

STATE OF MICHIGAN
COURT OF APPEALS

DAVID D. HUME,

Plaintiff-Appellant,

v

MARY K. HUME,

Defendant-Appellee.

UNPUBLISHED
January 17, 2013

No. 307696
Wayne Circuit Court
Family Division
LC No. 09-101780-DM

Before: K. F. KELLY, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals of right an order granting defendant's motion for change of domicile and custody. Because the trial court's findings were not against the great weight of the evidence and it did not abuse its discretion in granting the motion, we affirm.

I. FACTUAL BACKGROUND

Plaintiff and defendant divorced in March 2010; the divorce was acrimonious. In the consent judgment of divorce, the parties were granted joint legal custody of their two youngest children, aged eighteen and eight.¹ The youngest child's primary residence was with defendant, and plaintiff was granted specific and detailed parenting time with her.

In June 2011, defendant sought to change domicile to the State of Washington. The motion only concerned the youngest child because the middle child had graduated from high school, was attending college in Marquette and was no longer within the jurisdiction of the family court. Shortly thereafter, plaintiff filed a motion for immediate temporary and permanent physical custody of the child, alleging that defendant's home was unfit. Following an initial hearing on the competing motions, and after hearing testimony of a child protective services

¹ The parties had three children. At the time of the divorce, the eldest child was nineteen and no longer a minor. While the middle child was eighteen and no longer a minor, she was still attending high school.

(CPS) worker, the trial court dismissed plaintiff's motion and scheduled an evidentiary hearing on defendant's motion for change of domicile.

At the evidentiary hearing, defendant testified that she was engaged to Todd Rowe, who lived in Washington. Defendant met Rowe decades ago in high school, and reconnected with him on the internet in November 2010. In the beginning of 2011, Rowe and defendant began dating and eventually became engaged. During their relationship, defendant and Rowe most commonly communicated on the computer through "Skype" messaging. Rowe met the child a few days before the hearing; Rowe previously communicated with the child through Skype and by telephone. Rowe had two teenage daughters, who also had an opportunity to meet the child. Defendant wanted to move to Washington and believed that the move would improve the quality of life for both her and the child. Defendant did not receive child support from plaintiff and had been living off of an inheritance and unemployment benefits. She was struggling to find employment in Michigan, and was having a difficult time as a real estate agent because of the real estate market. According to defendant, the real estate market in Washington was more stable and offered more economic opportunity. She had been offered employment opportunities in Washington. In addition, Rowe earned nearly \$100,000 a year and would be paying for their living expenses.

Defendant testified that the child was not doing well in school and she had hired a tutor for her. Defendant attributed the poor performance to the child's frequent travel back and forth between plaintiff and defendant, the conflict and lack of communication between the parties, and the classrooms being too large at her school. According to defendant, classroom sizes are smaller in Washington. Defendant admitted that a move to Washington would take the child away from her two older siblings; however, defendant noted that the older children were now adults. The middle child attended college at Northern Michigan University and the oldest child frequently traveled for work. Defendant did not believe a move would significantly impact the child's relationship with her siblings because the child would continue to see her siblings at holidays and over the summer in much the same way as she currently did. Defendant believed that plaintiff would still be able to exercise reasonable parenting time after the move to Washington because the child would be able to spend longer uninterrupted blocks of time with plaintiff, as opposed to short periods of time during the week, and the move would significantly decrease the tension between the parents by limiting their contact. Defendant suggested that plaintiff's parenting time would include summer vacation and alternating holidays. Finally, defendant testified that she would not move to Washington unless the child was allowed to go with her.

Plaintiff objected to the change in domicile and alternatively requested physical custody with defendant having parenting time during the summers and holidays. Plaintiff testified that he was a self-employed painter and plasterer. He and his girlfriend had moved to a five-bedroom house in Grosse Pointe in February 2011 where the parties' two older children also returned when not away at school or work. Plaintiff saw the child every three days and was a very active and involved father. He went on field trips, volunteered in her school and arranged for academic testing and support. He testified that although the child's siblings were not home frequently, they were still close with the child. The child also had close extended family and friends in Michigan that she saw frequently. Plaintiff did not believe that a change of domicile was in the child's best interests because it would remove her from him, her older siblings, her extended

family and the excellent school system she was attending. Plaintiff was concerned that the child would be uprooted to live across the country where she knew no one in order to live with a man she had only met just days before the evidentiary hearing.

After the hearing, but before the trial court's decision, defendant married Rowe. The trial court granted defendant's motion to reopen the proofs and admitted a copy of the marriage license as part of her proofs.

On November 14, 2011, the trial court entered a lengthy and detailed opinion and order granting defendant's motion to change domicile. After summarizing the facts of the case, the trial court analyzed the factors that a trial court must consider when deciding a motion for a change of domicile pursuant to MCL 722.31(4). The trial court found that the move to Washington had the capacity to improve the quality of life for both defendant and the child. The economic benefits resulting from the move were substantial—Rowe could help pay for expenses and defendant had job offers and opportunities in Washington. Rowe lived in a newer, well-maintained home, where defendant and the child would live. The move to Washington would not significantly decrease the amount of time the child spent with relatives and siblings, because she would still be home for holidays and school breaks. In particular, the trial court noted that because the child's siblings are away for most of the year because of college attendance and traveling for work, the move to Washington would probably have little impact on the time spent with them. Based on the testimony, the trial court found the schools in Washington and Michigan were comparable. However, the trial court found that, given the child's trouble in school, living with one parent during the school year would be less stressful on the child, and improve her quality of life.

The trial court also found that both plaintiff and defendant had complied with the parenting time order, although the trial court acknowledged parenting time disputes and recognized that on one occasion plaintiff had refused to return the child in June 2011 based on the condition of defendant's home. The trial court did not believe defendant's move to Washington was motivated by a desire to frustrate plaintiff's parenting time, and plaintiff would still have reasonable parenting time with the child. The trial court further found that plaintiff's opposition to the move was not based on financial gain, and there was no conclusive evidence regarding domestic violence.

After determining that the factors favored a change of domicile, the trial court next found that there was an established custodial environment with both plaintiff and defendant, and that the child's move to Washington would constitute a change in the child's established custodial environment. The trial court then analyzed the best interest factors to determine if the change in custody was in the child's best interests, MCL 722.23. The trial court held that factor (a) (the love, affection, and other emotional ties between the parties and the child) and factor (h) (home, school, and community record of the child) favored defendant, and that factor (j) (willingness of parties to facilitate and encourage relationship with the other parent) slightly favored defendant. Factor (b) (the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue the education and raising of the child in their religion), factor (c) (capacity of the parties to provide food, clothing, and medical care), factor (d) (the length of time the child has lived in stable environment), factor (e) (moral fitness of the parties), and (g) (mental and physical health of the parties) favored both parties. The trial court noted that for factor (i)

(the reasonable preference of the child), the child was interviewed, was old and mature enough to express a preference, and had expressed a preference. The trial court did not indicate which party that factor favored, but did say that the child's preference was considered. Finally, the trial court concluded that factor (k) (domestic violence) did not favor either party.

The trial court found that there was clear and convincing evidence that it was in the child's best interests to grant the parties joint legal custody and grant defendant physical custody. The trial court granted plaintiff parenting time during the entirety of the child's spring break and summer vacation, and at least one week of Christmas vacation. The parties were to alternate Thanksgiving and Christmas holidays, and plaintiff was responsible for the costs of transportation during parenting time in lieu of paying child support. Plaintiff would have telephone and/or webcam contact with the child on Sundays, Tuesdays, and Thursdays at 7:30 p.m.

On December 8, 2011, the trial court entered an order denying plaintiff's motion for reconsideration. Plaintiff's motion for stay of proceedings pending appeal was denied. Plaintiff appeals as of right arguing that the trial court's findings under MCL 722.31(4) and 722.23 were not supported by the great weight of the evidence, and thus, the ruling changing custody and the child's domicile was an abuse of discretion.

II. STANDARD OF REVIEW AND APPLICABLE LAW

"This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). "We employ three different standards when reviewing a trial court's decision in a child-custody dispute." *Frowner v Smith*, 296 Mich App 374, 380-381; 820 NW2d 235 (2012). "We review the trial court's findings of fact to determine if they are against the great weight of the evidence, we review discretionary decisions for an abuse of discretion, and we review questions of law for clear error." *Id.* A trial court's custody determination is entitled to the utmost level of deference, and an abuse of discretion exists with respect to such a determination only where the decision "is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Id.* at 705-706.

We review a decision to change the domicile of a child for an abuse of discretion. *Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012). The trial court's findings are reviewed under the great weight of the evidence standard. *Id.* "Under this standard, we may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction." *McKimmy v Melling*, 291 Mich App 577, 581; 805 NW2d 615 (2011). We defer to the trial court on issues of credibility. *Gagnon*, 295 Mich App at 568.

"[A] parent of a child whose custody is governed by court order may not change a legal residence of the child to a location which is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued" without court approval. MCL 722.31(1); *Gagnon*, 295 Mich App at 565. A court may permit a legal residence

to change if, after considering certain factors set forth below, a change is warranted by a preponderance of the evidence. *Gagnon*, 295 Mich App at 566.

When evaluating a motion for change of domicile, a trial court must engage in a three-step inquiry. *Gagnon*, 295 Mich App at 565, 570. First, the trial court must determine whether a change of domicile is permitted after evaluating the factors in MCL 722.31(4):

- (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
- (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
- (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
- (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
- (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

The trial court must consider the factors with the child as the primary focus in the court's deliberations. MCL 722.31(4); *Gagnon*, 295 Mich App at 566. If a trial court concludes that the factors favor a change in domicile, the second step is a determination as to whether the change of domicile will affect the child's established custodial environment. *Gagnon*, 295 Mich App at 570. If relocation would change a child's custodial environment, the trial court must then proceed to the third step and determine whether the movant has demonstrated by clear and convincing evidence that such a move would serve the child's best interests, utilizing the factors set forth in MCL 722.23. *Id.* "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Berger*, 277 Mich App 705. No one factor is determinative and the evaluation of the factors depends on the facts and circumstances of each case. The factors need not be weighed equally; the trial court has discretion as to how much weight each factor is given. *McCain v McCain*, 229 Mich App 123, 130-131; 580 NW2d 485 (1998).

III. CHANGE OF DOMICILE

In its opinion and order granting defendant's motion to change domicile, the trial court ruled that MCL 722.31(4) factors (a), (b), and (c) favored defendant, that factor (d) was not relevant to the case, and that factor (e) favored neither party. On appeal, plaintiff claims that

factors (a), (b), and (c) favored him over defendant, and the trial court erred in its findings. We disagree.

The trial court's finding that the change of domicile had the capacity to improve the quality of life for both the child and defendant, was not against the great weight of the evidence. The trial court first noted that, even though plaintiff argued that defendant's relationship with Rowe was impulsive and short, their marriage was genuine. The trial court also found that defendant's financial situation would improve significantly if she moved to Washington. In Michigan, defendant was unemployed, did not receive child support and had been unable to sell real estate. In Washington, defendant had a job offer as a registered investment advisor and she testified the real estate market was more stable. "It is well established that the relocating parent's increased earning potential may improve a child's quality of life." *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007). Defendant's marriage would also help defendant and the child financially. Rowe testified that he made \$100,000 per year as an engineer, owned a home, and was willing and able to provide for the child and defendant. While plaintiff contends that the testimony of defendant and Rowe was "self-serving" and the court should have required further verification of their testimony, his arguments relate directly to Rowe's and defendant's credibility, and "[t]his Court defers to the trial court on issues of credibility." *Gagnon*, 295 Mich App at 568.

The trial court's findings with respect to the child's relationship with her two older siblings, and the impact that the change in domicile would have on her relationship with them was also not against the great weight of the evidence. "[T]he sibling bond and the potentially detrimental effects of physically severing that bond should be seriously considered in cases where the children likely have already experienced serious disruption in their lives, as well as a sense of deep personal loss." *Brown v Loveman*, 260 Mich App 576, 602; 680 NW2d 432 (2004), quoting *Wiechmann v Wiechmann*, 212 Mich App 436, 439-440, 538 NW2d 57 (1995). The trial court found that the time the child spent with her siblings would not decrease greatly as a result of the move because, as both parties testified, the child's siblings did not live at home for the majority of the year. The trial court noted that the child saw her siblings most frequently at holidays and in the summer, which is when plaintiff would have parenting time with the child under the modified parenting time schedule.

The trial court also found that, based on the testimony, the school the child would attend in Washington was comparable to the school she was attending in Michigan. At the hearing, there was testimony that both schools were excellent, and no testimony disparaged either school. Plaintiff argues that his more significant participation in the child's education makes Michigan schools paramount to Washington, and that the trial court erred in failing to fully consider that fact. Plaintiff testified that he was very involved in the child's education, arranged for testing, actively volunteered in her classroom, and helped with her homework. Plaintiff testified that he worked with the child on review materials in order to prepare her for the next grade, as well as worked with her utilizing on-line educational materials. Defendant similarly testified that she also was very involved with the child's education. Defendant stated that she helped the child with homework, and because the child was struggling in school, she hired a tutor. Defendant testified that she felt the child's poor performance was caused by her frequent travel between plaintiff and defendant, the lack of communication between the parties, and the classrooms being too large at her school. The trial court found defendant's testimony to be credible and directly

relied on defendant's testimony in its opinion and order. The trial court's finding was supported by the record and was not against the great weight of the evidence.

The trial court found that both parties had substantially complied with the parenting time order and that defendant's motivation in changing the child's domicile was not to frustrate or defeat plaintiff's parenting time. Defendant testified that she always complied with the parenting time schedule, and encouraged the child to spend time with plaintiff. Plaintiff also testified that he complied with the parenting time schedule with the sole exception of a two day period following a CPS complaint regarding defendant's home conditions and explained his reasoning. He further testified that he had been denied parenting time by defendant. Both parties testified that there were parenting time disputes and the trial court acknowledged tension between the parties, which arose well before the motion to change domicile was filed. The trial court's findings were supported by the record and were not against the great weight of the evidence.

The trial court's finding that plaintiff's modified parenting time schedule would allow him an adequate basis for preserving and fostering a parental relationship with the child, was also supported by the record. With regard to factor (c), our inquiry is "whether the proposed parenting time schedule provides 'a realistic opportunity to preserve and foster the parental relationship previously enjoyed' by the nonrelocating parent." *McKimmy*, 291 Mich App at 584, quoting *Mogle v Scriver*, 241 Mich App 192, 204; 614 NW2d 696 (2000). "[A] change in domicile will almost always alter the parties' parenting time schedule to some extent and . . . the parenting time schedule need not be equal to the prior parenting time schedule in all respects." *Brown*, 260 Mich App at 595. It is undisputed that plaintiff's parenting time decreased after the child moved and the trial court was obligated to fashion a parenting time schedule that would foster and preserve plaintiff's relationship with the child. Plaintiff was granted parenting time during the child's entire summer vacation, which is a block of uninterrupted of time. In addition, plaintiff was granted parenting time during the child's other school breaks and on holidays, and has a minimum of three telephone/webcam contacts with the child each week. Additionally, the trial court found that the decrease in communication and parenting time exchanges between defendant and plaintiff would reduce the stress in the child's life, which clearly would enhance the relationship between the child and each party. The trial court's finding that the altered parenting time schedule would adequately provide plaintiff with a realistic opportunity to preserve and foster his parental relationship with the child was not against the great weight of the evidence.

Based upon our review of the record, and deferring to the trial court on issues of credibility and its superior ability to observe the witnesses, we cannot find that the trial court abused its discretion in determining that a change of domicile was in the child's best interest.

IV. CHANGE OF CUSTODY

Plaintiff next argues that the trial court's finding that the move to Washington was in the child's best interests was not supported by the great weight of the evidence. We disagree.

"After granting a change of domicile, the trial court must determine whether there will be a change in the established custodial environment and, if so, determine whether the relocating parent can prove, by clear and convincing evidence, the change is in the child's best interest."

Gagnon, 295 Mich App at 570. The trial court found, and the parties do not contest, that the change in domicile would constitute a change in the child's established custodial environment. Accordingly, before changing custody, MCL 722.23 required the trial court to consider the following factors:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

The trial court analyzed each best interest factor. The trial court held that factors (a) and (h) favored defendant, and that factor (j) slightly favored defendant. The trial court held that factors (b), (c), (d), (e), (f), and (g) favored both parties. The trial court did not state which party factor (i) favored, and found that there was inconclusive evidence on factor (k). On appeal, plaintiff challenges the trial court's findings in regard to factors (a), (b), (c), (d), (e), (h), and (j).

Under factor (a), the trial court found that, while both parties expressed their love and affection for the child, and had emotional ties with her, defendant spent more time with the child, the child's primary residence was with defendant and that the emotional tie with the defendant was stronger. This finding is not against the great weight of the evidence. The trial court correctly noted that the child's primary residence was with defendant and that the child spent more time in defendant's home. Defendant and the child were close, and defendant testified that she would not move to Washington unless she could take the child. Plaintiff contends that he had a stronger emotional bond with the child than defendant, demonstrated by his active role in her life. Plaintiff claims that the trial court discounted the bond between him and the child, and the court's decision was based only on overnight visitation. Based on all of the evidence in the record, we find that there was sufficient evidence to support the court's finding under factor (a) and it was not against the great weight of the evidence. Plaintiff's argument that the trial court should have more heavily weighed his active relationship with the child as opposed to defendant's relationship with the child, is a question of weighing witness credibility which is reserved for the trial court. *Gagnon*, 295 Mich App at 568.

The trial court found that factor (b) favored both parties, and that both parties were actively involved in the child's life. Plaintiff argues that factor (b) favored him, specifically in regard to his role in the child's education. According to plaintiff, he was far more active in the child's education than defendant, and was in her classroom nearly every day. Plaintiff asserts that defendant had minimal participation in the child's education, and relied on plaintiff to manage the child's progress. However, the trial court also heard testimony that defendant was also involved with the child's education. She testified that she helped the child with her homework, and obtained a tutor for the child because she was doing poorly in school, and was her Daisy and Brownie troop leader. Clearly, both parties were active participants in the child's life.

The trial court found that factor (c) favored both parties. Plaintiff argues that factor (c) clearly favored him. According to plaintiff, defendant admitted that she had no income and was unemployed, and thus, could not provide for the child. Defendant's only means of support was her husband, a virtual stranger, and her "alleged" job offer, whereas plaintiff had a home, consistent employment, steady income, and health insurance for the child. Plaintiff, however, mischaracterizes defendant's testimony. While defendant was unemployed at the time of the hearing, she was still supporting the child with her unemployment benefits and with funds from an inheritance. Furthermore, evidence presented at the hearing established that defendant had a job offer in Washington, and that Rowe, who earned a sufficient salary to support a family, would help support her and the child. Plaintiff claims that defendant's and Rowe's testimony regarding their future income and financial position was not credible and should not be believed, but that argument is without merit because issues of credibility are left for the trial court. *Gagnon*, 295 Mich App at 568.

The trial court found that factor (d) favored both parties. Plaintiff argues that factor (d) clearly favored him. According to plaintiff, the great weight of the evidence showed that defendant's home was "disgusting," and clearly not equal to plaintiff's home. The testimony at the hearing was conflicting. Three witnesses testified that the house was smelly, dirty, and crowded with boxes and clothing; the smell caused one witness to have an asthma attack. Defendant, Rowe, and one of plaintiff's witnesses testified that while defendant's house may be

messy and rundown, it was not uninhabitable. The CPS worker testified that defendant's home was acceptable for the child and there were no issues with the condition of the home or the child's health or safety living there. The trial court found the CPS worker's testimony credible, and stated that the testimony from the hearing did not support plaintiff's argument. Again, issues relating to the credibility of evidence are left for the trial court. *Gagnon*, 295 Mich App at 568.

Plaintiff additionally argues that, although the child's primary residence was with defendant, the evidence clearly showed that the child was best cared for with plaintiff. However, plaintiff presented no evidence to show that the child was not cared for by defendant. The trial court noted that plaintiff's arguments were discounted by the fact that he did not dispute defendant's ability to parent the child until after defendant wanted to move to Washington. We cannot conclude that the trial court's findings were against the great weight of evidence.

The trial court found that factor (e) favored both parties because both plaintiff's and defendant's homes offered permanence and stability. Plaintiff argues that the evidence relied on by the trial court regarding the child's future home in Washington was unreliable, and the evidence showed plaintiff's home was in a nice area and filled with family. Plaintiff's arguments relate directly to the credibility of Rowe's and defendant's testimony regarding their future home in Washington, and this Court defers to the trial court on issues of credibility. *Gagnon*, 295 Mich App at 568.

The trial court found that factor (h) favored defendant. The trial court found defendant's testimony, that, while both parents were involved in the child's education, the stress of going back and forth between parents was at least partially causing the child's problems in school, was credible. The trial court further noted, and the record supports, that defendant had signed the child up for tutoring, religious education classes, and Brownies. Plaintiff argues that he had the most active role in the child's education, and the child's struggles in school can be attributed to defendant's lack of organization and what he characterized as a hectic, messy lifestyle. Plaintiff's argument again relates directly to credibility. The trial court found defendant's testimony regarding the child's struggles in school to be more credible than plaintiff's testimony. Plaintiff further argues that defendant did not even know what school district in Washington the child would attend—she said it was Bonney Lake School District, and Rowe said it was Sumner school district. Even though defendant did not at first recall the exact name of the school the child would be attending in Washington, she later provided details about the school. Rowe also provided testimony regarding the school, noting that it was the same elementary school his daughters had attended. The trial court's findings were not against the great weight of the evidence.

The trial court found that factor (j) slightly favored defendant because plaintiff refused to return the child to plaintiff even after CPS told him to return the child. Plaintiff argues that he refused to return the child for a short time because of a legitimate concern for the child's safety. While plaintiff argues that he was justified in not returning the child, the trial court disagreed. Plaintiff's own testimony established that CPS told plaintiff to return the child, and he refused. The trial court's finding was not against the great weight of the evidence.

The trial court's findings on the best interest factors, MCL 722.23, are supported by the record and are not against the great weight of the evidence. The trial court did not abuse its discretion in changing custody.

IV. RE-OPENING PROOFS

Plaintiff next argues that the trial court abused its discretion when it allowed defendant to introduce evidence after the evidentiary hearing concluded, and that the trial court violated his due process rights because it did not permit plaintiff to cross-examine defendant regarding the new evidence. We disagree. A motion to reopen the proofs is a matter within the discretion of the trial court. *Bonner v Ames*, 356 Mich 537, 541, 97 NW2d 87 (1959).

Defendant moved to admit her marriage license after the evidentiary hearing was concluded. Plaintiff objected to the evidence, and a hearing was held. The trial court granted defendant's motion.

"When evaluating whether the trial court abused its discretion on a motion to reopen proofs, this Court will consider (1) the timing of the motion, (2) whether the adverse party would be surprised, deceived, or disadvantaged by reopening the proofs, and (3) whether there would be inconvenience to the court, parties, or counsel." *Michigan Citizens for Water Conservation v Nestle Waters North America Inc*, 269 Mich App 25, 50; 709 NW2d 174 (2005), rev'd on other grounds 479 Mich 280, 737 NW2d 447 (2007), citing *Bonner*, 356 Mich at 541. Here, plaintiff was not surprised, deceived, or disadvantaged by reopening proofs; the relationship between defendant and Rowe was a major issue at the hearing. Plaintiff had notice of the motion, and was able to view the evidence before the hearing. He responded to the motion in a timely manner and raised his objections before the trial court. There was no inconvenience to the court, parties, or counsel. The trial court noted that admission of the evidence before the opinion would save the court's resources and time. The trial court did not abuse its discretion when it allowed defendant's marriage license to be admitted into evidence after the conclusion of the evidentiary hearing.

Plaintiff also argues that his due process rights were violated when the trial court admitted the evidence without allowing him to cross-examine defendant regarding the evidence. A constitutional issue not raised before the trial court is not preserved for appeal. *Bay County Prosecutor v Nugent*, 276 Mich App 183, 192; 740 NW2d 678 (2007). Unpreserved constitutional issues are only reviewed for plain error affecting substantial rights. *Id.* at 193.

"Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Hanlon v Civil Service Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002), quoting *Traxler v Ford Motor Co*, 227 Mich. pp. 276, 288; 576 NW2d 398 (1998). "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Id.*

Plaintiff never asked the trial court for an opportunity to cross-examine defendant at the hearing on defendant's motion to admit new evidence. Plaintiff provides no support for his assertion that the trial court was required to sua sponte offer him the opportunity to cross-

examine defendant. Plaintiff did not deny the fact that defendant was married, but wanted to cross-examine her regarding her commitment to the marriage; however plaintiff had the opportunity to cross-examine her about the veracity of her feelings for Rowe at the evidentiary hearing. There was a hearing on the motion, and plaintiff had an opportunity to respond. Plaintiff's due process rights were not violated.

Affirmed.

/s/ /Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Deborah A. Servitto