

Court of Appeals of Kansas.

In the Matter of the Marriage of Doyce D. ADAMSON, Appellant,
and
Pamela A. ADAMSON, Appellee.
No. 93,713.
April 21, 2006.
Review Denied Sept. 19, 2006.

Background: After granting husband and wife divorce, the Sedgwick District Court, James Beasley, J., entered order dividing marital property and awarded husband maintenance in amount of \$350 for 24 months. Husband appealed.

Holdings: The Court of Appeals held that:

- (1) husband waived challenge to admission of wife's proffer of testimony and exhibits;
- (2) Sixth Amendment right to cross-examine witnesses in criminal proceedings did not apply to divorce proceedings;
- (3) division of marital property was not inequitable and was supported by evidence; and
- (4) maintenance award of \$350 per month for 24 months was fair and equitable.

Affirmed.

Appeal from Sedgwick District Court; James Beasley, judge. Opinion filed April 21, 2006. Affirmed.

Jennifer A. Wagle, of Floodman, Wagle & West, of Wichita, for appellant.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellee.

Before MALONE, P.J., GREEN and BUSER, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Doyce Adamson appeals from the trial court's ruling concerning the division of property and the award of spousal maintenance in this divorce case. First, Doyce argues that the trial court abused its discretion in failing to admit exhibits into evidence and in allowing his former wife, Pamela Adamson, to proffer her testimony. Finally, Doyce contends that there was not substantial competent evidence to support the trial court's findings regarding the division of property and the award of spousal maintenance. Finding no reversible error, we affirm.

In September 2002, Doyce sued for divorce from his wife Pamela. Doyce and Pamela had been married for 23 years and had no minor children. At the time the divorce was filed, Doyce was disabled and unemployed. Pamela was employed and earning an income. The trial court's temporary orders required Pamela to pay spousal maintenance of \$1,000 a month to Doyce. Pamela moved to modify the temporary orders, arguing in part that her income had been overstated in Doyce's domestic relations affidavit and that she was unable to pay spousal maintenance. Nevertheless, the trial court ordered that spousal maintenance remain at \$1,000 a month.

In April 2003, Pamela moved to terminate spousal maintenance, arguing that Doyce had received a lump sum settlement from Social Security and was receiving monthly Social Security payments. The trial court reduced Pamela's spousal maintenance obligation to \$500 a month.

In April 2004, the trial court granted the divorce, reserving all issues of property and debt division for trial. In July 2004, the trial court conducted a trial on the remaining issues. The trial court heard testimony from Doyce concerning property division and spousal maintenance issues. Pamela's testimony was presented through her trial counsel. At the conclusion of trial, the trial court set forth its orders concerning the property division. In addition, the trial court ordered Pamela to pay Doyce \$350 monthly spousal maintenance for 24 months. A written journal entry of the trial court's ruling was later filed in the case.

In October 2004, Doyce moved for a new trial under K.S.A. 60-259(a). Doyce argued that the trial court's decision was contrary to the evidence; that Pamela's exhibits had not been provided to Doyce's counsel 20 days before trial as required by the pretrial conference order; that Pamela's testimony at trial was through a proffer which was erroneous; and that certain exhibits were not admitted into evidence at trial. The trial court held a hearing on Doyce's motion for a new trial. In responding to Doyce's arguments concerning Pamela's testimony and the exhibits, Pamela's counsel stated:

“Your Honor, I don't know if you'd caught this, but this was a full day that we spent on this case. We dealt with this back in chambers on the-in the conference room right by Ms. Armstrong's office. We sat back there both myself and [Doyce's counsel.] We dickered, we went back and forth, we were in front of the court, we were not in front of the court on-back there and we presented. We had an agreement to present the exhibits. We had an agreement that I could proffer the testimony of my client. Those were agreements that were entered into between my self and opposing [sic] counsel in front of the court. And May be [sic], obviously, apparently, we should of [sic] put it on the record. But the reality is, that's what happened, and the court was aware of that.... There was no objection from [Doyce's counsel]; there was no objection [by] his client when he was sitting in the courtroom as to that.”

*2 During the hearing, the trial court asked Doyce's current counsel if she needed to consult with Doyce's former counsel to determine whether there had been an agreement on how the matter would proceed. Doyce's counsel responded that she had spoken with Doyce about the possibility of his former counsel making agreements that Doyce did not authorize. Doyce's current counsel told Doyce that he should take up that issue in a different forum. Nevertheless, in arguing that Doyce should be granted a new trial, Doyce's current counsel focused on the fact that the parties' agreement had not been placed on the record.

At the conclusion of the parties' arguments, the trial court denied Doyce's motion for a new trial. The trial court determined that there had been an agreement to proceed by Pamela's proffered testimony and to the admission of the exhibits.

I. Standard of Review

The arguments that Doyce now makes on appeal were raised in his motion for a new trial. "The granting of a new trial is a matter of trial court discretion and, as with all discretionary matters, will not be disturbed on appeal except by a showing of abuse of that discretion. [Citation omitted.]" *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 485, 15 P.3d 338 (2000).

II. Trial Court's Admission of Evidence

[1] First, Doyce argues that the trial court abused its discretion in failing to admit exhibits into evidence and in allowing Pamela to proffer her testimony. The admission of evidence lies within the sound discretion of the trial court. This court's standard of review is whether the trial court abused its discretion in admitting the evidence. The party attacking the evidentiary ruling must show an abuse of discretion which exists only when no reasonable person would take the view of the trial court. See *Garrett v. Read*, 278 Kan. 662, 667, 102 P.3d 436 (2004).

In denying Doyce's motion for a new trial, the trial court found that the parties had stipulated to the proffered testimony and the admission of exhibits:

"[M]y recollection of the events was that we did meet in chambers and discuss the procedure by which we would hear this matter, and counsel did, in agreements, to the best of my recollection, and agreed to the admission of those documents. Agreed to, by stipulation, off the record, to the proffer of the evidence for-allowed counsel to indicate, without objection, from the respondent or the petitioner, what the testimony of Ms. Adamson was. The court certainly has a very large number of cases and has over the years relied upon counsel to make those kinds of agreements for their clients and [has] not [questioned] counsels ability or authority, certainly if they over step their bounds, as indicated they may have to respond in some other form under a different cause of action. But, I'm not going to grant a new trial because I do believe that everything was considered and both parties were not prejudiced by

representation of counsel.”

*3 Black's Law Dictionary 1455 (8th ed.2004) defines “stipulation” as “[a] voluntary agreement between opposing parties concerning some relevant point; esp., an agreement relating to a proceeding, made by attorneys representing adverse parties to the proceeding.” “A stipulation to admissibility of evidence means that the party agreeing to the stipulation waives any objection to the evidence.” *Hardesty v. Coastal Mart, Inc.*, 259 Kan. 645, 650, 915 P.2d 41 (1996). Parties are bound by the stipulations made by them or their counsel unless those stipulations are withdrawn by the trial court. *C.M. Showroom, Inc. v. Boes*, 23 Kan.App.2d 647, 649, 933 P.2d 793 (1997).

Here, the parties' stipulation to the proffered testimony and admission of exhibits is evidenced by the record. At the start of trial, the trial judge announced that Pamela's testimony was going to be proffered by counsel:

“[The Court:] [T]his matter is set for trial and we have spent a considerable amount of time today going through the-going through the trial notebooks and the file and we're going to proceed with the petitioner testifying. I think the respondent is going to offer her testimony through proffer by counsel.

“[Pamela's counsel:] That's correct, Your Honor.”

At that point, Doyce presented his testimony in the case. Following recross-examination of Doyce, the following dialogue took place:

“[Pamela's counsel:] I'm willing to move forward with my proffer if the Court feels that's appropriate at this time.

“The Court: [Doyce's counsel?]

“[Doyce's counsel]: *I have no objection to that.*” (Emphasis added.)

Upon presenting Pamela's proffered testimony to the trial court, Pamela's counsel stated:

“Your Honor, may it please the Court and counsel. My client has given me permission to proceed and proffer this testimony in the exhibits.”

During the presentation of the proffered testimony, the content of exhibits were reviewed and presented to the trial court.

Following the proffer of testimony by Pamela's counsel, Doyce's counsel indicated that he had objections to some of the exhibits:

“[Doyce's counsel:] Are these being offered as evidence? If so, I do have some objections to certain exhibits being offered.”

Nevertheless, the trial judge responded to Doyce's objection by indicating that their discussion before trial was that the exhibits would be admitted into evidence:

“The Court: Well they were- *the discussion that we had was that it was going to be admitted into evidence.*” (Emphasis added.)

The trial transcript in this case supports the trial court's findings. There had been an agreement or stipulation to proceed by Pamela's proffered testimony. Moreover, Pamela's proffered testimony included a discussion of the content of the exhibits at trial. By making this stipulation, Doyce has waived any arguments regarding this evidence.

Citing to Supreme Court Rule 163 (2005 Kan. Ct. R. Annot. 216), Doyce, however, argues that the trial court erred in allowing Pamela's proffered testimony and exhibits to be presented at trial because there was no written stipulation or a record made of the actual stipulation in this case.

*4 Under Supreme Court Rule 163, the trial court has discretion to proceed upon oral stipulations not made a part of the record. Supreme Court Rule 163 states: “A court is not required to give effect to stipulations between counsel, or oral admissions of counsel, *which are not reduced to writing and signed by the counsel to be charged therewith, or which are not made a part of the record.*” (Emphasis added.) As stated in *Lewis v. Gilbert*, 14 Kan.App.2d 201, 205, 785 P.2d 1367 (1990), “Supreme Court Rule 163 does not force the court to disregard any oral stipulations but rather provides that the court *is not required* to give the stipulation effect.” (Emphasis added.) Here, the record shows that the trial court chose to accept the parties' stipulations and to proceed to trial on these stipulations.

This court has previously recognized that a case may proceed by statements of counsel and the parties but that the record must be clear that both parties have agreed to this procedure. Specifically, this court in *Ellis v. Berry*, 19 Kan.App.2d 105, 107, 867 P.2d 1063 (1993), stated: “Though proceeding on statements of counsel and the parties may well be an expeditious and fair way to present evidence, it must be clear in the record that both parties have agreed to the procedure and everyone understands how the matter is to be presented.” As discussed above, it is clear from the record in this case that the parties had agreed to proceed by Pamela's proffered testimony which included discussion of the contents of the exhibits.

[2] Pamela further argues that Doyce failed to make a contemporaneous objection to proceeding by proffered testimony at trial related to any of the evidence or procedures and thus failed to preserve this issue for appeal. K.S.A. 60-404 states:

“A verdict or finding shall not be set aside, nor shall the judgment or decision

based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear *the specific ground of objection.*" (Emphasis added.)

Thus, under K.S.A. 60-404, a party must raise a timely and specific objection to the admission of evidence at trial in order to preserve that issue for appeal. See *State v. Flynn*, 274 Kan. 473, 496, 55 P.3d 324 (2002).

Here, Doyce failed to object to the introduction into evidence of Pamela's proffered testimony. Moreover, Doyce failed to make a contemporaneous objection to Pamela's discussion of the content of the exhibits. After Pamela's counsel had proffered Pamela's testimony, however, Doyce's counsel did object to several of the exhibits being admitted into evidence. Doyce's counsel objected to the value of items that were represented in appraisal reports. Moreover, Doyce's counsel objected to an inventory prepared by Pamela of items that had been damaged in an insurance claim. Doyce's counsel maintained that the money received from the insurance company had been used for home repairs. Nevertheless, the objection by Doyce's counsel was untimely. The proper time to object would have been when Pamela's counsel was discussing the content of the exhibits. Furthermore, as Pamela argues, Doyce's arguments related to the weight to be given the evidence by the trial court and not to the admissibility of the evidence.

*5 [3] Doyce also contends that his due process right to cross-examine witnesses was violated through the use of Pamela's proffered testimony in this case. As Pamela points out, however, the right of confrontation under the Sixth Amendment to the United States Constitution applies only to criminal proceedings. See *State v. Johnson*, 258 Kan. 475, 479, 905 P.2d 94 (1995) ("The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him or her."). Moreover, there is no indication that Doyce was prohibited from calling Pamela to the stand to question her about any aspect of her proffered testimony.

Finally, assuming *arguendo* that the trial court improperly allowed Pamela's counsel to present her testimony and improperly admitted the exhibits, Doyce waived his arguments concerning this evidence when he agreed to proceed to trial through Pamela's proffered testimony which would include discussion of the exhibits. "A party may not invite error and then complain of that error on appeal. [Citation omitted.]" *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003). See also *In the Matter of the Estate of Esther Broderick*, 34 Kan.App.2d 695, Syl. ¶ 10, 125 P.3d 564 (2005) ("Where a party procures a court to proceed in a particular way thereby inviting a particular ruling, that party is precluded from assailing such proceeding and ruling on appellate review."). As a result, Doyce's arguments on this issue fail.

[4] We point out that in his motion for a new trial, Doyce also contended that

Pamela's exhibits had not been provided to his counsel 20 days before trial as required by the pretrial conference order. It appears that Doyce fails to make any argument on this issue in his brief. An issue not briefed by the appellant is deemed waived or abandoned. *Roy v. Young*, 278 Kan. 244, 248, 93 P.3d 712 (2004). Therefore, we decline to address this issue any further.

III. Trial Court's Award

Next, Doyce maintains that there was not sufficient evidence to support the trial court's findings regarding the property division and award of spousal maintenance. The trial court has broad discretion regarding spousal maintenance and in adjusting the property rights of parties involved in a divorce action, and its exercise of that discretion will not be disturbed by an appellate court absent a clear showing of abuse. See *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002); *In re Marriage of Day*, 31 Kan.App.2d 746, 758, 74 P.3d 46 (2003).

A. Property Division

[5] In dividing the parties' property, the trial court indicated that it was adopting Exhibit A as definitive of the parties' assets. Exhibit A was Pamela's proposed settlement agreement that listed the values of the parties' liquid assets, real estate assets, and personal property. The trial court awarded Doyce the following: (1) Doyce's savings account; (2) one-half of the Sun Life Financial account; (3) one-half of the mold insurance claim on personal property totaling \$9,088.64; (4) all payments received from a prior loan to Becky Davis; (5) Doyce's IRA; (6) any payments received on Doyce's personal injury claim; (7) one-half of the trust account in the approximate amount of \$16,477.80; (8) all funds obtained from the claim against American Family for structural damage on the marital residence; (9) an insurance check for \$5,977.20; and (10) personal property listed on Exhibit A as Doyce's sole and separate property. In addition, the trial court awarded Doyce the marital residence. Doyce was also entitled to any money over and above \$18,177.27 for damage caused by mold to the marital residence.

*6 The trial court awarded Pamela the following property: (1) her savings account; (2) one-half of the Sun Life financial account; (3) one-half of the mold insurance claim on personal property totaling \$9,088.64; (4) her IRA; (5) one-half of the trust account in the approximate amount of \$16,477.81; (6) her 401K; (7) an insurance check for \$3,028.58; and (8) personal property listed on exhibit B as Pamela's sole and separate property. In addition, the trial court awarded Pamela two real estate lots free and clear of all claims of Doyce. Further, the trial court ordered that each party was responsible for his or her own credit card and other debt obligations.

When dividing property and debt in a divorce proceeding, the trial court does not have to accomplish an equal division; the distribution must be just and

reasonable. *In re Marriage of Roth*, 28 Kan.App.2d 45, 48-49, 11 P.3d 514 (2000).

In addition, K.S.A. 60-1610(b)(1) states:

“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.”

Doyce maintains that there was not sufficient evidence to support the trial court's division of property. Nevertheless, we find ample evidence to support the trial court's determination. The trial court had before it the court file, Doyce's testimony, Pamela's proffered testimony, and the exhibits. Pamela's trial counsel explained how the values contained in exhibit A had been determined, referencing other exhibits that contained documentation to support the values. Based on the values listed in exhibit A, the trial court's division of property resulted in Doyce receiving more than half of the total assets and property. The trial court's division of property was just and reasonable. We find no abuse of discretion in the trial court's decision.

[6] In his brief, Doyce seems to focus on the division of the trust account. Doyce testified at trial that he had borrowed \$25,000 from his parents and placed it in Pamela's attorney's trust account as good faith money to purchase the marital residence. According to Doyce, he then obtained a loan for \$70,000 to purchase the home. Doyce testified that he understood the purchase price of the home to be \$85,000, which included an approximate \$26,000 mortgage owed on the house.

In his brief, Doyce maintains that anywhere between \$34,000 and \$44,000 of the home loan proceeds were placed in trust. According to Doyce, there should have been a total of \$59,000 to \$69,000 in trust. Nevertheless, Doyce maintains that the trial court's award of \$16,477.80 to each party indicates that \$26,000 to \$36,000 had not been explained.

*7 Nevertheless, as pointed out by Pamela, much of Doyce's argument is speculative and fails to reference anything from the trial record. Moreover, Doyce needed to bring forth evidence from his previous attorney showing that funds had not been adequately disbursed to him. Doyce's attorney indicated at the motion for new trial hearing that the funds might have been disbursed and that she would need to speak to Doyce's previous attorney. Specifically, Doyce's attorney stated: “Judge, if I could just-my client's not received any money from the trust

account. I'm not saying that [Pamela's attorney] hasn't paid it out to [Doyce's previous attorney]. I'm saying [Doyce's previous attorney] hasn't turned over any money to my client and it may have gone towards his fees." These statements indicate that Doyce had failed to contact his previous attorney concerning the disbursement of the trust account funds. We agree with Pamela that all the money may have been paid out and it may have been paid out fairly and equitably.

Pamela points out that during her proffered testimony, her attorney explained the distributions of the money in the trust account. In addition, the trial court attempted to explain to Doyce's trial counsel the situation, stating that the \$25,000 good faith money went to pay off some of Doyce's credit card debt and then to his equity in the home. The trial court then stated that Doyce would receive some of the money back when he received half of the trust account plus he would have the equity in the house.

Doyce has the burden to show that the trial court abused its discretion in dividing the parties' property. See *In re Marriage of Larson*, 257 Kan. 456, 463-64, 894 P.2d 809 (1995) ("The burden of showing abuse of discretion lies with the party alleging abuse."). Doyce, however, fails to cite to any place in the record establishing that the trial court's distribution was inequitable. The appellant has the duty to designate a record sufficient to establish the claimed error. *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 777, 27 P.3d 1 (2001). Without such a record, claims of alleged error must fail. *Rural Water Dist. No. 6 v. Ziegler Corp.*, 9 Kan.App.2d 305, Syl. ¶ 4, 677 P.2d 573, rev. denied 235 Kan. 1042 (1984).

We find no abuse of discretion in the trial court's property distribution.

B. Spousal Maintenance

[7] Doyce fails to make any argument as to why the award of spousal maintenance was deficient. Doyce merely states that the award of spousal maintenance went from \$1,000 at the beginning of the case to \$350 at the end of the case, while the parties' incomes remained constant.

In its decision, the trial court noted that an award of spousal maintenance is based upon need versus ability to pay. The trial court awarded Doyce spousal maintenance of \$350 a month for 24 months. The trial court noted that this amount was in addition to the 22 months of spousal maintenance that Doyce had already received. Doyce had previously received monthly spousal maintenance of \$1,000 for 7 months and \$500 for 15 months.

*8 Under K.S.A. 60-1610(b)(2), the trial court in the decree may award spousal maintenance to either party "in an amount the court finds to be fair, just and equitable under all of the circumstances." The trial court may consider the following factors when determining need and amount of spousal maintenance:

“age of the parties, present and prospective earning capacities, the length of the marriage, the property owned by each party, the parties' needs, the time, source, and manner of acquisition of property, family ties and obligations, and the parties' overall financial situation. [Citation omitted.]” *In re Marriage of Day*, 31 Kan.App.2d 746, 758, 74 P.3d 46 (2003).

The evidence in the record on appeal establishes that the spousal maintenance award was fair, just, and equitable as required by K.S.A. 60-1610(b)(2). At trial, Pamela's attorney represented that Pamela did not have the ability to pay spousal maintenance, pointing to her domestic relations affidavit. Pamela's domestic relations affidavit, as well as Pamela's updated affidavit submitted as Exhibit B, shows that she was unable to cover her expenses with her current income. We recognize that at the time of trial, Doyce was unable to work. Moreover, Doyce testified that he could not meet his expenses and had to withdraw money from his retirement account. It is apparent that by awarding spousal maintenance, the trial court took into account Doyce's situation. We can infer that the trial court found that Doyce's request for \$750 monthly spousal simply was not feasible based on Pamela's current situation. We find no abuse of discretion in the trial court's award of spousal maintenance to Doyce.

Affirmed.