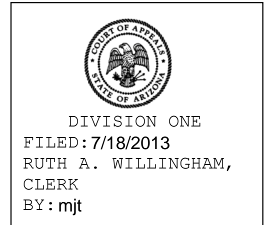
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 7/18/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of: DAVID A. WHITE, Petitioner/Appellant, v. KELLY S. WHITE, Respondent/Appellee, and STATE OF ARIZONA, ex rel. THE DEPARTMENT OF ECONOMIC SECURITY, Intervenor/Appellee.	1 CA-CV 12-0523 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. FC2003-091262

The Honorable Boyd W. Dunn, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

David A. White — San Tan Valley
Petitioner/Appellant *In Propria Persona*

Kelly S. White — Phoenix
Respondent/Appellee *In Propria Persona*

Thomas C. Horne, Arizona Attorney General — Phoenix
By Carol A. Salvati, Assistant Attorney General
Attorneys for Intervenor/Appellee

B R O W N, Judge

¶1 David A. White ("Father") appeals from the superior court's judgment denying his request for sole custody, reducing his parenting time, and ordering payment of child support. For reasons that follow, we affirm the parenting time modification but vacate the custody and child support rulings and remand for further proceedings.

BACKGROUND

¶2 Father and Kelly S. White ("Mother") shared joint legal and physical custody[1] of their minor child pursuant to a 2003 consent dissolution decree. The decree did not order either party to pay child support. Although the decree included a parenting time schedule, the parties informally agreed to a different arrangement—the child would spend weekends with Father from Thursday or Friday after school until Sunday or Monday before school, and would be with Mother at all other times.

¶3 In 2011, Mother filed a petition to modify custody, parenting time, and child support. As changed circumstances, Mother cited the child's school schedule, an alleged difference

[1] As of January 1, 2013, the legislature changed all references to "legal custody" in Arizona Revised Statutes (A.R.S.) title 25, chapter four to "legal decision-making." *See* 2012 Ariz. Sess. Laws, ch. 309 (2d Reg. Sess.); A.R.S. § 25-401(3) (2012). The orders in this case were entered prior to this effective date; therefore, we use the term "custody" in this decision.

in Father's financial circumstances, and Father's change in residence to a location farther from Mother's home. Mother also sought sole legal custody and child support. Father requested that the parties be ordered to mediate, but alternatively he sought sole legal custody with reasonable parenting time for Mother.

¶4 Several years prior to Mother's petition to modify, this case was referred to the Department of Economic Security's Child Support Enforcement division ("the State"). Therefore, in response to Mother's petition to modify, the State asked that the superior court refer issues of child support to a Title IV-D commissioner. *See* A.R.S. § 25-509. At the hearing on Mother's petition to modify, the court referred the child support issues to a Title IV-D commissioner and told the parties it would not hear evidence relating to child support.

¶5 The superior court affirmed the joint legal custody order previously in place, but ordered Father to have parenting time every other weekend from Friday after school until Sunday at 6:00 p.m. and Wednesdays after school until 7:00 p.m. Additionally, the court entered a child support award against Father. Father filed a motion for new trial, arguing that child support should have been referred to a Title IV-D commissioner and seeking clarification of the court's child support

calculations. The court decreased the amount of the child support ordered but denied the motion as to the other issues. Father timely appealed, and we have jurisdiction pursuant to A.R.S. section 12-2101(A)(2) and (5)(a).

DISCUSSION

I. Custody

¶6 Father contends the superior court abused its discretion by failing to make detailed findings of fact and conclusions of law supporting its custody order. "In a contested custody case, the court must make specific findings regarding all relevant [A.R.S. § 25-403(A)] factors *and* the reasons the decision is in the best interests of the child[]. . . . Failure to make the requisite findings pursuant to A.R.S. § 25-403 can constitute an abuse of discretion requiring reversal and a remand." *Hart v. Hart,* 220 Ariz. 183, 185-86, ¶ 9, 204 P.3d 441, 443-44 (App. 2009) (emphasis added) (citing *Owen v. Blackhawk,* 206 Ariz. 418, 421-22, ¶ 12, 79 P.3d 667, 70-71 (App. 2003)).

¶7 Both parties sought a change from joint legal custody to sole legal custody. The superior court noted its obligation to consider the factors in section 25-403 in deciding the custody issue, but did not make sufficient findings relating to those factors on the record. The court stated:

> In consideration of the factors, the Court determines that the primary area of dispute between the parties deals with the definition of parenting time based upon the changed circumstances and their inability to make final decisions. There is no question that the parents['] relationship at times is hostile and that their conflict could arguably make co-parenting difficult, if no[t] impossible. However, the Court determines that such conflicts can be hopefully resolved by clarifying and updating certain provisions that the parties agreed to at the time of their divorce which are simply no longer feasible.

The court also noted that Father now lives in San Tan Valley, approximately fifty miles from Mother, and that the parties have been unable to make decisions jointly or agree on a diagnosis for the child's medical condition. These findings, however, do not address or relate to each of the factors listed in A.R.S. § 25-403(A). Although the evidentiary hearing was brief, there was some evidence presented as to the child's relationship with Father, the child's mental health, both parents' likelihood for allowing frequent and meaningful continuing contact with the other, and whether one or both parents have provided primary care. *See* A.R.S. § 25-403(A)(3), (5), (6), and (7).

¶8 Because the superior court erred by not making findings on the record, we vacate the custody order and remand for findings as required by A.R.S. § 25-403. "By doing so, we do not suggest a particular outcome on remand nor do we require

additional evidentiary proceedings, unless the court determines that they would be appropriate." *Hart*, 220 Ariz. at 187, ¶ 14, 204 P.3d at 445. Father also argues the superior court erroneously found that he wanted sole custody and to have the child attend school near his residence. Father testified that he was seeking sole legal custody; however, from our review of the record we do not discern any support for the superior court's conclusion that both parties "wish for the child to attend school at their respective residential locations." Instead, Father explained how he had been taking the child to and from her school in Phoenix on certain days; but neither he nor Mother suggested that if the court awarded him sole custody he would move her to a different school. When the superior court issues its findings on remand, the court should reconsider whether Father is requesting that the child change schools, based on the existing record or as supplemented by the parties, in the court's discretion.

¶9 Father also contends the superior court abused its discretion in allowing Mother's live-in partner to testify because Mother did not disclose this witness until the Saturday before trial in an untimely pretrial statement. Although Father raised the alleged untimely disclosure at the start of the trial, the court stated that it would rule on the objection when

the witness took the stand. Father, however, proceeded to cross-examine the witness without renewing his objection or reminding the court that his previous objection had not been ruled upon. Although Mother's pretrial statement was untimely, Father waived his objection by failing to renew it when the witness was called to testify. *State v. Mays*, 96 Ariz. 366, 370-71, 395 P.2d 719, 722-23 (1964) (failure to obtain ruling on prior objection waived issue on appeal). Accordingly, the court did not abuse its discretion in considering the testimony of Mother's partner.

II. Parenting Time

¶10 The superior court awarded Father "parenting time on alternating weekends from Friday after school until Sunday at 6:00 p.m. and every Wednesday evening from after school until 7:00 p.m." This is a reduction of Father's parenting time under the parties' previous informal schedule, which allowed him to have the child nearly every weekend from Thursday or Friday after school until Sunday evening or Monday morning. It is also less time than the schedule set forth in the 2003 consent decree, which provided Father parenting time in a two-week block: Sunday at 12:30 p.m. to Wednesday at 10:00 a.m. in week one and Saturday at 12:30 p.m. to Monday at 7:00 p.m. in week two. Additionally, the consent decree gave Father one

additional day every six months and four weeks in the summer. The parties, however, did not abide by this schedule until shortly before trial, when the superior court ordered a return to this schedule pending an evidentiary hearing. There was also evidence that the parties exercised parenting time on alternating weeks during the summer of 2011.

¶11 Father argues the superior court made no findings in support of the parenting time order. We will address his challenge to the parenting time order because it might become relevant to the proceedings on remand. We review an order modifying parenting time for an abuse of discretion. *Armer v. Armer,* 105 Ariz. 284, 289, 463 P.2d 818, 823 (1970).

¶12 In contrast to the statutory requirement for detailed findings regarding a contested custody decision, the court is not required to make specific findings on the record in modifying parenting time. *Hart,* 220 Ariz. at 187, ¶¶ 16-17, 204 P.3d at 445. Because specific findings are not required, the court did not abuse its discretion by not detailing the basis for its parenting time order.

¶13 Father also argues that the court improperly concluded that his move from Mesa to San Tan Valley constituted a relocation as defined by A.R.S. § 25-408(A). The parenting time order does not indicate, however, that the court considered the

relocation statute in making its determination. *See* A.R.S. § 25-408(B)-(I). Rather, the court appears to have simply factored Father's move and the increased distance the child would have to travel to attend school into its overall assessment of the child's best interests. Thus, although the court used the term "relocated" in its order, nothing suggests that the court actually considered Father's move as a relocation for purposes of A.R.S. § 25-408.

¶14 Father argues that the parenting time order constituted a restriction of his parenting time without the findings required by A.R.S. §§ 25-408(A) and 25-411(J) (2012). Pursuant to A.R.S. § 25-408(A) (repealed effective January 1, 2013) and § 25-411(J), the court may modify parenting time consistent with the child's best interests, but shall not restrict parenting time unless the court finds that parenting time would seriously endanger the child's physical, mental, moral or emotional health. *See Hart,* 220 Ariz. at 188, ¶ 19, 202 P.3d at 446 (holding that restriction of parenting time pursuant to § 25-411(J) (formerly § 25-411(D)) requires a best interests analysis *as well as* a finding of endangerment). Father contends the reduction in his parenting time constituted a restriction requiring that the court make these findings concerning endangerment.

¶15 First, we note the record is not clear about the extent to which the parenting time order reduced Father's overall parenting time hours. The current order reduced Father's school-year hours from the parties' past schedule, but Father was awarded equal parenting time (alternating weeks) during the summer months. Moreover, Father exercised his parenting time in a varied and inconsistent manner, so it is not possible to ascertain precisely how much time Father previously exercised. Only recently did the parties begin to follow the schedule set forth in the consent decree.

¶16 However, even assuming the court reduced Father's parenting time, we disagree that the reduction in the number of parenting time hours constituted a "restriction." The statutes do not define "restrict" or otherwise explain the difference between a modification in parenting time and a restriction in parenting time. As we understand these statutes, the limitation on the court's power to "restrict a parent's parenting time rights" refers to the court's power to restrict the manner in which parenting time is exercised, such as when the court imposes supervised parenting time or specifies the location where parenting time may or may not be exercised. *See Turley v. Turley,* 5 S.W.3d 162 (Mo. 1999) (holding that for endangerment standard to apply, the modification of parenting time "must

restrict or limit one party's visitation rights compared to their visitation rights under the original agreement[;]" citing as examples: denial of overnight visits, limiting location of visits, or imposing supervision requirements).[2] Under the circumstances presented in this case, we conclude the modification in Father's parenting time hours was subject to a best interests standard, and was not a restriction requiring application of an endangerment standard.

¶17 Father also makes conclusory allegations that the trial court's determinations were motivated by gender bias in favor of Mother. "A trial judge is presumed to be free of bias and prejudice and a defendant must show by a preponderance of the evidence that the trial judge was, in fact, biased." *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38, 124 P.3d 756, 768 (App. 2005) (internal quotations omitted). Father has presented no evidence, and our review of the record has revealed none,

[2] Other jurisdictions ruling on this issue have similarly concluded that a reduction in the amount of parenting time hours may constitute a restriction if it is a substantial decrease or based on a parent's conduct that could threaten the child's physical, mental, moral, or emotional health. *See e.g., In re Marriage of West,* 94 P.3d 1248, 1251 (Colo. App. 2004) (noting that "[m]ost of the cases that address "restrictions" in visitation involve outright denial of visitation or require supervised visitation"); *Anderson v. Archer,* 510 N.W.2d 1, 4 (Minn. App. 1993) (holding that best interests standard, not endangerment standard, applied where appellant was still allowed substantial visitation time after the modification).

indicating that the judge in this case was biased against him. Accordingly, Father's allegation of bias is without merit.

III. Child Support

¶18 Father and the State argue that the superior court erred in making child support orders after expressly informing the parties and the State that the court would refer child support issues to a Title IV-D commissioner. We agree.

¶19 We review the modification of child support orders for an abuse of discretion. *Little v. Little,* 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999). An abuse of discretion exists when the superior court commits an error of law or acts arbitrarily. *City of Phoenix v. Geyler,* 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985).

¶20 Having appeared pursuant to A.R.S. § 25-509, the State had a right to be heard regarding child support issues. The State asked to have the child support issues referred to a Title IV-D commissioner or, alternatively, to allow the State to appear telephonically for the child support hearings. Initially, the superior court set the hearing to consider only parenting time and income tax issues. The State did not appear at the hearing, and the court confirmed that child support issues would be referred to a Title IV-D commissioner.

¶21 After the hearing, however, the superior court entered orders modifying the child support terms of the consent decree. There was no evidence in the record to support the findings made in the child support orders. The court stated that it based its calculation on Father's January 8, 2012 affidavit of financial information, but that is not in the record. Moreover, by advising the parties and the State that child support issues would not be considered at the hearing but then addressing those issues, the court deprived the parties and the State of the opportunity to present evidence and argument. *See Cook v. Losnegard,* 228 Ariz. 202, 206, ¶¶ 18-19, 265 P.3d 384, 388 (App. 2011). Accordingly, we vacate the modified child support orders and remand for further proceedings consistent with this decision.

IV. Fair Hearing

¶22 Father contends he was deprived of a fair hearing because the superior court allowed certain "unethical practices" by Mother. Father asserts that Mother made false statements regarding daycare costs and Father's income. Financial issues will be decided by a Title IV-D commissioner on remand and we thus we do not address them here. Regarding Mother's allegedly false testimony about weekend access, mediation, and the information she provided to doctors, we defer to the superior

court's determination of the weight and credibility to attribute to conflicting evidence. *See Gutierrez v. Gutierrez,* 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998).

¶23 Father argues that the superior court's findings regarding the traffic to Father's home and the amount of travel were prejudicial. As discussed above, the court did not abuse its discretion or act in a prejudicial manner in considering that the fifty-mile distance between the parties' homes would require a significant amount of travel time for the child.

¶24 Father also contends there was no evidence to support the court's finding that he paid Mother $645 in lieu of child support. Any misstatement regarding amounts Father paid despite the lack of a prior child support order is harmless in light of the fact that we are vacating the child support orders for reconsideration.

V. Attorneys' Fees and Costs

¶25 On appeal, Father requests sanctions pursuant to A.R.S. § 12-349. Because Father raised this argument for the first time in his reply brief, however, the argument is waived and we do not consider it. *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204 n.3, ¶ 7, 119 P.3d 467, 471 n.3 (App. 2005). As for costs, although Father was successful on some issues on appeal, he did not prevail on others he raised. Additionally, we have

remanded for further proceedings which may or may not have a more favorable outcome for Father. Therefore, we conclude neither party is entitled to an award of costs on appeal under A.R.S. § 12-342(A). *See Concannon v. Yewell*, 16 Ariz. App. 320, 322, 493 P.2d 122, 124 (1972) ("As a general rule, where both parties prevail on a material question on appeal, each must bear his own costs.").

CONCLUSION

¶26 We vacate the superior court's custody order and remand for further findings as required by A.R.S. § 25-403. We also vacate the court's child support orders and remand for appropriate consideration by a Title IV-D commissioner. The remainder of the court's judgment is affirmed.

_____________/s/___________________
MICHAEL J. BROWN, Judge

CONCURRING:

________________/s/___________________
SAMUEL A. THUMMA, Presiding Judge

________________/s/___________________
DIANE M. JOHNSEN, Judge