

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A20-1548**

In re the Marriage of:  
Michelle Grace Friesen, petitioner,  
Respondent,

vs.

Joshua David Friesen,  
Appellant.

**Filed March 14, 2022  
Affirmed  
Ross, Judge**

Washington County District Court  
File No. 82-FA-19-89

Kathryn A. Graves, Benjamin J. Hamborg, Henson & Efron, P.A., Minneapolis, Minnesota  
(for respondent)

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Kirk,  
Judge.\*

**NONPRECEDENTIAL OPINION**

**ROSS, Judge**

This case arises from a child-custody dispute between the parents of two children.  
Father appeals from the district court's judgment granting mother sole physical and legal

---

\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

custody and affording him limited parenting time. We conclude that the district court did not violate father's due-process rights by requiring him to submit deposition testimony during pandemic-related, in-person restrictions rather than allow him to examine witnesses at a trial using online technology. We also conclude that the district court did not abuse its discretion by excluding a child-custody evaluation from evidence. We therefore affirm.

## **FACTS**

Joshua Friesen and Michelle Friesen had two daughters during their eight-year marriage, which ended in divorce in 2020. Before their dissolution trial, the parties first stipulated to a temporary parenting-time schedule with Joshua having the children alternating weekends and two evenings during each week. They then stipulated to modify the temporary schedule, with Joshua having the children Thursday overnight and all-day Friday every week.

One dispute in the district court proceedings, and in this appeal, involves a custody evaluation. In January 2020 the district court ordered the parents to participate in a child-custody evaluation by a court-appointed evaluator. The district court ordered a second court-appointed evaluator to assist the first, and the two coauthored a report. But the report did not make it into evidence at the bench trial. During the first day of the dissolution trial, Joshua, self-represented, attempted to offer hearsay evidence of statements made by the evaluators. The district court prohibited the hearsay but indicated that it would allow evidence of the evaluators' statements either by their own testimony or through the evaluation report if the report was supported by proper foundation. Joshua did

not produce the evaluators either to testify or to lay the foundation for their report to be admitted into evidence.

Shutdowns arising from the burgeoning COVID-19 pandemic disrupted the proceedings after the first day of trial. The district court postponed the second day of trial four times before it ordered the parties to submit any remaining evidence through deposition testimony. Joshua objected to this process as unfairly burdensome and complained that he lacked the time to conduct depositions. He instead attempted to offer the child-custody evaluation into evidence by filing the report with the district court. The district court did not receive the report into evidence, but it offered to extend the proceedings if either party requested to allow more time for any depositions. Neither party requested any extension nor conducted any depositions.

The district court entered a judgment and decree dissolving the marriage, and it based its custody and parenting-time decision on the testimony and exhibits admitted during the first day of trial. It granted Michelle sole legal and physical custody of the children and assigned Joshua parenting time on alternating weeks with Thursday overnight and all-day Friday and then Thursday overnight through Sunday evening. The district court reasoned that the parties' acrimonious interactions justified minimizing parenting exchanges and contact between them. The district court complained that Joshua was responsible for the length of the litigation, observing that he "cycled through two attorneys" and opining that "it is very clear . . . that [Joshua] sought to obtain an outcome in this case that was contrary, in all likelihood to the advice of his prior counsel, resulting in additional cost to the parties and friction between the parties." The district court awarded Michelle

\$20,000 in need-based attorney fees. Joshua appeals only the custody and parenting-time decision.

## DECISION

Joshua challenges the district court's custody and parenting-time order and asks that we remand the case for a new trial. He bases his challenge first on the district court's procedural restrictions regarding trial testimony and second on its decision to exclude the evaluators' report. For the following reasons, neither challenge prevails, and we will affirm despite our concern over aspects of the district court proceedings.

One concern is that the district court seemingly based its attorney-fee decision in part on its observation that Joshua "sought to obtain an outcome . . . that was contrary, in all likelihood, to the advice of his prior counsel." We do not see how either the district court's apparent speculation about privileged communication between a party and his attorney, or its censure of that party for seeking a result that might differ from one suggested by his attorney, are acts within the district court's discretion. Of related concern is the district court's explanation limiting *one* parent's parenting time based on acrimony between *both* parents and its corresponding failure to explain how limiting parenting time rather than limiting the number of contacts between the parents responds to a concern about acrimony. (We see that the district court's parenting-time determination results in the same number of exchanges as Joshua's proposed equal parenting-time schedule—four transitions within each 14-day period.) We comment here only to ensure that our affirmance on the specific issues raised not be mistaken as our endorsing elements of the

district court's order discussed during the appeal but not specifically challenged. We base our decision only on the issues presented for our review.

## I

Joshua argues that the district court's decision requiring the parties to submit witness testimony through depositions rather than administering an online, remote trial violated his right to due process. The state and federal constitutions prohibit the state from depriving a person of liberty without due process of law. Minn. Const. art. 1, § 7; U.S. Const. amend. XIV, § 1. Joshua has a liberty interest in presenting evidence bearing on child custody and parenting time. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (holding a parent has a protected fundamental right to make decisions concerning the care, custody, and control of his children); *SooHoo v. Johnson*, 731 N.W.2d 815, 820 (Minn. 2007) (applying this principle); *see also Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (holding an opportunity to present evidence is a protected procedural due-process right); *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 565 (Minn. App. 1994) (applying this principle), *rev. denied* (Minn. Feb. 14, 1995). The principal question in any due-process challenge is whether the complaining party had sufficient notice and “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotation omitted). We evaluate whether the procedure satisfies the constitutional requirement by weighing several factors: the private interest at stake, the risk that the procedure would mistakenly infringe on that interest, the likely benefit of a different procedure, and the interests of the state, including the burdens

a different procedure would impose. *Id.* at 335. Based on our weighing of these factors, we conclude that imposing the deposition process did not violate Joshua’s right to due process.

The private interest at stake—the opportunity to present evidence to determine child custody and parenting time—is particularly significant. Few controversies resolved in court include stakes as high as a decision affecting the parent-child relationship. *See, e.g., Troxel*, 530 U.S. at 65 (stating that one of the oldest fundamental liberty interests recognized by the Court is the interest of parents in the care, custody, and control of their children). Any judicial procedure affecting that interest must be especially fair.

We do not believe that the district court’s pandemic-driven procedural change posed any significant risk of mistakenly infringing on Joshua’s interest in relation to any benefit that might result from a different procedure. Neither party questions the district court’s need to alter the process from taking live, in-person trial testimony as a response to the pandemic and the uncertain danger posed by personal contact. Our focus is on any contrast between the risk-benefit balance in taking testimony by deposition and in taking testimony live through interactive, online technology. We observe that the parties could and did engage witnesses directly in the first day of trial. Joshua had the opportunity to present evidence, and he did so. He cross-examined Michelle and provided his own testimony bearing on custody and parenting time. As to the second day of trial, we can assume that Joshua would have called other witnesses if the trial were conducted live. And we can assume that deposing witnesses and introducing a video recording or transcripts of their testimony is administratively more cumbersome and time consuming than offering testimony live through online technology. But Joshua does not explain how presenting

additional evidence using one form of technology rather than another would affect the substance of the evidence. Nor does he explain how the district court's procedure inhibited his opportunity to be meaningfully heard. Whether the parties took witness depositions in person or online, the substance of their direct examination and cross-examination would presumably have been identical to the substance of the same examination occurring live, online, during the trial. The only difference would have been the district court judge's participation in one but not the other, with no reason to suppose any impact on witness responses. The district court's procedure did not risk mistakenly infringing on Joshua's interest.

We are not persuaded otherwise by the fact that Joshua lacked the time, legal expertise, or funds to conduct depositions. The district court invited the parties to request additional time to conduct depositions, and Joshua did not do so. Regarding Joshua's assertion that he lacked the legal skill to conduct a deposition, self-represented litigants face the same procedural rules that represented parties face. *Gruenhagen v. Larson*, 246 N.W.2d 565, 569 (Minn. 1976). And the process and substance of his unrepresented questioning of witnesses during an online trial would have presumably been the same as the process and substance of his similarly unrepresented questioning of witnesses beforehand during a deposition. We do not consider the merits of Joshua's assertion that conducting depositions posed too great an expense to meet his due-process rights. He presented neither this argument nor supporting evidence of this assertion in the district court, and under *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), we will not generally address arguments raised for the first time on appeal.

The final factor also does not support Joshua’s due-process challenge. The district court’s significant interest in fashioning a proceeding that avoided in-person contact is obvious under the circumstances of the pandemic posing unknown hazards. Mindful of the objective to preserve and promote the children’s welfare in a timely fashion, *see Santosky v. Kramer*, 455 U.S. 745, 766 (1982), the district court also was motivated to avoid additional potential pandemic-related continuances and consequent delays in resolving the dispute over the children’s custody, among other trial issues. Postponing the hearing yet again in the hope of receiving live testimony was therefore a problematic option. Less clear is the district court’s interest in trying the case through recorded deposition testimony rather than live, online trial testimony. But because of the reasons already discussed, the incremental additional challenge of questioning witnesses by deposition was marginal and raises no constitutional concern.

We hold that the district court’s trial procedure did not violate Joshua’s right to due process. We are not asked and do not decide whether the district court’s decision to require that remaining witness testimony be submitted through depositions complied with the rules of civil procedure, and we offer no opinion about it.

## II

Joshua also contends that the district court abused its discretion by excluding the child-custody evaluation from evidence and that, as a result, the district court’s custody and parenting-time decision should be reversed. The district court has broad discretion to resolve child-custody disputes. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). We review custody decisions by considering whether the district court abused its discretion by

making unsupported findings or by errantly applying the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). The decision whether to admit opinion testimony also rests within the district court's discretion. *Id.* We are satisfied that the district court acted within its discretion in its treatment of the evaluators' report.

We first clarify the dispute. The district court here did not generally prevent Joshua from introducing either the evaluators' report or their potential statements about it. It instead invited this evidence conditioned only on the evaluators being presented for questioning. This requirement comports with the statutory rule that child-custody evaluations must be made available to all parties before the hearing and that evaluators must be available both for prehearing discovery and cross-examination during the hearing. Minn. Stat. § 518.167, subd. 3 (2020). Joshua does not raise any question that the district court's condition followed the statutory examination requirement, and he cites no statute or rule of evidence that the district court violated by conditioning admissibility on proper foundation. The district court acted within its discretion by excluding the evidence.

**Affirmed.**