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NOT DESIGNATED FOR PUBLICATION

No. 96,186

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of:

SUSAN K. STUCKEY,
Appellant,

and

MICHAEL BRUCE STUCKEY,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; WILLIAM O. ISENHOUR, JR., judge.

Opinion filed October 26, 2007. Affirmed.

J. Mikeal Hagerdon, of Shawnee Mission, for appellant.

Louis S. Wexler, of Louis S. Wexler, P.A., of Overland Park, for appellee.

Before MARQUARDT, P.J., BUSER, J., and LARSON, S.J.

Per Curiam: This is an appeal of the trial court's division of property in a contested

divorce. We hold the trial court did not abuse its discretion in the division of property between the parties and is therefore affirmed.

While the parties are clearly familiar with the testimony which was brought forth in several contested hearings and during a 2-day trial, most of the exhibits are not a part of the record on appeal, and our review of the trial court's ruling is based on the transcripts of the testimony and attachments to the parties' brief, several which appear to have been admitted into evidence at trial and others that may not have been admitted.

The record as presented to us shows the following:

Susan K. Stuckey and Michael Bruce Stuckey were first married in September 1982. They were first divorced in February 1990 when Michael was facing incarceration as the result of a criminal conviction. Michael's conviction was reversed on appeal, and he was subsequently acquitted of the charges.

The 1990 divorce appears to have been precipitated by the parties' fear of a damage action by the heirs of a person Michael had killed. Since Michael could well have gone to prison, Susan received approximately 90% of the property and Michael was relieved of his obligation to support the parties' then minor children.

In the 1990 divorce, Susan received the marital residence, two rental properties, a lake home at Sunrise Beach, Missouri, her mutual funds and stocks, an automobile, and personal property. Michael received an automobile, a boat, his mutual funds, and a business known as Sound Enterprises, which appeared to have lost most of its value after his conviction and was ultimately sold for $21,000.

A fairly short time after his conviction was overturned, Susan and Michael began seeing each other (some time in 1991), and he moved back in with her in late 1992. From that time forward, real property was sold and purchased by the parties. Titles were taken separately and jointly. Vehicles were purchased together. Joint income tax returns were filed upon accounting advice. Susan became successful in the real estate sales and rental business. Michael worked at Montgomery Ward, Kessinger-Hunter Company, and at the time of this second divorce, he was maintenance director of the Kansas City Zoo earning an annual salary of $78,000.

It was a contested issue of whether the parties considered themselves husband and wife from 1992 to 1998, but they remarried on July 9, 1998. In September 2004, Susan sued Michael for divorce, claiming incompatibility. Michael filed his answer and cross-claim for divorce, also alleging incompatibility.

The contested divorce was tried on May 19 and 20, 2005, with testimony focusing on valuations of all of the parties' real property, value and history of numerous investments and accounts, dissipation of assets, inheritances, location and value of personal property, and the respective parties' requested division of property. Maintenance was not an issue as both parties waived their rights to make such claims. Both sons of the marriage were emancipated, so custody and child support was not considered.

At the conclusion of evidence, the trial court divided the property by ruling from the bench. Detailed valuations of real property were not made but investments, retirement accounts, and vehicles were divided. Susan received five rental properties, Michael received the lake property, and since neither party desired the parties' residence, it was ordered sold and the equity divided. Personal property was divided, and each of the parties was ordered to pay their own attorney fees.

Both parties moved to alter and amend the court's rulings and contested terms of a proposed journal entry. A further hearing was held on September 26, 2005, where the court redistributed a brokerage account, found a World Savings account had been depleted paying for the children's educational expenses, gave Michael another opportunity to examine the marital house to try to locate personal property previously awarded, but refused to make any other changes in the previous division of property.

Susan has timely appealed.

Michael has filed a motion to dismiss the appeal, claiming Susan acquiesced in the trial court's order. We ordered Susan to show cause why the appeal should not be dismissed. Susan responded. We retained the appeal and gave Michael leave to renew his claim of lack of jurisdiction. He has not done so and is deemed to have abandoned these arguments. See *McGinley v. Bank of America, N.A.*, 279 Kan. 426, 444, 109 P.3d 1146 (2005) (an issue not briefed is deemed waived or abandoned).

Susan's principle argument is that the trial court committed reversible error in failing to set aside to her the premarital assets that were awarded to her in the divorce decree of the prior marriage of the parties. She argues Michael's dissipation of assets was not addressed by the court. She also argues the court mistakenly believed she had a large income resulting in the court erroneously refusing to allow her attorney fees and that the division of property was grossly unfair and an abuse of discretion.

Our standard of review in divorce cases is well known: The district court has broad discretion in adjusting the property rights of parties in a divorce action, and the exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002). In addition,

the party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *In re Marriage of Larson*, 257 Kan. 456, 463-64, 894 P.2d 809 (1995).

Further, "an appellant has the duty to designate a record sufficient to establish the claimed error. Without an adequate record, the claim of alleged error fails. [Citation omitted.]" *Ellibee v. Aramark Correctional Services, Inc.*, 37 Kan. App. 2d 430, 433, 154 P.3d 39 (2007), *rev. denied* 284 Kan. ___ (2007). Although Susan mentioned in passing in her motion for reconsideration that the court did not make factual findings as to the property valuations, she did not request and that such findings be made. While a judge should state the controlling facts as required by K.S.A. 60-252, Susan's failure to object severely limits review and supports the presumption that the district court found all necessary facts to support its decision. See *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006).

While both parties did append copies of some exhibits to their briefs, the appendices must be excerpts from the record, not additional material. Supreme Court Rule 6.02(f) (2006 Kan. Ct. R. Annot. 36) and Supreme Court Rule 6.03(e) (2006 Kan. Ct. R. Annot. 39). While we have reviewed the testimony, the information we have received is confusing.

Based on Michael's exhibit No. 902 appended to his brief, he received property with a total value of $552,949.50 and Susan received property with the value of $559,066.72. On the other hand, there is an attachment to Susan's brief which was not admitted at trial but appears based on exhibit No. 8A that was admitted. However, Michael argues that this exhibit contains valuations that were not found by the court, fails to show an amount Susan received based on an inheritance, and does not include changes that were made by the court in a posttrial ruling.

We will consider, as best we can, Susan's arguments, but the record presented to us makes our review difficult.

Susan's argument that the trial court failed to credit her portion of the marital estate for the assets she brought into the marriage as provided in the property settlement from the first divorce is without merit.

It has been our rule under K.S.A. 2006 Supp. 23-201(b) that "[a]ll property owned by married persons . . . shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce." The rule that a wife is entitled to her separate property brought into a marriage has long been abrogated. See *Zeller v. Zeller*, 195 Kan. 452, 459, 407 P.2d 478 (1965), and

especially the discussion found in *In re Marriage of Schwien*, 17 Kan. App. 2d 498, 504-05, 839 P.2d 541 (1992).

Both parties discuss *In re Marriage of Allen*, 31 Kan. App. 2d 31, 59 P.3d 1030 (2002). In *Allen*, a couple divorced and signed a property settlement agreement. The couple subsequently remarried and divorced again. During the subsequent divorce trial, the district court divided the marital property differently than provided for in the original property settlement agreement. On appeal, the wife asserted that the property settlement agreement from the first divorce controlled the property division in the second divorce. The Court of Appeals rejected this argument. 31 Kan. App. 2d at 32. Instead, the court held that absent clear and unambiguous language that the settlement agreement continued to be in effect even if the parties remarried and divorced again, the agreement only helped define the property that each brought into the second marriage. 31 Kan. App. 2d at 36-37.

In this case, the trial court clearly considered the property brought into the marriage by Susan, but it was not required to set aside all that property to her and then divide the balance. The court followed the law and considered all of the property as marital property. Susan's first argument shows no error by the trial court.

As to Susan's arguments that the trial court failed to consider Michael's dissipation

of cash assets, a review of the record shows otherwise. She argues that the $41,000 in cash taken by Michael was not considered and she is entitled to be credited with that amount.

It is correct that dissipation of assets is one of the factors to be considered by the trial court when it divides the marital estate. K.S.A. 60-1610(b)(1). But, Michael admitted taking $25,000 from a safety deposit box and $16,000 from a safe at the time the second divorce was filed. At his attorney's direction, he deposited the money in a bank account and accounted for the amount at trial. It was used to fix a rental house the parties jointly owned, where he moved after the divorce was filed, and to pay his attorney fees of $9,500, for furniture as he had none, and other expenses.

The court had before it how the cash was spent and did not find the money was used for illegal or inequitable purposes. See *In re Marriage of Rodriguez*, 266 Kan. 347, 352, 969 P.2d 880 (1998) (defining dissipation as wasting or spending money foolishly).

The trial court was required, and apparently did, consider these expenditures, but it was under no obligation to credit Susan with this identical amount or, at the least, half of the amount. It may be that some of the funds were used to improve a rental Susan received, but that is not clear from the record we have received. The trial court's handling

of the cash Michael utilized was not an abuse of discretion requiring reversal.

Susan argues the trial court erroneously thought she had an income of $1,000,000 a year from her real estate business and erroneously utilized it in the property division. Apparently, one of the exhibits showed her income at $45,000 per month when it was, in fact, a yearly income amount.

The comment about this came at the time the court was denying Susan's motion for attorney fees. This improper income figure was pointed out to the court by Susan's counsel. There is nothing in the record we have reviewed to show this momentary confusion had any effect on the court's rulings.

Susan's requests for attorney fees was denied at the end of trial, where the court suggested both parties were able to pay their own fees. It was again an issue at the motion for reconsideration, and the court stressed that the parties' incomes, whatever they might be, did not factor into its decision to deny attorney fees. Nor is this testimony shown to have erroneously affected the division of property.

Finally, the record is clear that the trial court applied the following factors set forth in K.S.A. 60-1610(b)(1) in dividing the marital estate:

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> "In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property."

The percentages argued by each party are not conclusive. Susan had more income than Michael, and Michael may have received a greater division of property than Susan received. But there is clearly no showing that the division of property was so inequitable as to constitute an abuse of discretion. The record presented to us shows a bitter divorce, a 2-day trial with conflicting testimony, and posttrial motions, all handled to the best of the trial court's thoughtful considerations in a lawful manner. There is no basis shown to us that an abuse of discretion existed in these proceedings.

The trial court is affirmed.