IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KELLY LOUISE PEART,
Petitioner/Appellant,

v.

GERMAN GONZALEZ,
Respondent/Appellee.

No. 2 CA-CV 2015-0034
Filed October 28, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. SP20101628
The Honorable James E. Marner, Judge

AFFIRMED

Kelly Louise Peart, Freeburg, Illinois
In Propria Persona

German Gonzalez, Tucson
In Propria Persona

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 In this paternity action, Kelly Peart appeals from the trial court's order granting appellee German Gonzalez joint legal decision-making and parenting time with their child, V., as well as the court's denial of her subsequent motion to vacate that order. On appeal, Peart argues the court erred when it scheduled an evidentiary hearing "with only (13) days[']notice." She also argues the court violated her due process rights because Gonzalez did not give "proper notice" of his request for a parenting-time plan and she was unable to present witness testimony or submit evidence when she appeared telephonically at the hearing. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3, 968 P.2d 1053, 1055 (App. 1998). Peart gave birth to V. in June 2007, and, in November 2010, the trial court entered a paternity order naming Gonzalez the father. The court then entered a post-paternity judgment awarding child support to Peart, with whom V. had resided "for the greater part of the last six (6) months."

¶3 The parties informally shared parenting time with V. until Peart moved to Illinois in November 2013. At that time, the parties agreed that V. would continue living with Gonzalez in Arizona during the school year but would stay with Peart during

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

the summer. During the summer of 2014, however, Peart decided V. should attend school in Illinois and did not return V. to Arizona.

¶4 On November 6, 2014, Gonzalez filed a petition to establish legal decision-making and parenting time. The trial court issued an order to appear for a hearing on December 8, 2014, "so the court c[ould] determine whether the requests in the Petition . . . should be granted." Peart, who was eight months pregnant and under a travel restriction at the time, appeared telephonically at the hearing. Gonzalez and Peart both testified and requested parenting time with V. during the school year.

¶5 In its ruling, the trial court awarded the parties joint legal decision-making authority and ordered that V. would live with Gonzalez during the school year and Peart during the summer. Peart filed a motion for relief from the judgment pursuant to Rule 85(C), Ariz. R. Fam. Law P., which the court denied, as well as a motion for reconsideration of that denial, which the court also denied. Peart timely appealed.[2] We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1), (2).

Setting the Hearing

¶6 Peart argues the trial court erred by "holding an evidentiary hearing on legal decision making and parenting time with only (13) days[']notice." She maintains "[t]he Court was aware

[2]Peart's notice of appeal indicates she is appealing "from a final Judgment order finding that [she] had 'Proper Notice' and [her] 'Due Process Rights' were not violated" and then lists the dates on which the trial court denied her motion for relief from the judgment and her motion for reconsideration, but not the date of the underlying judgment. Rule 8(c), Ariz. R. Civ. App. P., requires an appellant to list "the judgment or portion of the judgment from which the party is appealing." Nevertheless, we may construe a notice of appeal liberally. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 30, 972 P.2d 676, 683 (App. 1998). Because Peart clearly indicated the issues she intended to raise, we understand her to be appealing from both the underlying judgment and the denial of her motion for relief from the judgment.

that [she] only had (13) days in which to gather and present evidence" and she "inquired as to whether the matter could be continued until after her pregnancy," but "the court informed [her] that she would have to make an appearance telephonically." Generally, we review a court's application of procedural rules de novo, *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, ¶ 22, 189 P.3d 1114, 1122 (App. 2008), and the denial of a motion to continue for an abuse of discretion, *Ornelas v. Fry*, 151 Ariz. 324, 329, 727 P.2d 819, 824 (App. 1986).

¶7 Peart does not provide any legal authority, however, to support her assertion that the trial court erred when it set the hearing for December 8, 2014. An appellant is required to cite to "supporting legal authority" for each of his or her contentions. Ariz. R. Civ. App. P. 13(a)(7) (argument in opening brief must contain "supporting reasons for each contention," with citations to authorities and relevant portions of record). Failure to do so constitutes waiver of the issue. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (appellant's failure to develop and support argument waives issue on appeal).

¶8 Moreover, the record in this case does not show that Peart ever requested a continuance—either by filing a motion or making an oral request during the hearing—or that the trial court was "aware" she had thirteen days' notice of the hearing.[3] *See* Ariz. R. Fam. Law P. 77(C)(1) ("When an action has been set for trial, hearing or conference on a specified date by order of the court, no continuance of the trial, hearing or conference shall be granted except upon written motion setting forth sufficient grounds and good cause . . . ."). Instead, Peart points to an appendix to her motion for reconsideration, which she asserts is a record of her telephone calls and is evidence that she had spoken to an

[3]In her opening brief, Peart states she "was served out-of-state by certified mail with the Petition to Establish and Order to Appear Re: Legal Decision Making & Parenting Time . . . on November 25, 2014." To substantiate this statement, however, she cites to her motion for relief from the judgment, which does not support this assertion.

administrative assistant at the trial court. But issues brought to the court's attention for the first time in a motion for reconsideration are generally waived.[4] *See Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 18, 235 P.3d 285, 290 (App. 2010) ("'One of the reasons . . . is that when a new argument is raised for the first time in a motion for reconsideration, the prevailing party below is routinely deprived of the opportunity to fairly respond.'"), *quoting Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006) (alteration in *Ramsey*). We therefore conclude that the issue is waived and do not address it further.

Notice of a Parenting Time Order

¶9 Peart also argues "the trial court denied [her] due process of law by substantially decreasing her parenting time without 'proper notice.'" We review questions of law, including due process claims, de novo. *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, ¶ 16, 132 P.3d 290, 294 (App. 2006); *cf. Mack v. Cruikshank*, 196 Ariz. 541, ¶ 6, 2 P.3d 100, 103 (App. 1999).

¶10 Peart also raised this issue for the first time in her motion for reconsideration. *See Ramsey*, 225 Ariz. 132, ¶ 18, 235 P.3d at 290. Nevertheless, we have discretion to consider constitutional arguments, such as due process claims, even if not timely raised. *See Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406 n.9, 904 P.2d 861, 868 n.9 (1995); *Olson v. Walker*, 162 Ariz. 174, 181, 781 P.2d 1015, 1022 (App. 1989) ("Constitutional arguments . . . may be raised at any time, although it is within the court's discretion whether to consider them."). And, if Peart's assertion were correct—that she lacked adequate notice of the trial court's intent to enter a parenting-time plan—then she also would have lacked sufficient opportunity to raise the issue as well. Accordingly, we exercise our discretion and address Peart's argument.

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[4]To the extent Peart suggests this issue is related to her due process claims, we note that "the mere invocation of a . . . due process challenge is not necessarily a sufficient reason to forego application of the waiver rule." *In re MH 2008-002659*, 224 Ariz. 25, ¶ 10, 226 P.3d 394, 396 (App. 2010).

¶11 Generally, at a minimum, due process requires notice and "an opportunity to be heard at a meaningful time in a meaningful manner." *Wallace v. Shields*, 175 Ariz. 166, 174, 854 P.2d 1152, 1160 (App. 1992); *see Huck v. Haralambie*, 122 Ariz. 63, 65, 593 P.2d 286, 288 (1979). "[A] parent is entitled to due process whenever his or her custodial rights to a child will be determined by a proceeding." *Smart v. Cantor*, 117 Ariz. 539, 542, 574 P.2d 27, 30 (1977); *see also Heidbreder v. Heidbreder*, 230 Ariz. 377, ¶ 14, 284 P.3d 888, 892 (App. 2012) ("A trial court errs if it modifies child support without conducting a hearing or allowing the parties to gather and present their evidence."). And, although parenting time is different from "custodial rights," *see Owen v. Blackhawk*, 206 Ariz. 418, ¶ 11, 79 P.3d 667, 670 (App. 2003), a parent still has a fundamental interest in the outcome of a determination of parenting time, *see Christy A. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 299, ¶ 22, 173 P.3d 463, 470 (App. 2007) ("Parents have a fundamental interest in the care, custody, and control of their children, which interest is protected by the Due Process Clause of the United States Constitution."). Thus, due process requires notice and opportunity to be heard before a court enters a parenting-time order. *See also* A.R.S. § 25-403.01(D) ("A parent . . . is entitled to reasonable parenting time . . . unless the court finds, *after a hearing*, that parenting time would endanger the child's physical, mental, moral or emotional health.") (emphasis added).

¶12 In this case, Peart had sufficient notice that parenting time would be litigated at the evidentiary hearing. The post-paternity judgment awarding child support to Peart clarified that it did "not create . . . [an] order for custody, access or parenting time" and, "[i]f any party would like to establish parent/child access, they must file a petition to establish these rights with the [c]ourt." In his petition filed in November 2014, Gonzalez failed to place a checkmark in the appropriate box to indicate he was "request[ing] an order for Parenting Time." And, he did not select a suggested parenting-time schedule within the form he submitted as his parenting-time plan. Notwithstanding these deficiencies, however, Peart had notice regarding the nature of his petition and the hearing. The caption of the petition indicated that Gonzalez sought an order for both legal decision-making and parenting time. The affidavit

Gonzalez filed with the petition stated that the nature of the action was legal decision-making and parenting time, and his proposed parenting-time plan detailed some of his requests. And last, the order to appear specified that the purpose of the hearing was to establish legal decision-making and parenting time.

¶13 Additionally, at the evidentiary hearing, the trial court stated: "We're here on Mr. Gonzalez's motion to establish legal decision-making and parenting time. Do you understand that, Ms. Peart? Do you understand why we're here?" She responded, "Yes." And, when prompted by the court, Peart stated: "I'm proposing that I have [V.] school years. He can have her summers, and we [can] rotate holidays." Thus, because the record shows Peart had sufficient notice of Gonzalez's request for a parenting-time plan, *see Huck*, 122 Ariz. at 65, 593 P.2d at 288; *Wallace*, 175 Ariz. at 174, 854 P.2d at 1160, the court did not violate Peart's due process rights when it entered an order establishing such a plan. *See Emmett McLoughlin Realty, Inc.*, 212 Ariz. 351, ¶ 16, 132 P.3d at 294; *Mack*, 196 Ariz. 541, ¶ 6, 2 P.3d at 103.

Opportunity to Present Evidence

¶14 Peart lastly argues her "'due process' rights were violated when she appeared telephonically and was unable to call witnesses and submit evidence." Again, we review questions of constitutional law de novo.[5] *Emmett McLoughlin Realty, Inc.*, 212

[5]Peart first raised this argument below in her motion for relief from the judgment, which the trial court interpreted as an argument pursuant to Rule 85(C)(1)(d) or (f). On appeal, Peart refers to Rule 85(C)(1)(a) and (d), which provides relief for "mistake, inadvertence, surprise, or excusable neglect" or if "the judgment is void." However, she does not explain why her claimed due process violation would entitle her to relief pursuant to Rule 85(C). Because Peart has provided insufficient argument on that particular issue, we consider it waived. *See* Ariz. R. Civ. App. P. 13(a)(7); *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393 n.2. We nevertheless address Peart's argument in this section as a general due process challenge, similar to the manner in which we addressed her argument that she had received insufficient notice of the nature of Gonzalez's petition to

Ariz. 351, ¶ 16, 132 P.3d at 294; *cf. Mack*, 196 Ariz. 541, ¶ 6, 2 P.3d at 103.

¶15 In addition to "notice and an opportunity to be heard at a meaningful time and in a meaningful manner," due process "entitles a party to offer evidence and confront adverse witnesses." *Curtis v. Richardson*, 212 Ariz. 308, ¶ 16, 131 P.3d 480, 484 (App. 2006). For this reason, when factual issues are in dispute during a family law action, a trial court must provide "adequate opportunity for efficient direct testimony and cross-examination." *Volk v. Brame*, 235 Ariz. 462, ¶¶ 1, 20, 333 P.3d 789, 791, 795 (App. 2014).

¶16 In this case, however, the record does not support Peart's argument that she was denied the opportunity to present testimony or submit evidence. At the start of the hearing, the trial court explained: "What I probably am going to do is put you both under oath and take sworn testimony from you. And if either one of you has any additional evidence, you can offer it." This was consistent with Rule 8, Ariz. R. Fam. Law P., which governs the procedure for telephonic appearances and testimony. *See* Ariz. R. Fam. Law P. 8(B) (during telephonic appearance "the court may allow a party or witness to give testimony"), (C) (procedure for admitting documents during telephonic appearance). After the parties testified, the court asked, "Is there anything else you wanted to add, Ms. Peart?" Peart replied in the negative. Also, when Gonzalez offered into evidence a letter from one of V.'s school teachers, the court asked Peart if she had any objection, and Peart again replied in the negative. Thus, Peart was not denied the opportunity to present testimony or submit evidence as she alleges. Although we acknowledge she was required to take extra steps if she wanted to submit evidence during the hearing, *see* Ariz. R. Fam. Law P. 8(C), there is no indication in the record that the court would have excluded any evidence she offered. Thus, the court did not violate Peart's due process rights. *See Emmett McLoughlin Realty, Inc.*, 212 Ariz. 351, ¶ 16, 132 P.3d at 294; *Mack*, 196 Ariz. 541, ¶ 6, 2 P.3d at 103.

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establish parenting time. *See Jimenez*, 183 Ariz. at 406 n.9, 904 P.2d at 868 n.9; *Olson*, 162 Ariz. at 181, 781 P.2d at 1022.

Disposition

¶17 For the foregoing reasons, we affirm.