

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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IN RE THE MARRIAGE OF:

ROGER H. CONTRERAS,  
*Petitioner/Appellee,*

AND

NANCY L. BOURKE,  
*Respondent/Appellant.*

No. 2 CA-CV 2013-0092  
Filed February 24, 2014

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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NOT FOR PUBLICATION  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); Ariz. R. Civ. App. P. 28(c).*

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Appeal from the Superior Court in Cochise County  
No. DO200901390  
The Honorable Kimberly A. Corsaro, Judge Pro Tempore

**VACATED AND REMANDED**

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COUNSEL

Roger H. Contreras, Sierra Vista  
*In Propria Persona*

Nancy Bourke, Naco  
*In Propria Persona*

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**MEMORANDUM DECISION**

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

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VÁSQUEZ, Presiding Judge:

¶1 In this domestic-relations case, appellant Nancy Bourke appeals from the trial court’s post-decree-of-dissolution order modifying parenting time in favor of appellee Roger Contreras. On appeal, Nancy argues the court denied her due process of law by modifying parenting time without providing her notice or a hearing. For the reasons stated below, we vacate the court’s order and remand for proceedings consistent with this decision.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to sustaining the trial court’s order. *See In re Marriage of Yuro*, 192 Ariz. 568, ¶ 3, 968 P.2d 1053, 1055 (App. 1998). The parties had been married for ninety-seven days when Roger filed for dissolution in December 2009. While the dissolution was pending, Nancy gave birth to the parties’ son, X., in March 2010. In January 2011, after a contested custody hearing, the court entered an under-advisement ruling awarding Roger sole legal custody of X. and providing Nancy with parenting time every Wednesday and Sunday overnight.<sup>1</sup> As part of that ruling, the court also provided:

Commencing on [X.]’s 3rd birthday,  
[Nancy] shall exercise her parenting time as  
follows:

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<sup>1</sup>As of January 1, 2013, the legislature changed the references in our statutes from “legal custody” and “physical custody” to “legal decision-making and parenting time.” *See* 2012 Ariz. Sess. Laws, ch. 309, §§ 1-26; A.R.S. § 25-401. Because the original orders in this case were entered prior to the effective date, we use the terms employed by the trial court.

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(1) Midweek parenting time shall commence from the end of [Nancy]'s work day on Wednesdays until she delivers [X.] to day care on Friday mornings.

(2) Alternating weekends shall mean that [X.] remains in [Nancy]'s care from the commencement of her Wednesday midweek visit until Sunday evening at 4:00 p.m.

¶3 After a subsequent dissolution trial, the trial court entered a decree of dissolution in April 2011, which largely incorporated the January 2011 ruling but omitted the increase in Nancy's parenting time upon X.'s third birthday. On appeal, this court affirmed the decree. *Contreras v. Bourke*, No. 2 CA-CV 2011-0103 (memorandum decision filed Mar. 30, 2012).

¶4 In November 2012, after the parties had filed numerous motions regarding parenting time, the trial court appointed a parenting coordinator "to resolve the day to day parenting time matters of the parties." See Ariz. R. Fam. Law P. 74(A). The parenting coordinator subsequently asked the court to clarify whether it had intended to omit the increase in Nancy's parenting time from the decree.<sup>2</sup> In a January 2013 order, the court explained: "The omission of the expanded alternating weekend provision [from the decree] was an unintentional oversight." And the court confirmed that its "intent was to expand [Nancy]'s overnight visits once [X.] turned 3 on March 25, 2013."<sup>3</sup> But, based on "the parties'

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<sup>2</sup>In May 2011, the trial court had entered an amended decree of dissolution, which provided that the orders following the dissolution trial take precedence over the January 2011 ruling, but still omitted any reference to the change in parenting time upon X.'s third birthday.

<sup>3</sup>Roger filed a motion for reconsideration of the January 2013 order, arguing that "[t]he omission of the automatic expansion of parenting time was no mistake." The trial court denied the motion

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behavior and complications surrounding exchanges,” the court directed the parenting coordinator to “set forth a recommendation for a new schedule, commencing March 25, 2013, that expand[ed] Nancy]’s overnight parenting time and minimize[d] the in person exchanges.”

¶5 The following month, the parenting coordinator issued her report and recommendations on the increase in Nancy’s parenting time. The parenting coordinator recommended that, “[w]henever possible, exchanges should occur at daycare.” Accordingly, the parenting coordinator endorsed Nancy’s midweek parenting time from Wednesday after work until Friday morning, but she proposed pushing back Nancy’s alternating weekends to Thursday after work until Monday morning, when X. could be picked up and dropped off at daycare. She suggested that both parents must drop off X. at daycare by 8:30 a.m. and pick him up no earlier than 12:30 p.m., and she recommended starting the new schedule on March 18, 2013. The parenting coordinator also made recommendations for changes to the holiday and vacation schedules.

¶6 Roger filed an objection to the parenting coordinator’s report and recommendations. Roger largely agreed with the parenting coordinator’s recommended weekly schedule for parenting time, but he argued that X. should not be picked up from daycare earlier than 4:30 p.m. Roger also objected to the proposed commencement date and the holiday and vacation schedules.

¶7 In April 2013, after a hearing, the trial court entered an under-advisement ruling, approving in part and modifying in part the parenting coordinator’s report and recommendations.<sup>4</sup> Based on its “concerns about [Nancy]’s ability to put [X.]’s best interests above

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and “again confirm[ed its] intent to expand [Nancy]’s parenting time.”

<sup>4</sup>Because the hearing occurred five days before X.’s third birthday, the trial court entered temporary orders for parenting time while the objection was pending.

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her own,” the court ordered that Nancy’s parenting time be on an alternating weekly schedule, starting April 22, 2013, with week one consisting of Wednesday after daycare until Monday before daycare and week two consisting of Wednesday after daycare until Thursday before daycare. The court also entered new orders regarding the holiday and vacation schedules and pick-up and drop-off times. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(2).<sup>5</sup> See *Cone v. Righetti*, 73 Ariz. 271, 274-75, 240 P.2d 541, 543 (1952) (order modifying custody, visitation, and support appealable as special order after judgment).

**Discussion**

¶8 Nancy argues that the trial court “denied [her] due process of law by substantially decreasing her parenting time without notice or a hearing.” We review a trial court’s orders establishing parenting time for an abuse of discretion. *Nold v. Nold*, 232 Ariz. 270, ¶ 11, 304 P.3d 1093, 1096 (App. 2013). “An abuse of discretion exists when the trial court commits an error of law in the process of exercising its discretion.” *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 23, 97 P.3d 876, 881 (App. 2004). We review questions of law, including due process claims, de novo. *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 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).

¶9 As a preliminary matter, we address Roger’s argument that Nancy failed to raise her due process concerns before the trial court. Nancy admits she did not raise her argument below but maintains that she “did not have an opportunity” to do so because she “had no notice during [the] hearing that the court was contemplating a decrease in regular parenting time and nothing

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<sup>5</sup> This court originally dismissed the appeal because the May 10, 2013 notice of appeal was not timely filed after entry of the April 8, 2013 ruling. However, Nancy filed a motion for reconsideration, arguing that she had filed her notice of appeal on May 6, 2013, but the clerk of the court did not file stamp it until May 10, after the trial court had granted her application for deferral of fees. This court subsequently granted the motion for reconsideration and reinstated the appeal.

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between the time of that hearing and the court's order reducing her time notified either of the parties of a potential decrease."

¶10 "Generally, this court will not address an issue raised for the first time on appeal." *Yano v. Yano*, 144 Ariz. 382, 386, 697 P.2d 1132, 1136 (App. 1985). However, "this rule is a rule of prudence, not of jurisdiction." *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, n.9, 105 P.3d 1163, 1171 n.9 (2005). We have discretion in deciding whether to consider constitutional arguments for the first time on appeal. 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, however, may be raised at any time, although it is within the court's discretion whether to consider them.").

¶11 Here, for the reasons discussed below, we agree with Nancy that she did not have an opportunity to raise her due process argument before the trial court. See *Jimenez*, 183 Ariz. at 406 n.9, 904 P.2d at 868 n.9 (this court may entertain arguments not raised below "[w]hen good reason exists"). Moreover, the issue presented raises a question of law that the parties have thoroughly briefed on appeal. See *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶¶ 21-22, 160 P.3d 223, 229 (App. 2007); *Winsor v. Glasswerks PHX, L.L.C.*, 204 Ariz. 303, n.3, 63 P.3d 1040, 1046 n.3 (App. 2003). Accordingly, we exercise our discretion and consider Nancy's argument.

¶12 The argument on appeal essentially raises three issues: (1) whether the trial court's ruling constitutes a modification of parenting time; (2) if so, what due process rights are afforded in that context; and (3) whether those rights were violated here. We address each issue in turn.

**Was this a modification of parenting time?**

¶13 Nancy maintains that the trial court's April 2013 ruling decreased her parenting time upon X.'s third birthday and was therefore a modification of the January 2011 ruling. Roger contends the court's April 2013 ruling did not modify parenting time but "was merely an implementation" of the January 2011 ruling.

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¶14 A modification of parenting time is a change in “the schedule of time during which each parent has access to a child at specified times.” A.R.S. § 25-401(5); *see Owen v. Blackhawk*, 206 Ariz. 418, ¶¶ 2-5, 13, 79 P.3d 667, 669, 671 (App. 2003) (mother’s parenting time modified when reduced to school breaks and alternating holidays). The trial court must determine parenting time “in accordance with the best interests of the child,” considering “all factors that are relevant to the child’s physical and emotional well-being.” A.R.S. § 25-403(A); *see also* A.R.S. § 25-411(J). “In a contested . . . parenting time case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.” A.R.S. § 25-403(B); *see also Reid v. Reid*, 222 Ariz. 204, ¶ 18, 213 P.3d 353, 358 (App. 2009).

¶15 We conclude that the April 2013 ruling was a modification of the January 2011 ruling. The trial court effectively eliminated one of Nancy’s overnights with X. from the original increased schedule. An order that reduces parenting time by one night every other week cannot be an implementation of a prior order. *See The American Heritage Dictionary* 646 (2d coll. ed. 1982) (defining “implement” as “[t]o put into practical effect”). Such a substantive change must be a modification. *See The American Heritage Dictionary* 806 (defining “modify” as “[t]o change in form or character”); *cf. Owen*, 206 Ariz. 418, ¶¶ 2-5, 13, 79 P.3d at 669, 671. Although neither party filed a petition for modification, *see* A.R.S. § 25-411; Ariz. R. Fam. Law P. 91(F), the court nonetheless modified Nancy’s increased parenting time upon X.’s third birthday.

**What due process rights are afforded?**

¶16 “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). 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). It also affords a party the opportunity to offer evidence and to confront adverse witnesses. *Curtis v. Richardson*, 212 Ariz. 308, 312, ¶ 16, 131 P.3d 480, 484 (App. 2006).

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¶17 In *Cook v. Losnegard*, this court vacated the trial court’s modification of child support based on a due process violation. 228 Ariz. 202, ¶¶ 19-20, 265 P.3d 384, 388 (App. 2011). There, the trial court awarded the mother sole custody of her son and ordered the father to pay child support. *Id.* ¶ 2. A few years later, the father filed a petition for modification of custody, in which he also asked the court to review the child support order. *Id.* ¶ 3. At the subsequent custody trial, the court declined to hear evidence on child support. *Id.* ¶¶ 4, 17. Yet, when the court issued its custody ruling, it also reduced the father’s child support obligation. *Id.* ¶ 4.

¶18 On appeal, we determined that the mother had not “received adequate notice and an opportunity to be heard regarding issues relevant to child support modification.” *Id.* ¶ 19. By way of example, we pointed out that the mother had evidence of daycare expenses, but the trial court did not hear that evidence at trial and did not consider it in modifying child support. *Id.* Since *Cook*, we have reiterated that “[a] trial court errs if it modifies child support without conducting a hearing or allowing the parties to gather and present their evidence.” *Heidbreder v. Heidbreder*, 230 Ariz. 377, ¶ 14, 284 P.3d 888, 892 (App. 2012).

¶19 We are unaware of any cases—and the parties have directed us to none—addressing due process rights in the context of parenting time. However, “[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). In that context, like with a modification of child support, due process includes the right to adequate notice and an opportunity to be heard. *Id.* Parenting time falls within this same spectrum. 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.”). Therefore, due process requires notice and opportunity to be heard before a court modifies parenting time. 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

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added); Ariz. R. Fam. Law P. 91(F)(2) (party seeking modification of parenting time must file order for other party to appear).

**Were those rights violated here?**

¶20 Here, the parties had no notice that the trial court was contemplating a modification of parenting time. In January 2013, the court confirmed that it had intended to include the increased parenting time, reflected in the January 2011 order, in the decree, making it automatically effective upon X.'s third birthday. Accordingly, the court asked the parenting coordinator for assistance in implementing the increase. In doing so, the court did not suggest that the parenting coordinator should also provide a recommendation to modify Nancy's increased parenting time by reducing it. Indeed, such a recommendation is prohibited under Rule 74(E), which provides that the "Parenting Coordinator shall not have the authority to make a recommendation affecting . . . a substantial change in parenting time." Moreover, the parenting coordinator's report and recommendations did not include a modification of parenting time but largely adopted the court's January 2011 ruling, merely pushing back Nancy's extended weekend from Wednesday through Sunday to Thursday through Monday.

¶21 And Roger's objection to the parenting coordinator's report and recommendations cannot be construed as a petition for modification for which Nancy had received notice. First, although he did not specifically cite the rule, Roger's objection was clearly made under Rule 74(I), which provides for objections to the parenting coordinator's recommendations. Roger did not request a modification of parenting time pursuant to Rule 91(F) or § 25-411. Although Roger asserted that "any further expansion of [Nancy]'s parenting time is contrary to [X.]'s best interests," *see* A.R.S. §§ 25-403(A), 25-411(J), he presented no new evidence or argument as to why the court should not implement the plan it had previously established.<sup>6</sup> Second, and perhaps more importantly, Roger

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<sup>6</sup>We also question the timeliness of any objection to the increase at that time, given that the trial court had ordered the

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proposed a weekly parenting-time schedule that was fairly consistent with the parenting coordinator's and did not decrease Nancy's overnight visits with X.

¶22 In addition, the parties had no opportunity to be heard on the modification of parenting time. Although the trial court held a hearing in March 2013, the parties only addressed Roger's objection to the parenting coordinator's report and recommendations.<sup>7</sup> Roger acknowledged that the parenting coordinator was tasked with "merely implement[ing the January 2011 ruling] with regards to the expanding weekends, alternating weekends." Neither party presented any evidence or argument suggesting that something less than what was ordered in the January 2011 ruling was under consideration. Instead, they focused primarily on the parenting coordinator's recommendations for holidays, vacation time, and the time for picking up X. from daycare. Notably, Nancy asserts that, had she known about the modification, she would have presented evidence on several of the § 25-403(A) factors. *See Cook*, 228 Ariz. 202, ¶ 19, 265 P.3d at 388. And, as Nancy points out, the court did not make any findings pursuant to § 25-403(A).

¶23 Based on the foregoing, we conclude that Nancy was not afforded due process because the trial court did not give her an opportunity to be heard before it modified her parenting time. *Cf. Smart*, 117 Ariz. at 542, 574 P.2d at 30.

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change in January 2011 and had repeated its intent to implement it in January 2013.

<sup>7</sup>The trial court also intended to address Nancy's motion to terminate the income withholding order at the hearing. However, during the hearing, the court suggested that Nancy's motion was improper and should be refiled as a motion to modify child support, to which Nancy agreed. The court also noted that it would be beneficial to wait until parenting time was resolved before modifying child support.

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**Disposition**

¶24 For the reasons stated above, we vacate the trial court's April 2013 ruling modifying parenting time and remand for proceedings consistent with this decision.