NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 07/24/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	1 CA-CV 11-0630
SUSAN LYNN PACK,	DEPARTMENT B
Petitioner/Appellee,	**MEMORANDUM DECISION**
v.	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
STEVEN PACK,	
Respondent/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. FC2006-051158

The Honorable Gerald Porter, Judge

REMANDED

Law Office of Florence M. Bruemmer, P.C. — Anthem
By Florence M. Bruemmer
Attorney for Appellee

Gillespie, Shields & Durrant — Mesa
By Mark A. Shields
Attorney for Appellant

T H O M P S O N, Judge

¶1 Steven Pack (Father) appeals from a post-dissolution modification order and asserts that the court erred in its parenting time adjustment, in granting Susan Pack (Mother) final decision-making authority over the minor children's education,

and in its failure to award Father his attorneys' fees. For the reasons that follow, we remand to the trial court for clarification or reconsideration and for further proceedings if necessary.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Mother and Father were divorced in 2006. They are the parents of two children born in 2003 and 2005. At the time of the divorce, Father was living with his brother and was given limited parenting time because of his living situation. The parenting agreement provided:

> The children will spend every other weekend with **FATHER** beginning Friday at 3:10 p.m. to 6:15 p.m. on Sunday and every Tuesday evening from 3:10 p.m. to 7:30 p.m. **FATHER** will be responsible for giving the children dinner on Sunday and Tuesday evening. Both parents agree to modify this parenting time schedule by, at a minimum, increasing the time **FATHER** returns the children to **MOTHER** on Sunday and Tuesday when Father's present living situation changes.

¶3 The agreement further provided that "[e]ach parent may take a total of five weeks of vacation time with the children during the year." In the initial child support worksheet, Father received credit for fifty-eight to seventy-two days of parenting time. In the child support worksheets thereafter, he

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[1] On appeal, we view the facts and reasonable inferences in the light most favorable to sustaining the trial court's ruling. *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, 522 n.1, 169 P.3d 111, 112 n.1 (App. 2007).

received credit for eighty-five days. It is unclear from the record why this increase occurred.

¶4 Father subsequently was able to move out on his own into a home with enough bedrooms for the children. In August 2010, Father requested a joint appointment with the parenting coordinator because Mother had denied his requests for additional parenting time. At the joint appointment, Mother said she did not believe that Father's living situation had changed despite being shown evidence of his new address. She refused to consider the parenting calendar presented by Father and would not agree to any changes in his parenting time. Father accused Mother of committing the children to activities during his limited parenting time.

¶5 In November 2010, Father filed a post-decree parenting time modification petition requesting equal parenting time and child support modification. He alleged that the current parenting plan was no longer in the children's best interests. Father also sought attorneys' fees pursuant to Arizona Revised Statutes (A.R.S.) section 25-324, asserting that this action would not have been necessary if Mother had followed the shared parenting agreement. In response, Mother argued that it was not in either child's best interest to increase Father's parenting time at the present time. The parties also disputed whether the children should attend public or private school. Mother filed a

motion for an order designating her as the final decision-maker in the children's education.

¶6 An evidentiary hearing was held on August 3, 2011. The hearing was scheduled for three hours with each party allowed half of that time to present its case. However, at the hearing, the judge informed the parties that due to other matters on his calendar, each side would have only seventy minutes. Although counsel for Father reserved time for closing argument, the time the court had allotted for the hearing expired without time for closing.

¶7 During the hearing, Father requested a week on, week off schedule, reasoning that it would minimize the friction between Mother and Father by limiting the interaction they had with one another. Mother asserted that she was willing to modify the parenting time arrangement, but that Father had failed to exercise the vacation time already granted to him. Father replied that Mother made it extremely difficult for him to have vacation time with the children. Mother also raised the issue of what she called the daughter's severe anxiety, but she had no evidence that this was in any way related to or caused by Father.

¶8 In a seven page ruling, the trial court adjusted the parenting time as follows:

> The Children will spend every other weekend with Respondent/Father beginning Friday at 6:00 p.m. until Sunday at 6:00 p.m. beginning August 19, 2011. Respondent/Father shall also have parenting time with the children every Tuesday from 3:10 p.m. until 7:30 p.m. (normal parenting time).

The court gave no explanation for reducing Father's parenting time, and the end of the ruling stated: "IT IS FURTHER ORDERED GRANTING Respondent/Father's Petition to Modify Parenting Time." Father also received thirty-five days of summer vacation time with the children. Because Mother and Father were unable to jointly decide the appropriate place to enroll the children in school, the court empowered Mother to make all education related decisions. The court increased the parenting time credit to ninety days for Father in calculating child support.

¶9 Father timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. § 12-2101(A)(2) (Supp. 2011).

DISCUSSION

Parenting Time

¶10 Father argues that the court violated A.R.S. § 25-411(J) (Supp. 2011) by restricting father's parenting time absent a claim, evidence, or findings of serious endangerment to the children. Father also asserts that the court violated the previous parenting order. We review a trial court's decision

about parenting time for an abuse of discretion. *Armer v. Armer*, 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970). A court abuses its discretion when the record is "devoid of competent evidence" to support its decision. *Borg v. Borg*, 3 Ariz. App. 274, 277, 413 P.2d 784, 787 (1966) (citation omitted). The trial court is in the best position to determine the children's best interests. *Earley v. Earley*, 10 Ariz. App. 308, 309, 458 P.2d 512, 513 (1969).

¶11 A.R.S. § 25-411(J) provides:

> The court may modify an order granting or denying parenting time rights whenever modification would serve the best interest of the child, but the court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger seriously the child's physical, mental, moral or emotional health.

Mother neither requested a restriction on Father's parenting time nor filed a cross-petition seeking a reduction of his parenting time. In the amended joint pre-trial statement, Mother requested that Father's parenting time not be increased until an assessment was done of the daughter's anxiety. At the hearing, Mother did not oppose a modification of parenting time, but again addressed her concern about the daughter's anxiety. The court made it clear that he could not limit Father's access to the children without some evidence that the anxiety was in some way connected to Father. Mother did not offer any evidence

that Father was the cause of or a contributor to the daughter's anxiety. Although the court's minute entry was lengthy, it did not make any findings regarding endangerment to the children's physical, mental, moral, or emotional health, and it did not discuss the children's best interests.

¶12 Section 25-411(J) does not require the trial court to reduce its findings to writing or state them on the record when modifying parenting time. A.R.S. § 25-411(J); *Hart v. Hart*, 220 Ariz. 183, 187, ¶¶ 16-17, 204 P.3d 441, 445 (App. 2009). We presume that the trial court knows the law and applies it correctly. *Fuentes v. Fuentes*, 209 Ariz. 51, 58, ¶ 32, 97 P.3d 876, 883 (App. 2004). However, this presumption may be rebutted by the record. *Frederickson v. McIntyre*, 52 Ariz. 61, 64, 78 P.2d 1124, 1126 (1938) ("We indulge the presumption always that the action of the trial court was regular and proper in the absence of a record controverting such presumption.").

¶13 Here, the court specifically stated that it was granting Father's petition to modify parenting time. However, the order actually reduced his parenting time by more than three hours every other weekend. Mother argues that Father's parenting time was not reduced, and that there was an expansion to Father's vacation time with the children. Mother does not cite the record to support this assertion, and this court has been unable to find in the record the modification of the

original parenting plan that she claims previously set his vacation time at three weeks. She later states in her brief that the parenting plan has not been modified. The shared parenting agreement grants each parent five weeks of vacation. Thus, it is unclear how the thirty-five days of summer vacation time granted to Father in the court's ruling could be considered an expansion of vacation time. Regardless, the shared parenting agreement treats parenting time and vacation time separately. The clause calling for the modification of Father's parenting time refers to the regular week schedule and not periodic vacation time. Thus, an increase in vacation time would not be sufficient to comply with the shared parenting agreement. It is not clear from the court's ruling or the hearing transcript why the court did not follow the shared parenting agreement. Citing a lack of evidence, the court rejected Mother's main concern about expanding Father's parenting time. The three hours-plus parenting time change was a significant reduction in Father's parenting time, considering Father's already limited time with his children and that the reduction was not requested by Mother. Accordingly, we remand the court's order with respect to parenting time for clarification or reconsideration.

Attorneys' Fees

¶14 Father next argues that the trial court erred in refusing to grant attorneys' fees under A.R.S. § 25-408(J)

(Supp. 2011) for Mother's refusal to abide by the shared parenting agreement. We review the trial court's failure to award fees for an abuse of discretion. *Alley v. Stevens*, 209 Ariz. 426, 429, ¶ 12, 104 P.3d 157, 160 (App. 2005) ("[T]he failure to award fees in a child-support matter will not be reversed unless the court abused its discretion.").

¶15 At oral argument, Father requested attorney's fees be awarded pursuant to A.R.S. §§ 25-408(J) and 25-324 (Supp. 2011) for implementing the parenting plan. Father appeals only under § 25-408(J), which provides:

> The court shall assess attorney fees and court costs against either parent if the court finds that the parent has unreasonably denied, restricted or interfered with court-ordered parenting time.

The trial court found both Mother and Father "have taken unreasonable positions, failed to comply with prior Court Orders and unnecessarily extended these proceedings." It is true that the trial court made no findings that Mother had unreasonably denied, restricted, or interfered with the court-ordered parenting time. However, the court did reject Mother's excuse for not giving Father the expanded time that the shared parenting agreement called for, which may implicitly constitute a finding that Mother interfered with Father's parenting time, especially if the court intended but failed to expand Father's parenting time. While the court may not have considered

Mother's actions "unreasonable," we remand this issue for the court's further consideration in light of the clarification needed regarding parenting time.

Education Decision-Maker

¶16 Father asserts the court violated A.R.S. §§ 25-402 (2007) and 25-411 and Rule 91 of Arizona Rules of Family Law Procedure by granting Mother decision-making authority over the children's education without making the required findings. We review the trial court's education authority order for an abuse of discretion. *Owen v. Blackhawk*, 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003). We will not disturb the court's ruling unless the court has clearly mistaken or ignored the evidence. *Armer*, 105 Ariz. at 289, 463 P.2d at 823.

¶17 Mother and Father had joint custody with joint decision-making authority for the children. Joint legal custody means "the condition under which both parents share legal custody and neither parent's rights are superior, except with respect to specified decisions as set forth by the court." A.R.S. § 25-402(2). All joint custody parenting plans are required to address the education of the children. A.R.S. § 25-403.02(A)(1) (Supp. 2011); *Jordan v. Rea*, 221 Ariz. 581, 586, ¶ 9, 212 P.3d 919, 924 (App. 2009). The pertinent part of the parties' 2006 parenting plan provided:

> Both parents agree that educational needs, including schools, day care and special programs, will be mutually agreed upon. [Son] will be attending Desert Sky Montessori five days a week and [Daughter] shall be with child care providers . . . five days a week. . . .
>
> . . . .
>
> . . . It is each parent's responsibility to notify the school(s) as to the Shared Parenting Agreement so the school(s) is/are aware that all communication from the school must be sent to both parents.

¶18 Since agreeing to the parenting plan, Father and Mother have had great difficulty agreeing about the children's education. In August 2010, they argued over when their daughter should start kindergarten. That same year, Father signed son up for public school without Mother's consent. Mother and Father have continued to argue over what school their children should attend since that time. Mother wants both children to attend the Arts Academy because they are familiar with the school. Father wants the children to attend public school. In February 2011, Father enrolled both children in public school without Mother's knowledge or consent. When Mother contacted the principal in May and advised her that no mutual decision had been reached, the principal deemed the pupil registration forms invalid. In June, Mother filed a motion for order designating herself as final decision-maker re: education. The court denied this motion, but stated that it would reconsider the matter at

the time of trial. At the evidentiary hearing on August 3, Father admitted that he had signed the children up for public school without Mother's permission, but testified that Mother had signed up the children for their current school without his consent. He agreed that they were at a stalemate on this issue. Father opined that his son liked his current school and had a lot of friends there, but that the public school was a highly rated school and would be better for his children. The relevant portion of the court's ruling stated:

> Because the parties have been unable to jointly decide the appropriate place for schooling the children, the Court will empower Petitioner/Mother to make all education related decisions for the children. Petitioner/Mother shall keep Respondent/Father reasonably apprised of all education issues and decisions and shall confer with Respondent/Father before making any decision concerning the children. All out-of-pocket costs associated with registration, tuition, clothing or enrollment of the children at any school, other than the public school, shall be borne entirely by Petitioner/Mother.

¶19 When a post-decree dispute arises "under the specific terms of a parenting plan included as part of a joint custody order, a best-interests standard should be applied." *Jordan*, 221 Ariz. at 589, ¶ 19, 212 P.3d at 927. Because a best-interests standard applies to a dispute about educational placement, the court shall consider all relevant factors,

including, but not limited to, those specified in A.R.S. § 25-403. *Id.* at 590, ¶ 23, 212 P.3d at 928.

¶20 The court's seven page ruling contains ample evidence that the court considered the best interests of the children. The court considered the long history of high conflict between these parties and their inability to resolve issues and attempted to minimize the disruption to the children's lives in the best possible way. The trial court is in the best position to determine what is in the children's best interests. *Porter v. Porter*, 21 Ariz. App. 300, 302, 518 P.2d 1017, 1019 (1974). This is not a change in joint custody as father asserts. Mother and Father still maintain joint custody over their children. However, where parents cannot agree on an element in a parenting plan, the court must determine that element in order to protect the children. A.R.S. § 25-403.02(B). We find no abuse of discretion in the court's ruling.

Trial Time

¶21 Father argues that the trial court erred in refusing to give him the closing argument time he reserved. "[A] trial court has broad discretion over the management of a trial," *Gamboa v. Metzler*, 223 Ariz. 399, 402, ¶ 13, 224 P.3d 215, 218 (App. 2010), and we review the court's enforcement of trial time limits for an abuse of discretion. *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 91, ¶ 30, 977 P.2d 807, 813 (App. 1998).

¶22 Both Mother and Father were given seventy (rather than ninety) minutes to present their cases. Although Father was able to present his case in full and cross-examine the witnesses, he asserts that he was prejudiced because he was not allowed time for closing argument. No constitutional or statutory provision guarantees parties an absolute right to present closing argument in a bench hearing. *Fuentes*, 209 Ariz. at 57, 97 P.3d at 882. Moreover, Father did not seek leave to submit a post-hearing brief. *Ahwatukee Custom Estates Mgmt. Ass'n v. Bach*, 191 Ariz. 87, 88-89, 952 P.2d 325, 326-27 (App. 1997) (submitting written closing argument in lieu of oral argument in light of time constraints), *vacated in part on other grounds*, 193 Ariz. 401, 973 P.2d 106 (1999). In the circumstances of this evidentiary hearing, we find no abuse of discretion in the court's decision.

CONCLUSION

¶23 Based on the foregoing, we remand the order insofar as it modified parenting time and denied attorneys' fees to the trial court for clarification or reconsideration. We affirm the order in other respects. Mother requests an award of attorneys' fees and costs on appeal. We deny her request for fees.

/s/
JON W. THOMPSON,
Acting Presiding Judge

CONCURRING:

/s/
SAMUEL A. THUMMA, Judge

/s/
DIANE M. JOHNSEN, Judge