NOT DESIGNATED FOR PUBLICATION

No. 110,443

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

ROBERT ROCHA,
Appellee,

and

KAREN ROCHA,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; DANIEL A. DUNCAN, judge. Opinion filed August 8, 2014. Affirmed in part, reversed in part, and remanded with directions.

Karen Rocha, appellant pro se.

Bruce W. Beye, of Overland Park, for appellee.

Austin K. Vincent, of Topeka, for *amicus curiae*, Home School Legal Defense Association.

Before PIERRON, P.J., HILL and MCANANY, JJ.

PIERRON, J: Karen Rocha appeals several components of the decree entered by the trial court in her divorce from Robert Rocha. She challenges the maintenance and child support award, the division of assets, the child custody arrangement, and whether the judge acted as an impartial factfinder.

Karen and Robert were married on September 9, 1995, in Kansas City, Kansas. There were four children born during the marriage: Hannah (1996), Dominic (1997),

Gabriella (2001), and Olivia (2002). Robert filed for divorce in July 2012, alleging incompatibility between the couple. The divorce proceedings were contentious to say the least.

After 3 days of testimony, the trial court entered a decree of divorce on May 9, 2013, granting both parties the divorce based on irreconcilable differences in their marriage. First, the court granted joint legal custody with Robert having primary residential custody. The children were to finish the school year and then move to Corpus Christi, Texas, to live with Robert. Second, the court ordered Karen to pay $1,409 per month in child support commencing June 15, 2013, and continuing until each child was either married, became emancipated, or reached the age of 18. The court stated Karen's child support obligation was to be paid by a reduction of Robert's net monthly maintenance payment. Robert was required to provide typical insurance coverage and then Robert would cover 71% and Karen would cover 29% of any uninsured expenses. The parents split the children for tax purposes.

For spousal maintenance, the trial court ordered Robert to pay Karen $3,000 per month for April and May 2013. The court ordered Robert to pay Karen $3,046 per month for 56 months beginning June 15, 2013. However, for the first six payments, the court ordered Robert to deduct $1,000 from Karen's maintenance payment and forward that amount directly to Karen's attorney, Raymond Probst. Regarding the marital house in Kansas City, the trial court ordered the residence sold and the net equity from the proceeds was awarded to Robert to be applied directly to his indebtedness. The court also split the couple's debts and divided the responsibility for paying those debts. The court split the vehicles and allowed Karen to keep any retirement benefits she had earned and Robert was allowed to keep any retirement benefits he had accrued while working in Texas. The court treated Robert's KPERS benefits differently:

> "That [Robert] shall receive his KPERS Retirement Plan; however, effective April 2018, [Karen] shall receive 25% of the marital portion of [Robert's] KPERS

> Retirement Benefit which shall be set aside to her pursuant to a Qualified Domestic Relations Order which the District Court of Wyandotte County, Kansas, shall have continuing jurisdiction to enter."

On June 7, 2013, Karen filed a motion to reconsider the divorce decree raising a series of complaints similar to those now raised on appeal. The trial court partially granted Karen's motion to reconsider, clarifying that Robert was responsible for paying Karen's student loans. Otherwise, the motion to reconsider was denied. The court also granted Probst's motion to withdraw as Karen's attorney. Karen appealed and now appears pro se on appeal. Karen has a law degree but does not currently have a license to practice law.

We first determine if the trial court abused its discretion in determining the amount of spousal maintenance and dividing the marital property.

Karen challenges the award of spousal maintenance and the division of marital property. First, she argues the trial court erred in ordering Robert to make six monthly payments of $1,000 to Probst for his attorney fees and reducing her monthly maintenance payment by that amount. Second, Karen argues her share of the KPERS pension should not be considered maintenance, but rather should be considered a divisible asset that she is entitled to collect as part of the divorce. Third, Karen challenges the division of the proceeds from the marital home. She argues it was unfair to award 100% of the equity to Robert after sale of the marital home.

While Karen separates her arguments about property division and maintenance into separate issues, we will address them together as they are, by their nature, closely intertwined. "Maintenance and division of property are separate and distinct concepts, but neither can be intelligently fixed by itself without giving appropriate consideration to the other. [Citation omitted.]" *In re Marriage of Sedbrock*, 16 Kan. App. 2d 668, 675, 827 P.2d 1222, *rev. denied* 251 Kan. 938 (1992); see K.S.A. 2013 Supp. 23-2802; K.S.A.

2013 Supp. 23-2902. "An appellate court generally reviews a trial court's award of maintenance for an abuse of discretion. [Citation omitted.] Nevertheless, because the trial court is required to comply with statutes authorizing payment of support and maintenance, where it fails to do so, this court will find reversible error." *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, 706-07, 229 P.3d 1187 (2010).

A maintenance award must be fair, just, and equitable under all the circumstances. K.S.A. 2013 Supp. 23-2902. The purpose of spousal maintenance is to provide for the future support of the divorced spouse, and the amount of maintenance is based on the needs of one of the parties and the ability of the other party to pay. *In re Marriage of Hair*, 40 Kan. App. 2d 475, 484, 193 P.3d 504 (2008), *rev. denied* 288 Kan. 831 (2009) (citing *Carlton v. Carlton*, 217 Kan. 681, 681, 538 P.2d 727 [1975]).

Karen indicates in her appellate brief that she does not complain about receiving maintenance or that she did not receive a fair amount of maintenance. However, She argues that all of the deductions from her spousal maintenance award resulted in a payment of only $637 per month for the first 6 months and then only an award of $1,637 for the remainder of the payments. She suggests it was an arbitrary, fanciful, and unreasonable to require her to both find a new home and live on only $637 per month while searching for employment. Karen argues the payment of the attorney fees was a penalty and the trial court gave no consideration to the fact that the couple decided Karen would stay at home with the children to the detriment of her legal career while Robert climbed the professional ladder. Karen contends the trial court's order was an abuse of discretion and constituted a penalty by deduction of the attorney fees.

Without citing any persuasive authority, Karen complains the trial court basically forced her to pay Probst's attorney fees out of the maintenance she was receiving. This was not a penalty as characterized by Karen, but the involuntary payment of Karen's debt incurred as a result of the divorce. Karen argues the order is outside the framework of legal standards and there is no authorization for the trial court's action. However, we find

no abuse of discretion in the amount of maintenance paid by Robert and the subsequent deductions made by the trial court for Karen's attorney fees and also her child support obligation. However, that does not end our analysis in this case because the trial court did not make an equitable division of the marital property such that the spousal maintenance and the deductions can stand.

Karen's second and third issues involve the division of marital property. Karen argues the trial court erred by characterizing her share of the KPERS pension as maintenance. We agree. Robert concedes the KPERS account is "a bit more interesting."

The trial court here specifically considered Robert's KPERS money to be income and not marital property. In *In re Marriage of Graham*, No. 100,345, 2009 WL 596576, at *3 (Kan. App. 2009) (unpublished opinion), the trial court found that "in cases like this where the pensioner is already retired, 'the Court always treats the pension as income and not as personal property.'" The *Graham* court reversed, finding the trial court's decision "was predicated upon legal principles that are contrary to the plain language of the statute and the case authorities that require the district court to treat such [pension] benefits like any other marital property in making an equitable division." 2009 WL 596576, at *3. When K.S.A. 2013 Supp. 23-2802(a) expressly provides that pensions are marital property, the demands of the statute are not satisfied merely by treating pensions as income for alimony.

Here, the trial court specifically took into consideration the facts that the parties had been married for nearly 17 years and that Karen had sacrificed her career to stay at home with the children and eventually engaged in homeschooling. However, we find the trial court's division of property and balancing of the financial obligations was an abuse of discretion. See *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002); *In Re Marriage of Sadecki*, 250 Kan. 5, 8-9, 825 P.2d 108 (1992) (ultimate division of property must be just and reasonable, it need not be equal.)

Under K.S.A. 2013 Supp. 23-2802(c), for the division of marital property, a trial court must consider many of the same factors used for determining maintenance:

> "(1) The age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) their present and future earning capacities; (5) the time, source and manner of acquisition of property; (6) family ties and obligations; (7) the allowance of maintenance or the lack thereof; (8) dissipation of assets; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; and (10) such other factors as the court considers necessary to make a just and reasonable division of property."

See *Williams v. Williams*, 219 Kan. 303, 306, 548 P.2d 794 (1976) (court noted there is no fixed rule and the district court in a divorce action is vested with wide discretion in adjusting the financial obligations of the parties.)

The essential question in this case is whether the trial court abused its discretion in setting over all the KPERS pension benefits to Robert and ordering Robert to only pay maintenance in an amount equal to Karen's share of the pension benefits. We find no reasonable person would agree with what resulted in the complete lack of any maintenance payments in this case.

K.S.A. 2013 Supp. 23-2801(a) requires the trial court to divide the marital property of the parties in the divorce decree. Marital property includes all real and personal property owned by the parties, jointly or individually, at the time the divorce action is commenced. K.S.A. 2013 Supp. 23-2801. K.S.A. 2013 Supp. 23-2802(a) specifically instructs the court to include in its division of marital property "any retirement and pension plans."

While an equitable division of the marital property does not require a 50/50 split of pension benefits, the trial court is required to take into account a marriage partner's

pension in making its division. See *In re Marriage of Sedbrook*, 16 Kan. App. 2d at 684-85.

In *In re Marriage of Sadecki*, the trial court awarded the husband, a former professional baseball player, his pension from major league baseball. The wife claimed the trial court erred in not dividing the pension. However, the value of the nonpension assets set over to the wife was nearly nine times the value of the nonpension assets set over to the husband. Further, the trial court opined that this disproportionate division of nonpension assets adequately compensated the wife for her contribution to the creation of the husband's pension. Under the circumstances, our Supreme Court was satisfied that the trial court "not only recognized the baseball retirement plan as an asset but specifically considered it as such in making the division of property." 250 Kan. at 10.

From the time Robert filed for divorce in July 2012, he was paying $6,200 per month in temporary support to Karen. He also continued to pay the $1,895 mortgage payments for the marital home and did so until sale of the property. The divorce was final on May 9, 2013. Major changes were evident in the resolution of this case from Karen's perspective. The trial court ordered sale of the marital home. The trial court awarded residential custody of the children to Robert in Texas. The court imputed income to Karen after she had worked in the home to raise the children for many years and also homeschooled them.

The trial court considered nearly all of the statutory factors in resolving the property issues in this case. The court considered whether any debts were marital debt, equal division of payments received from pensions, granted Karen first choice of marital vehicles, the length of the marriage, and survivor/death benefits on the KPERS pension. Within this argument, Karen also complains about the distribution of the $30,000 proceeds of the marital home. We look at the equity of the martial home in the big picture. For instance, in Karen's domestic relations affidavit she listed equal responsibility for her and Robert of approximately $126,000 in creditor debt which

included $31,873 for her student loan debt. The trial court did not divide this $126,000 debt equally. Instead, the trial court ordered Robert to pay Karen's student loans which resulted in a division of the creditor debt approximately $30,000 to Karen and $100,000 to Robert. However, the equity in the house could certainly be seen as an offset for Robert to pay Karen's student loan obligation. Further, there is really no argument the cars used by the couple were unequally divided. The problem, however, is the trial court's "distribution" of the KPERS benefits skewed the financial picture.

Here, the trial court mentally divided the KPERS benefits between Robert and Karen. Those benefits were a monthly income stream of approximately $6,000. The trial court stated that Robert and Karen should share in those benefits equally—$3,000 each. However, the court did not award $3,000 in benefits to Karen. Instead, the trial court allowed Robert to continue to receive the $6,000 KPERS benefit payment and ordered him to make 56 months of maintenance payments in the amount of $3,000 and then a full 25% payout of the KPERS benefits after that.

The hitch in the trial court's analysis is that the court failed to then consider what amount of maintenance payment would be fair, just, and equitable under all the circumstances, irrespective of the KPERS benefits. See K.S.A. 2013 Supp. 23-2902(a). Karen is entitled to $3,000 per month from the KPERS benefits or an equivalent set-off. By not awarding any payments over and above $3,000, the court in essence awarded no maintenance to Karen. The court then ordered Robert to subtract $1,000 per month for 6 months to pay Karen's attorney fees. Further, the court ordered Robert to subtract Karen's $1,409 child support obligation from the $3,000 payment as well. The result is Karen shouldered the payment of her attorney fees and her child support out of the KPERS benefits that she should have been receiving in full. Robert received the full benefit of his KPERS payments. Karen did not. This is clearly not a situation similar to *Sadecki* where the value of the nonpension assets set over to the wife was nearly nine times the value of the nonpension assets set over to the husband. The financial disparity is magnified by the

fact that Robert earns over $110,000 as a fire chief in Texas, in addition to receiving his KPERS monthly pensiont. Karen was properly imputed minimum wage.

We specifically request the trial court to reexamine its maintenance and property division decisions. We realize the attorney fees have long been paid to Probst and in essence Karen was involuntarily ordered to satisfy her debt to Probst. The main concern here is that *in addition to maintenance payments awarded to Karen*, she is entitled to an unmodified $3,000 monthly payment for as long as the KPERS benefit is paid out. As was the case in *Sadecki*, this compensates Karen for her contribution to the creation of Robert's KPERS pension. With this in mind, whether the trial court considers Roberts' KPERS pension as income or marital property (but not both), the trial court must determine what amount of maintenance Karen is entitled to entitled to over and above the $3,000 monthly KPERS payment based on the factors in K.S.A. 2013 Supp. 23-2802(c), including the drastic differences in income. Any reduction for child support should be taken out of this maintenance amount, not the $3,000 KPERS payment.

Accordingly, we must set aside the trial court's decree with respect to Robert's pension. Since the trial court's maintenance payment was predicated upon the entirety of Robert's pension being set over to him, we must set aside the order for maintenance and remand the case to the trial court for reconsideration of Robert's pension consistent with K.S.A. 2013 Supp. 23-2802(a) and reconsideration of the issue of maintenance consistent with K.S.A. 2013 Supp. 23-2902(a).

Next, Karen argues the trial court failed to act as a neutral factfinder and instead took an adversarial and prejudicial role in deciding the case. She alleges the court testified for Robert, made up evidence, assisted Robert's lawyer, expressed exasperation at the proceedings, acquiesced in distorted and fabricated evidence, improperly allowed Robert to reopen direct examination, permitted tampered transcripts, applied the wrong standard of proof, threatened the granting of attorneys fees for future motions to modify, and entered an erroneous parenting plan. Karen also argues Judge Duncan should have

recused himself from the case because he had presided over the divorce case of Mr. Dragon Subasic.

Karen's affidavit in support of her motion to change judge recounts all the alleged prejudicial treatment occurring in her trial and in consideration of her motion to reconsider. In the affidavit she argues Judge Duncan should have recused himself because he presided over the 2009 divorce case involving Subasic with whom she had a personal relationship. K.S.A. 20-311f, in relevant part, states: "[A] party may move for a change of judge in accordance with K.S.A. 20-311d within seven days after pretrial, or after receiving written notice of the judge before whom the case is to be heard, whichever is later." Failure to comply with the statute bars consideration. See *State v. Timmons*, 218 Kan. 741, 749, 545 P.2d 358 (1976).

In *Timmons*, the court determined that the defendant's motion for a change of judge was untimely because defendant knew the name of the judge 6 weeks before trial, and there was nothing in the record to indicate the defendant acquired new information which might be indicative of prejudice between the motion date and the trial. 218 Kan. at 749. In *State v. Brown*, 266 Kan. 563, 570, 973 P.2d 773 (1999), the court concluded that the motion for a change of judge was untimely because the defendant knew in late April 1996 the name of the judge handling the case and did not file the motion until August 1996. Karen's argument that Judge Duncan should have recused himself is untimely and there is no evidence she could not have raised this argument within the proper time constraints of K.S.A. 20-311f prior to trial.

Additionally, we have examined the transcripts in this case from beginning to end. We have examined the extensive arguments raised by Karen, including that Judge Duncan was not a neutral trier of fact. We find no merit in these arguments. This was a very emotional and involved trial. We find none of the allegations raised by Karen suggest that Judge Duncan did not remain neutral or that he did not conduct a fair trial of this case. In fact, during the time the trial recessed on February 20, 2013, and reconvened

on April 3, 2013, the trial court entertained motions for temporary support, custody, and for spring break parenting time. At one point during the motions hearing, the trial judge was just as terse with Robert's attorney, as he had been with Karen's attorney "You're assuming a fact not in evidence and that's that he's going to live with his father when this case is over. And that's not the case – or at least that's not the case yet. Don't assume what I'm going to do with this file until I've heard all of the evidence, because I'm not going to rule until [I've] heard all of evidence."

It is important to note this was a bench trial so none of the trial court's comments were made in front of a jury. In *State v. Anderson*, 243 Kan. 677, 763 P.2d 597 (1988), for example, the trial judge expressed his thoughts on the quality of evidence during a bench trial. Our Supreme Court held that the trial judge acted properly and "[s]uch guidance by the judge during trial is intended to be helpful to counsel, and is not a resolution of the merits of the case." 243 Kan. at 678. While it is important for trial judges to remain neutral, trial judges are allowed to express their thoughts on the quality of the evidence and such guidance is intended to be helpful to counsel and is not a resolution of the merits of the case. 243 Kan. at 678.

Certainly, a trial judge must remain impartial. Allegations of judicial misconduct during trial must be decided on the particular facts and circumstances surrounding each alleged misconduct. In order to warrant or require the granting of a new trial, or in this case to modify the trial court's ruling, it must affirmatively appear the conduct was of such a nature that it prejudiced the substantial rights of the complaining party. *State v. Kendig*, 233 Kan. 890, 896, 666 P.2d 684 (1983).

For many of the allegations, Karen fails to demonstrate any prejudice, *i.e.*, the wrong dates of the trial on the divorce decree. For the other allegations, a trial court certainly has discretion how to conduct a trial in his or her courtroom, including the admission of evidence, *i.e.*, admission of documents or reopening of direct examination. See *State v. Williams*, 259 Kan. 432, 446, 913 P.2d 587 (district judges must have

discretion to control the courtrooms of this state), *cert. denied* 519 U.S. 829, 117 S. Ct. 94, 136 L. Ed. 2d 49 (1996); *Gilman v. Blocks*, 44 Kan. App. 2d 163, 180, 235 P.3d 503 (2010) (A trial judge, as the presiding officer of a court, has control over the proceedings in a case.). Additionally, the trial court corrected the "tampered transcript" confusion clearly in Karen's favor by ordering Robert to pay all of Karen's $30,000 in student loans.

Domestic cases are frequently emotionally traumatic for witnesses who are personally involved in the events to which they are testifying. There is nothing in the record before us to indicate that the trial judge exceeded any boundaries or levels of judicial propriety in the handling of this case. We find no error or judicial impropriety.

With regard to the trial court's cautionary statement about attorney fees, the trial court certainly had authority under K.S.A. 2013 Supp. 23-2715 to award costs and attorney fees in a divorce case where "justice and equity require." Where the court has authority to grant attorney fees, its decision is reviewed under an abuse of discretion standard. *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 572, 215 P.3d 561 (2009). The court's comment that it would consider attorney fees on a subsequent frivolous motion was certainly within its power. We find no "chilling" of Karen's right to use legal process where no attorney fees were even ordered against her.

Karen also challenges the parenting plan as containing misstatement of facts, unreasonable requirements, and erroneous information. She challenges the requirement of a licensed psychologist or psychiatrist to mediate their parenting plan disputes, the no-contact order with Dragan Subasic, and the visitation schedule. As for the appropriate standards of review:

> "When a child custody issue arises between parents, the paramount consideration of the trial court is the welfare and best interests of the child. The trial court is in the best position to make the inquiry and determination and, in the absence of abuse of sound judicial discretion, its judgment will not be disturbed on appeal." *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, Syl. 1.

Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. *In re Marriage of Rayman*, 273 Kan. 996, 999, 47 P.3d 413 (2002). With particular reference to Karen's claim of error:

> "When an appellant challenges the sufficiency of the evidence to support a trial court's findings regarding a child's best interests, this court reviews the evidence in a light most favorable to the prevailing party below to determine if the court's factual findings are supported by substantial competent evidence and whether those findings support the court's legal conclusion." *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, Syl. ¶ 3.

Of particular significance to this case on appeal, the trial court may change or modify any prior order of custody, residency, visitation, and parenting time when a material change of circumstances is shown. K.S.A. 2013 Supp. 23-3218(a). Under K.S.A. 2013 Supp. 23-3219(a), the requesting party must establish a prima facie case of a material change in circumstances or the court shall deny the motion. The trial court may also make any order relating to custodial arrangements which is in the best interests of the child. K.S.A. 2013 Supp. 23-3206. At the time Karen filed her motion to reconsider, the trial court had just entered an order finding it was in the best interests of the children for Robert to have residential custody. Karen is not entitled to a retrial of the case simply by restating the evidence in a motion to reconsider. She has not met a burden of establishing a prima facie case with the same evidence recently rejected by the trial court.

Next, Karen argues the trial court abused its discretion in awarding residential custody of the children to Robert. Karen contends the record shows the weight of the evidence warranted an order granting her custody of the children.

In granting joint custody of the children, but giving Robert residential custody, the trial judge ruled:

> "Alright. Custody of the children. As I understand, that school is out on May 22nd at Ward High School. That's a Friday. On May 29th, they are to be ready to move to Texas with their clothing and personal effects packed. You can move them over the Memorial Day weekend. I'm granting primary custody to Mr. Rocha for a number of reasons, one of which is your client, Mr. Probst, has made some interesting, I have to say bad or questionable choices over the pendency of this divorce. And I think that Mr. Rocha appears to be a more stable environment for the children. He also appears to understand that the benefits of education aren't just what you learn, it's—the socialization and interaction with other students, which are important, that cannot be achieved by home schooling."

Under K.S.A. 2013 Supp. 23-3201, a trial court must make decisions regarding the custody or residency of a child in accordance with the best interests of the child. When the residency dispute is between the parents, the court's primary consideration must be the welfare and best interests of the child. In light of the fact that the trial court is in a better position to weigh witness credibility, we generally will not overturn such decisions unless the court abused its discretion. See *In re Marriage of Vandenberg*, 43 Kan. App. 2d at 701. Challenges to specific factual findings in support of such determinations are reviewed to assure that they are supported by substantial competent evidence and they support the court's legal conclusions. *In re Marriage of Kimbrell*, 34 Kan. App. 2d 413, 420, 119 P.3d 684 (2005).

In *In re Marriage of Bradley*, 258 Kan. 39, 45, 899 P.2d 471 (1995), our Supreme Court explained the appellate court's role in reviewing the trial court's decision in child custody matters:

> "Our function is not to delve into the record and engage in the emotional and analytical tug of war between two good parents over two good children. The district court was in a better position to evaluate the complexities of the situation and to determine the best interests of the children. Unless we were to conclude that no reasonable judge would have reached the result reached below, the district court's decision must be affirmed. As there were good reasons and sufficient evidence supporting the district court's decision,

> and the district court understood and applied the correct, controlling legal principles, we find no abuse of discretion."

We have reviewed the record to determine if substantial competent evidence was available to the trial court to support its decision. Rather than list each factor in K.S.A. 2013 Supp. 23-3203, we focus on Karen's arguments on appeal.

Karen first points out that she has been the primary care taker for the children for the last 17 years. Second, Karen points to the testimony of multiple people that the children are happy, healthy and intelligent. Kelli O'Connell testified the children were "all very smart." Third, Karen disputes the trial court's finding that she has made questionable choices during the pendency of the divorce and that the court never specified what questionable choices she made. However, Karen defends Subasic and his struggles and points to all the things he has done for her and the family. She states Subasic never harmed any of the children. Karen justified her decision to help Subasic as an extension of Christian charity. Karen does not deny Subasic's drinking problems, but justifies them as he is "self-medicated with alcohol" to cope with his posttraumatic stress disorder. The first factor raised by the trial court was questionable choices by Karen. There is substantial evidence to support the court's finding of these questionable choices.

Fourth, Karen argues Robert did not return to Kansas in 2012 except for three weekend visits. However, she points out that Robert has flex time at work and has used vacation time for trips to Mexico instead of coming to see his children. She argues Robert has not been involved with the children's activities and was the wage earner in the family. Robert explained the trips were for a friend's wedding and to visit another fire department in Mexico. Robert stated the children had also been to Texas to see him several times during 2012.

Fifth, Karen says that both parents value education as evidenced by her law degree and she should not be punished for homeschooling her children. Karen argues the trial

court's comments about home-schooling show his personal bias and his unsupported stereotype of homeschooling. Karen testified to the educational opportunity and enrichment activities the children received during their homeschooling, including major production plays, boy scouts, online socialization with friends, piano lessons, church group activities, and on-line curriculum. Karen contends the court's comment that she is educating the girls for the Fifteenth Century, not the Twenty-First Century, is absolutely false. She points to Robert's testimony that the girls are "[I]nternet savvy" and have a Nook, laptops, and know how to use the Internet.

Counsel for the Home School Legal Defense Association filed an *amicus curiae* brief in support of Karen. The purpose of the *amicus* brief was to provide background and evidence of the growing popularity of homeschooling and demonstrate that homeschooling meets the academic and social needs of children and produces well-developed and socialized adults. This question has come up in other cases. The court in *Staub v. Staub*, 960 A.2d 848, 853 (Pa. Super. 2008), stated: "[W]e decline to adopt a bright line rule or presumption in favor of public schooling over home schooling. Thus, we conclude that the trial court did not err in utilizing a 'case by case' approach to this educational issue." The *Staub* court applied the best interests of the child analysis in considering all the factors, including education, in determining child custody. 960 A. 2d at 853-56.

The trial court's statements that socialization and interaction with other students cannot be achieved by homeschooling are unsupported. We do not concur with the court's statements as evident by the authority cited in the *amicus* brief and also the facts of this case. While the guardian ad litem's (GAL) report detailed Karen's continued relationship with Subasic, her report also stated the children are "very polite, well-spoken, and well-behaved." The GAL's recommendation was "it is in the best interests of the minor children to remain here with their mother so long as there are boundaries and safeguards put in place." There is no evidence to support the trial court's homeschooling comments in this case.

Karen also highlights several additional facts discussed at the trial. She argues Robert gets paid a lot of money as fire chief and is expected to be in the office, work long hours, and not leave the city if possible. She states Robert was going to have his sister help the children with the transition to Texas and he interviewed nannies to help care for the children. Karen states Robert did not know what books his children were reading or that she taught kindergarten. Karen directs the court's attention to the fact that the GAL interviewed the parties and children and reviewed numerous exhibits in deciding the children should remain in joint residential custody with Karen. She claims the trial court ignored this recommendation.

Having reviewed the evidence in this case, we find substantial competent evidence supports the placement of residential custody of the children with Robert. We have carefully reviewed the record, in the light most favorable to the prevailing party, and we are unable to find anything therein that would affirmatively indicate the trial court, in its advantageous position, abused its discretion in granting custody of the children to the Robert. See *In re Marriage of Vandenberg*, 43 Kan. App. 2d 697, Syl. ¶ 3, 229 P.3d 1187 (2010). This was not an easy decision for the trial court. If circumstances require, the custody order may be changed or modified as time progresses, for continuing jurisdiction is vested in the trial court under conditions imposed by the provisions of K.S.A. 2013 Supp. 23-3218. Again, our function is not to delve into the record and engage in the emotional and analytical tug of war between parents doing what they think is best for their children. This is not a case where the evidence strongly points to placement with one parent over another. While the trial court's comments on the homeschooling issue were suspect, as we stated above, there is substantial evidence to support the trial court's decision based on what it believed were questionable choices by Karen. In this case, the trial court was in the best position to determine the best interests of the children. See *In re Marriage of Bradley*, 258 Kan. at 45. We find no abuse of discretion in the trial court's decision.

Last, Karen argues the trial court abused its discretion in determining the amount of child support.

We review a trial court's order determining the amount of child support for an abuse of discretion. *In re Marriage of Branch*, 37 Kan. App. 2d 334, 336, 152 P.3d 1265, *rev. denied* 284 Kan. 945 (2007). We have de novo review over the interpretation and application of the Kansas Child Support Guidelines (2013 Kan. Ct. R. Annot. 123). *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 425, 193 P.3d 466, *rev. denied* 288 Kan. 831 (2009).

The trial court imputed a wage of $151,000 per year to Robert ($115,000 salary plus $36,000 KPERS payout) and $51,000 per year to Karen ($15,000 minimum wage plus $36,000 KPERS payout). Section II.D. of the Kansas Child Support Guidelines states that "Domestic Gross Income" is " income from all sources, including that which is regularly or periodically received." (2013 Kansas Ct. R. Annot. 124). See *Ussery v. Kansas Dept. of SRS*, 258 Kan. 187, 191, 899 P.2d 461 (1995) (citing *Estate of G.E. v. Div. of Med. Assist.*, 271 N.J. Super. 229, 638 A.2d 833 [1994]) ([inclusion as "available income" for Medicaid eligibility the portion of husband's pension that a QDRO ordered directly paid to the wife was valid]).

When the trial court announced its ruling, it ordered counsel to prepare a new child support worksheet based on these amounts. Karen did not object to the journal entry prepared by Robert's attorney and filed on May 9, 2013. However, Karen filed the motion to reconsider pursuant to K.S.A. 2013 Supp. 60-259 on June 7, 2013. Counsel for Robert argues Karen had 10 days to file a motion pursuant to K.S.A. 60-259(f). However, that statute was amended in 2010 to increase the time to file a motion under K.S.A. 2013 Supp. 60-259(f) to 28 days. See L. 2010, ch. 135, sec. 133, effective July 1, 2010. Karen's motion filed on June 7, 2013, was still untimely since 29 days had passed since the divorce decree was filed on May 9, 2013. See K.S.A. 2013 Supp. 60-206(a)(1) (computing time when period stated in days).

In any event, Karen argues the child support payment did not include any adjustments for transportation or extended parenting time. We find no abuse of discretion in the trial court's decision for the parties to split the costs of transportation for the visitation times ordered by the court and for Karen to cover the costs of additional visitation. Karen also argues her child support payments should be eliminated during July and August when the children are in her custody. Karen contends she should receive an extended parenting time adjustment for the two summer months. The record on appeal does not include the child support worksheet used by the trial court in arriving at Karen's $1,409 monthly child support payment. Since we are remanding this case for a redetermination of the awards of marital property and maintenance, the record should include the final child support worksheet demonstrating how the adjustment for extended parenting time is credited to Karen.

Affirmed in part, reversed in part, and remanded with directions.