NOT DESIGNATED FOR PUBLICATION

No. 101,692

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

WENDY LYNN SHORT,
Appellee,

and

ROBERT ANTHONY SHORT,
Appellant.

MEMORANDUM OPINION

Appeal from Bourbon District Court; MARK ALAN WARD, judge. Opinion filed December 11, 2009. Affirmed.

Robert Anthony Short, appellant pro se.

No appearance by appellee.

Before GREENE, P.J., MALONE, J., and KNUDSON, S.J.

Per Curiam: Robert Anthony Short appeals the decree of divorce granted to Wendy Lynn Short by default judgment. Robert claims the district court should have provided him notice of the default hearing and the district court abused its discretion by *sua sponte* granting the default judgment.

Wendy and Robert were married on September 12, 1992. On August 4, 2008, Wendy filed a petition for divorce with the Bourbon County District Court. The clerk of the district court issued a summons stating that Robert had 20 days to respond to Wendy's petition or the court would enter a default judgment granting the relief requested in the petition. Robert was personally served with the summons and a copy of the petition on August 4, 2008, at 4:15 p.m. Robert never entered an appearance in the district court or filed a response to the petition.

The divorce petition came before the district court on October 6, 2008. Wendy appeared in person and pro se. The appearance docket indicates that Robert was in jail on that date. The district court granted the divorce and a decree of divorce was filed on the same date. The record does not reflect that Robert filed any motion to set aside the default divorce decree. Instead, Robert filed a notice of appeal on October 9, 2008.

Robert's pro se appellate brief alleges additional facts without citation to the record. Pursuant to Kansas Supreme Court Rule 6.02(d) (2009 Kan. Ct. R. Annot. 38),

factual allegations that are not keyed to the record are presumed to be without support in the record.

On appeal, Robert claims the district court should have provided him notice of the default hearing. He also claims the district court abused its discretion by *sua sponte* granting the default judgment. Wendy has not filed a responsive brief on appeal.

Generally, an appellate court reviews a default judgment for abuse of discretion. *Lara v. Vasquez*, 33 Kan. App. 2d 128, 131, 98 P.3d 660 (2004), *rev. denied* 279 Kan. 1006 (2005). To the extent that an issue on appeal requires statutory interpretation, an appellate court's review is de novo. *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 271, 202 P.3d 7 (2009).

Default judgments are governed by K.S.A. 60-255, which provides in part:

> "(a) *Entry.* Upon request and proper showing by the party entitled thereto, the judge shall render judgment against a party in default for the remedy to which the party is entitled. . . . If the party against whom judgment by default is sought has appeared in the action, he or she (or, if appearing by representative, his or her representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment

> by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state."

K.S.A. 60-255 provides for notice of the default hearing if the defendant has entered an appearance. An "appearance," as the term is used in the Kansas Code of Civil Procedure, K.S.A. 60-101 *et seq.*, means an overt act by which a party comes into court and submits himself or herself to its jurisdiction. *In re Marriage of Thompson*, 17 Kan. App. 2d 47, 50, 832 P.2d 349 (1992). If a party fails to enter an appearance and the case proceeds to a hearing for default judgment, the court may set the hearing for default at its discretion pursuant to Supreme Court Rule 132 (2009 Kan. Ct. R. Annot. 218). See also *In re Marriage of Welliver*, 254 Kan. 801, 810, 869 P.2d 653 (1994) (stating that the district court has discretion to set the hearing time for a default judgment).

Here, the summons served upon Robert informed him that if he failed to plead within 20 days of service, a judgment by default would be taken against him. Not only did Robert not file a pleading responding to the divorce petition within 20 days, Robert never entered an appearance in this matter prior to filing his notice of appeal. Under the circumstances, Robert was not entitled to notice of the default hearing under K.S.A. 60-255(a). Instead, Rule 132 applied and the district court had the discretion to set the default hearing at any time without notice to Robert.

In regard to Robert's argument that the district court may not grant a default judgment *sua sponte*, both the language of K.S.A. 60-255 and a recent Court of Appeals case, *Forer v. Perez-Lambkins*,42 Kan. App. 2d __ , 216 P.3d 718 (2009), support his position. K.S.A. 60-255(a) states that the district court shall enter default judgment "[u]pon request and proper showing." In *Forer*, this court reversed a default judgment after finding the prevailing party had not specifically requested the district court to grant default judgment:

> "District courts must comply with the procedure set forth in the statute. Because K.S.A. 60-255(a) specifically states the district judge shall render default judgment 'upon request,' this court will not uphold a grant of judgment that does not occur under circumstances that do not comply with the statute. After all, when a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be." Slip op. at 9.

However, Robert's assertion that the district court *sua sponte* granted a default judgment is not supported by the record on appeal. While Robert alleges in his appellate brief that Wendy did not wish to proceed on her petition for divorce, he provides no support from the record for this assertion. The district court's divorce decree indicates that Wendy appeared at the default hearing in person and pro se. The record does not contain a transcript of the hearing and, as a result, the record is silent as to what occurred at the hearing. Without a sufficient record, this court cannot ascertain whether Wendy

orally requested the district court to grant the petition at the hearing or whether, as Robert alleges, she asked the district court not to grant the divorce.

"An appellant has the burden to designate a record sufficient to establish the claimed error; without such a record, the claim of error fails. [Citation omitted.]" *Kelly v. VinZant*, 287 Kan. 509, 526, 197 P.3d 803 (2008). Because the record is not sufficient to support Robert's claim of error, his assertion that the district court abused its discretion by *sua sponte* granting the default judgment fails.

Affirmed.