Citation: BB v CB, 2025 MBCA 81
Date: 20250918

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Madam Justice Jennifer A. Pfuetzner
Madam Justice Anne M. E. Turner

***B E T W E E N**:*

	)	***C. T. B.***
B. B.	)	*on their own behalf*
	)	
(Petitioner) Respondent	)	***B. R. Murray***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
C. T. B.	)	***September 4, 2025***
	)	
(Respondent) Appellant	)	*Judgment delivered:*
	)	***September 18, 2025***

On appeal from *BC v CB*, 2025 MBKB 35 [*trial decision*]

RIVOALEN CJM

Introduction

[1] The respondent (the father) appeals a variation order pronounced on March 11, 2025, and signed on April 7, 2025, in which the trial judge varied the parents' shared parenting arrangement from a 2-2-3 schedule to a week-on-week-off schedule for the two children of the marriage (J.B., now thirteen, and T.B., now twelve). In addition, the trial judge granted the petitioner (the mother) final decision-making authority in respect of health care decisions for both children. The trial judge dismissed the father's request for J.B. to attend

school in his community and his request to find the mother in contempt of court.

[2] The father appeals only those parts of the trial judge's decision that relate to the question of where the children, specifically J.B., should attend school in the fall of 2025, the final decision-making authority in respect of the children's health care decisions and the award of costs against him. He also moves for the admission of further evidence.

[3] For the following reasons, I am of the view that the motion to admit further evidence and the appeal should be dismissed.

Background

[4] The mother and father live in different communities that are less than 50 kilometres apart. Since the divorce judgment and final order were pronounced in March 2017, they have had a shared parenting arrangement for the two children. The children have always attended the same school in the mother's community.

[5] In 2017, the father moved to vary the final order, requesting that the Court insert a clause that would require the children to attend school in the father's community. His motion was denied, with costs to the mother. In 2018, he again moved to vary the final order, this time with respect to the parenting arrangement. His motion was dismissed, with costs to the mother. In 2020, he moved to vary the parenting arrangement again but abandoned his motion.

[6] In February 2023, he once again moved to vary the parenting arrangement and again requested that the children attend school in his

community. The mother then moved to have final decision-making authority with respect to health care decisions affecting the children. These cross notices of motion to vary are the subject of the trial that has led to this appeal.

[7] In November 2024, the trial judge heard four days of oral evidence and cross-examinations. The mother was represented by legal counsel and the father was self-represented throughout the trial. At trial, it was clear that the dispute before the Court was about where the two children should attend school.

[8] Along with testimony from the mother and the father, the trial judge heard testimony from J.B.'s classroom teacher, his vice-principal, his acting principal, his school guidance counsellor, his family doctor and, importantly, his personal counsellor. The trial judge qualified J.B.'s personal counsellor as an expert in child counselling. In addition, the trial judge reviewed documentation, including J.B.'s school counselling records the father obtained in response to a request he made under *The Freedom of Information and Protection of Privacy Act*, CCSM c F175 [*FIPPA*].

[9] The father's main focus before this Court is on J.B. The father's primary arguments regarding J.B. are that the trial judge erred by failing to hear J.B.'s voice and by failing to consider evidence of bullying and trauma in assessing J.B.'s best interests. The father's position is that the trial judge's decision to maintain J.B.'s enrollment in the school he has always attended is against his best interests.

[10] Next, the father submits that the trial judge should not have changed what was a shared parental authority for health care decisions on J.B.'s behalf

to the mother now having sole decision-making authority. The father contends there was no change of circumstances that warranted this variation.

[11] The secondary arguments advanced by the father are that the school failed to protect J.B. and should be held liable, and that the trial judge was biased against him and failed to accommodate the father's hearing disability during the trial, thereby breaching his right to procedural fairness.

[12] Finally, the father argues that he was partially successful at trial and, therefore, the costs award against him was unfair.

[13] In addition to those alleged errors made by the trial judge, the father moves for an order that this Court allow him to file an affidavit he swore in June 2025, as well as a handwritten letter from J.B. as further evidence on the appeal. That affidavit relates to events occurring after the trial.

Standard of Review

[14] When considering the decisions of trial judges presiding over family law cases involving custody (now parenting orders), it is important to be reminded of the narrow focus of appellate review. The standard of review of a parenting order from a trial judge is clear—an appellate court should not disturb the trial judgment in the absence of a material error, a serious misapprehension of the evidence or an error of law (see *Van de Perre v Edwards*, 2001 SCC 60 at paras 11-16, citing with approval *Hickey v Hickey*, 1999 CanLII 691 at paras 10, 12 (SCC)). Because of the fact-based and discretionary nature of such decisions, trial judges must be shown considerable deference by appellate courts (see also *Sawatzky v Sawatzky*, 2018 MBCA 102; *Delichte v Rogers*, 2012 MBCA 105 at para 5).

[15] When reviewing the trial judge's factual findings, in order for this appeal to succeed, this Court must be satisfied that the trial judge has made palpable and overriding errors of fact. As observed by Stratas JA in *Patel v Dermaspark Products Inc*, 2025 FCA 145, "Palpable means obvious. And overriding means capable of changing the result of the case. As a practical matter, these two things very seldom happen together. First-instance judges almost never make obvious factual errors that can change the result of the case. Thus, reversal on this ground is rare indeed" (at para 9).

Analysis

[16] The trial judge's principal determination on the variation applications before him was what school the children should be attending but, in particular, whether it would be best for J.B. to change schools in the fall of 2025. The trial judge found that it would be in J.B.'s best interests to remain in the school that he has always attended in the mother's community. He made this finding having regard to all of the evidence and considering the factors enumerated in sections 17(1), 17(2.1), 17(3) and 17(5) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp) [the *Act*]. He also considered the best interests of the child factors set out in sections 16(1)–(3) of the *Act*, as well as the variation of parenting order factors set out in sections at 39(1)–(2) of *The Family Law Act*, CCSM c F20.

[17] The trial judge reviewed the history of the litigation that brought the parties to trial. In his reasons for decision, he summarized the testimony of the school professionals and teacher who interacted with J.B. at school, as well as the testimony of J.B.'s personal counsellor and family doctor.

[18] The trial judge carefully set out the school guidance counsellor's testimony and notes taken during her meetings with J.B. and recorded that J.B. met with the guidance counsellor twenty-three times from September 2022 to May 2023 (see *trial decision* at para 41).

[19] The trial judge stated that "[t]he Guidance Counsellor testified that, at one point, she asked [J.B.] if he wanted his counselling notes released to [the] father. [J.B.] said 'no'" (*ibid* at para 44). Notwithstanding J.B.'s wishes, the counselling notes were released to the father through *FIPPA*.

[20] The trial judge found that, while the objective evidence was that there were no suicide attempts linked to bullying, J.B.'s behaviour did raise concerns. He concluded that the school employees took reasonable steps to address these concerns (see *ibid* at para 92).

[21] The trial judge also found that there was undisputed evidence that, despite whatever might have happened in the past, J.B. was happy, healthy and doing well in school at the time of trial (see *ibid* at para 94).

[22] In regard to T.B., he found that there was no evidence at all that it would be in his best interests to move him from his current school to the school in the father's community (see *ibid* at para 95).

[23] The trial judge concluded that he would not order either child to move from their current school, as it would not be in their best interests (see *ibid* at para 96). He noted that the final order was silent as to which school the children must attend and he declined to order that the children must attend the school in the father's community (see *ibid* at para 97). In *obiter*, he opined the day may come when J.B. wishes to attend a high school in the father's

community for various valid reasons and that the parents might agree on this (see *ibid* at para 98).

[24] It is clear that the father disagrees with the trial judge's factual findings. The father is asking this Court to re-weigh the evidence and find that J.B. should be attending school in the father's community and that he and the mother should share responsibility to make the children's health care decisions.

[25] With respect to whether the mother should have final decision-making authority regarding the children's health care decisions, the trial judge addressed this and concluded that she should. He noted that a psychiatrist had diagnosed J.B. with ADHD and that his family doctor of many years had prescribed medication for his condition. He considered the testimony of the family doctor and the parents when reaching this conclusion.

[26] The trial judge found that the father's reluctance to let J.B. take the prescribed ADHD medication was unreasonable. The trial judge noted that the mother had to resort to litigation to get the father to cooperate. The trial judge stated that "[he was] extremely concerned that [the] [f]ather [would] behave unreasonably in the future, in respect of health-care decisions" (*trial decision* at para 110), and that the father's "unreasonable behaviour in respect of the ADHD medication constitute[d] a material change in circumstances after the final order" (*ibid* at para 111).

[27] The findings made by the trial judge were amply supported by the record. Having regard to the high level of appellate deference owed to the trial judge, the arguments advanced by the father, which amount to an attempt to re-litigate the facts, are not persuasive. I see no error in the manner in which

the trial judge exercised his discretion and I see no basis to reverse any of the trial judge's findings regarding where the children should attend school or that the mother should have final decision-making authority with respect to the children's health care decisions.

[28] I see no merit to any of the father's secondary arguments. The school was not a party to the litigation and no claim was advanced against it. There was nothing amounting to actual bias on the part of the trial judge or a reasonable apprehension of bias as explained in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20-26. I am satisfied that the trial judge reasonably accommodated the father's hearing deficit and the trial was fair.

[29] On the father's motion for admission of further evidence, he has not been able to persuade me that the evidence of events occurring after the trial and J.B.'s letter meet the test set out in *Palmer v R*, 1979 CanLII 8 (SCC), primarily because the further evidence would not have affected the outcome of the trial. The motion should therefore be dismissed.

[30] Finally, the father's arguments with respect to costs are based solely on the errors he alleges were made by the trial judge. Given that I have concluded that the trial judge did not err, I am not persuaded that his order of costs resulted from an error in principle or was plainly wrong (see *Johnson v Mayer*, 2016 MBCA 41 at paras 21-22).

Conclusion

[31] For these reasons, I would dismiss the motion to admit further evidence and the appeal with costs in favour of the mother.

Rivoalen CJM

I agree: Pfuetzner JA

I agree: Turner JA