 11, 1995. He did not use a real estate agent, so he did not have to pay a commission. The wife petitioned the court for an accounting, because the husband had failed to pay her any part of the proceeds. After a hearing the trial court found that the husband owed the wife \$11,995. The court reached that figure by subtracting from the sales price the real estate taxes Mr. Bush had paid since the divorce, (\$3,010) and the \$11,500 balance on the mortgage at the time of the divorce, dividing the remainder in half, and then subtracting from the wife's half the \$25,000 she had already received.

Both Mr. and Mrs. Bush filed Motions to Reconsider, Alter or Amend the Judgment. Mrs. Bush insisted that allowing Mr. Bush credit for the mortgage indebtedness at the time of the parties' divorce gave him credit twice for the same indebtedness. Mr. Bush claimed that the Court should not have interpreted the Marital Dissolution Agreement as a typical arms-length commercial transaction because he had agreed to a settlement which "granted to her more than she actually deserved" out of a desire not to subject their children to the consequences arising from a public airing of the wife's misbehavior during the parties' marriage.

After hearing both motions, the trial court agreed that Mr. Bush had been given credit twice for the same mortgage indebtedness. But he also concluded that he had been mistaken in failing to apply the balance on the \$42,000 mortgage loan against the proceeds from the sale of the house. The following is an excerpt from the court's second Opinion:

"A review of the pertinent parts of the testimony reveal that the former Mrs. Bush was indeed present at the time of the closing of the loan in June 1994 at which time the property was refinanced, and the record further discloses that the former Mrs. Bush and her attorney Mr. O'Neal were present at that closing to receive the cash payment from her former husband that was set forth in their Marital Dissolution Agreement and that she therefore knew of and, in the opinion of the Court, acquiesced in this transaction of financing."

Because the net proceeds from the sale, after the subtraction of the \$38,000 mortgage balance and the real estate taxes amounted to less than \$50,000, Mrs. Bush was deemed to have already received all she was entitled to.

II.

Though the trial court did not refer to the allegations of misbehavior in Mr. Bush's motion, we would like to dispel any implication that he is entitled to special consideration by virtue of those allegations. We note that while the relative fault of the

parties may be considered in setting alimony, Tenn. Code Ann. § 36-5-101(d)(1)(K), the Legislature has directed the court to divide the marital property “without regard to marital fault.” Tenn. Code Ann. § 36-4-121(a).

When marital property is divided through a Marital Dissolution Agreement, the agreement retains its contractual nature, even though incorporated into a Divorce Decree, except for those provisions which involve alimony in futuro or the legal duty of child support, over both of which the court retains its power to modify. *Blackburn v. Blackburn*, 526 S.W.2d 463, 465 (Tenn. 1975). None of the provisions at issue in the present case involve alimony in futuro or child support.

The agreement at issue, like all contracts, is to be construed in accordance with the intention of the parties. The importance of intention in the law of contracts is underlined by the many cases that prominently refer to it. For example, our Supreme Court said in *Bob Pearsall Motors Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975) that “The cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention consistent with legal principles.” See also *Petty v. Sloan*, 277 S.W.2d 355, 197 Tenn. 630 (Tenn. 1955); *Rodgers v. Southern Newspapers, Inc.*, 379 S.W.2d 797, 214 Tenn. 335 (1964); *McReynolds v. Cherokee Insurance Co.* 896 S.W.2d 777 (Tenn. App. 1994).

The long-standing judicial preoccupation with contractual intention may be inferred from the many Nineteenth Century cases in which our courts have made reference to it, including one case dating from as long ago as 1814. *Stramler v. Masterson's Heirs*, 3A Tenn. 75. The following quotation from a later case is illustrative: “The courts have always looked to the intention of the parties in determining their contractual rights and obligations. Our cases are too numerous on

this point to require citation.” *Deaton v. Vise*, 210 S.W.2d 665, 668, 186 Tenn. 364, 372 (1948).

III.

Though the agreement provided that the wife’s share of the equity in the home would be calculated by subtracting “mortgage balances” from the proceeds, there is no suggestion in the contract that Mr. Bush retained the right to reduce his wife’s share by unilaterally encumbering the property. We note that the trial court initially found it “inconceivable” that such was within the intention of the parties.

In its modification of the original order, the trial court found that the presence of Mrs. Bush and her attorney at the closing of the property loan indicated that she had “acquiesced” to the refinancing. Of course Mr. Bush did not require permission from his former wife in order to refinance. She had quitclaimed any interest in the property, and the marital dissolution agreement did not prohibit the action he took.

The thin wedge of the appellee’s argument seems to be that the use of the term “mortgage balances” in the agreement is ambiguous, because it does not refer to any specific mortgage instrument, and that the appellant’s supposed acquiescence to the refinancing constituted parol evidence proving that the parties intended all along for the subsequent mortgage to limit the wife’s rights to the proceeds. See *Coble Systems, Inc. v. Gifford Co.*, 627 Tenn. App. 359 (Tenn. App. 1982). However, we see nothing in the narrative statement of the evidence that would support an inference that the parties contemplated a refinancing. Aside from the fact that the wife was present at the closing, there is nothing in the testimony touching on that subject. Therefore, the proof offered at the hearing does not support the husband’s contention.

Further, the court acknowledged that the wife's purpose in being present at the closing was to "receive the cash payment from her former husband that was set forth in their Marital Dissolution Agreement" Since Mrs. Bush's purpose was to get the first installment of the money she was entitled to, one cannot conclude from her behavior that she waived any further rights she had under the Marital Dissolution Agreement. A waiver is a voluntary relinquishment of a known right, *Tenn. Asphalt Co. v. Purcell Enterprises, Inc*, 631 S.W.2d 439 (Tenn. App. 1982). We cannot find from the record in this case that the wife relinquished any rights by being present when the husband refinanced the property in order to pay the wife the first installment on her share of the equity.

IV.

The trial judge also gave the husband credit for all the taxes paid on the property from the time of the divorce until the date of the sale. We think that interpretation of the agreement is also erroneous. When the agreement says "after deducting any real estate fees and commissions, real property taxes, and mortgage balances" the list includes those things that are typically deducted from the seller's proceeds at the closing. "Real property taxes" in that context means the seller's prorated share of the taxes for the year of the sale. We are persuaded that the prorated taxes for that one year alone should be a credit to the husband on calculating the wife's remaining share of the equity in the marital home.

V.

With the interpretation of the agreement we have adopted, the wife's remaining share of the equity can be computed by taking the sale price (\$88,500) and

subtracting the mortgage balance at the time of the divorce (\$11,500) and the prorated taxes for the year of the sale (\$319.69). Dividing the net figure of \$76,680.31 by two will give the gross share of each party in the equity, \$38,340.15. According to the agreement, \$25,000 is to be deducted from the wife's share and the balance of \$13,340.15 paid to her.

We note that this calculation does not result in a precisely equal division of the equity. In fact, the husband gets a double credit for the initial mortgage, because the \$20,000 in debt credited to him includes the mortgage. But that part of the agreement is clear and unambiguous and should be enforced as it is written.

We reverse the judgment below and remand the cause to the Chancery Court of Coffee County for further proceedings in accordance with this opinion. Tax the costs on appeal to the husband.

BEN H. CANTRELL, JUDGE

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE