

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre
Madam Justice Anne M. E. Turner

BETWEEN:

<i>H. D. T.</i>	)	<i>S. N. Rosenbaum</i>
	)	<i>for the Appellant</i>
	)	
<i>(Petitioner/Respondent) Respondent</i>	)	<i>C. R. Williamson</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Appeal heard and</i>
<i>T. R. W. F.</i>	)	<i>Decision pronounced:</i>
	)	<i>October 1, 2025</i>
<i>(Respondent/Applicant) Appellant</i>	)	
	)	<i>Written reasons:</i>
	)	<i>October 14, 2025</i>

MAINELLA JA (for the Court):

Introduction

[1] The focus of this family law appeal is the ability of a family court judge, as the trier of fact, to depart from an expert's opinion as to what parenting arrangement is in the best interests of a child.

[2] After hearing the respondent/applicant's (the father) appeal of a variation order of a parenting order and related relief, and his motion to introduce further evidence in support of the appeal, we dismissed both the appeal and the motion with reasons to follow, which now do.

Background

[3] The parties are the parents of two children: A.T.F., age eighteen; and E.F., formerly known as B.T.F., age fourteen. As part of the parties' 2021 divorce, a final parenting order was made whereby parenting time with each of the children was set on a schedule with the father having the majority of the time with A.T.F. and each parent having equal time with B.T.F. (the final order). The final order also provided for shared decision-making authority and each party's child support obligations.

[4] Unfortunately, the family dynamic is one of high conflict. By the spring of 2024, both children were living primarily with the petitioner/respondent (the mother) despite the final order.

[5] In April 2024, B.T.F. expressed effeminate behaviour and came out as bisexual. The child chose to wear feminine clothing that the mother facilitated without consulting the father. As the trial judge put it, the father did not "react terribly well" to this turn of events.

[6] In June 2024, B.T.F. expressed the desire to be known by the feminine name of E.F. and to be addressed by the use of she/her pronouns. This decision led to "serious conflict" between the two siblings such that, thereafter, E.F. lived exclusively with the mother and A.T.F. lived exclusively with the father.

[7] Without consultation with the father and without legal authority, the mother withdrew E.F. from her school and enrolled her in a new school. She also, again without consultation with the father and without legal authority, at the request of E.F., obtained a referral from E.F.'s pediatrician for a

consultation with a pediatric endocrinologist for a puberty blocker prescription for E.F. for reasons of gender dysphoria (the hormone treatment). The father first learned about the proposed hormone treatment from his insurer. When the father objected, the hormone treatment plan was suspended.

[8] Both parties moved to vary the parenting arrangement created by the final order based on a material change in circumstances (see the *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 17(5); *Gordon v Goertz*, 1996 CanLII 191 at paras 9-13 (SCC)). Several aspects of the litigation were ultimately settled by consent, including E.F. being permitted to undergo the hormone treatment. Central to this appeal is the trial judge's approach to the new parenting arrangement for E.F. to reflect the change in circumstances.

[9] An experienced social worker, Mr. Berkowitz (Berkowitz), was jointly retained by the parties during the litigation process to provide his opinion on the parenting arrangement. Berkowitz interviewed the parties, A.T.F. and E.F., as well as the social worker counselling E.F. Berkowitz also reviewed the report of the pediatric endocrinologist as to hormone treatment for E.F. The trial judge qualified Berkowitz to give expert evidence on the parenting arrangement "based on a social worker perspective."

[10] E.F. expressed a preference to Berkowitz that she live primarily with the mother but with weekly five-hour visits with the father. E.F. said, if the relationship with the father improved, matters could increase to a 70/30 parenting arrangement with E.F. spending the majority of the parenting time with the mother.

[11] Berkowitz' opinion was that, despite E.F.'s maturity, immediate transition back to a shared and equal parenting arrangement was in E.F.'s best

interests. Berkowitz acknowledged that, despite E.F.'s preference, E.F. was not thriving in the mother's care. Berkowitz noted that E.F.'s life in the mother's home environment was unstructured. E.F. was not disciplined by the mother and, while living there, was isolated from friends and activities. While living with the mother, E.F. had poor school attendance. As the trial judge put it, Berkowitz thought life was "too easy" for E.F. at the mother's home. In contrast, Berkowitz felt E.F. would benefit from the more structured environment at the father's residence, particularly growing up with A.T.F. Berkowitz said, while the father had struggled to regularly accept E.F.'s expression of gender identity, he had a strong bond with E.F. and was genuinely supportive of accepting E.F. for who she is.

[12] The trial judge said, while he had a great deal of respect for the opinion of Berkowitz, he did not believe that "this [was] a case for 50/50 care." He found Berkowitz' recommendation "[surprising]". He said that, while he agreed with the idea of a 50/50 shared care arrangement as a long-term objective, that arrangement was "aspirational" and did not reflect the reality at that time. In his reasons, the trial judge cited three reasons for departing from Berkowitz' parenting arrangement recommendation.

[13] The trial judge found that E.F. demonstrated "emotional maturity." He noted E.F. was aware of how the hormone treatment would give her "breathing room" until she was faced with making a permanent choice about gender. The trial judge also referred to the fact that E.F. was emotionally mature enough to continue to express her gender identity despite negative reactions from the father or A.T.F. The trial judge's reasoning makes clear that he was of the view that this was an appropriate case to give significant weight to E.F.'s perceptions of her interests, needs, experience and

relationships with adults as to what parenting arrangement was in her best interests (see *Druwe v Schilling*, 2010 MBQB 75 at para 3).

[14] Next, the trial judge made a negative credibility finding against the father. Based on the father's trial testimony, the trial judge was of the view that the father had not yet truly accepted E.F.'s expression of gender identity despite loving his child and having a strong bond with her. He said, unless the father accepted E.F.'s reality soon, he risked "losing his child."

[15] Finally, the trial judge acknowledged that the record before him was such that the "children [had] both voted with their feet". The trial judge commented that A.T.F.'s reaction to E.F. was a "wild card" at that time.

[16] Berkowitz described A.T.F. "as a loving older brother who [was] clearly set in his ways." A.T.F. refers to E.F. by her prior name of B.T.F. despite E.F.'s preferred name. A.T.F. told Berkowitz that he is not "transphobic". He said he is a religious person and is entitled to his own beliefs. He apologized for making a homophobic slur against E.F. A.T.F. said he would try to call E.F. by her preferred name to make her feel comfortable and would not try to talk E.F. out of anything. A.T.F. said he would like to meet E.F. "in the middle."

[17] The trial judge varied the final order. The mother was granted the majority of parenting time with E.F., with the father having parenting time as agreed. The mother was granted exclusive decision-making authority on issues related to E.F.'s education. Child support was recalculated based on the new parenting arrangement. The parties were also ordered to undertake therapy with E.F. for reunification with the father.

Discussion

[18] The motion to introduce further evidence relates to the father's allegation that the mother refuses to fully cooperate in the reunification therapy for E.F. as ordered by the trial judge. The mother denies the allegation. The materials filed in support of this motion satisfy us that the high conflict between the parties continues.

[19] While there is some flexibility as to the admission of further evidence on an appeal involving the best interests of a child, we are not persuaded that the father's allegation of the mother not complying with a feature of the trial judge's variation order establishes a proper basis to admit further evidence on appeal in light of the criteria set out in *Palmer v R*, 1979 CanLII 8 at 775 (SCC) [*Palmer*] (see also *Barendregt v Grebliunas*, 2022 SCC 22 at para 29 [*Barendregt*]; *G (JD) v G (SL)*, 2017 MBCA 117 at paras 34-36).

[20] We are not convinced that the father's allegation that the mother is more responsible than he is for the apparent lack of progress in the reunification therapy for E.F. is relevant, credible or could have affected the result at trial (see *Palmer* at 775). Leaving aside our concerns of the relevance and significance of this issue to the trial judge's use of the expert evidence at trial, we note that the father's cursory allegation is answered by a detailed response from the mother.

[21] Moreover, we are mindful of the importance of finality in family law. An appeal is neither a retrial nor an opportunity for a party to vary an order based on post-trial events. As explained in *Barendregt*: "Because variation procedures are available in parenting cases to address changes

arising post-trial, the interest in reaching a just result can be fostered through other means. The admission of post-trial evidence on appeal therefore unnecessarily undermines finality and order in family law decisions” (at para 74; see also *Metis Child, Family and Community Services v CPR*, 2023 MBCA 82 at paras 138-39).

[22] In our view, it is not in the interests of justice to admit further evidence on this appeal.

[23] In terms of the merits of the appeal, we would highlight that, in our system of justice, expert witnesses give evidence; they do not decide the issue in dispute. The proper administration of justice requires that the distinctive roles of the expert witness and the trier of fact be respected. As was explained in *R v J-LJ*, 2000 SCC 51: “The purpose of expert evidence is thus to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act of informed judgment, not an act of faith” (at para 56).

[24] There is no departure from the distinctive roles of an expert witness and the trier of fact in family law in relation to the opinion of an assessor as to the best interests of a child (see *JP v The Minister of Social Development*, 2022 NBCA 57 at para 18; *Gunn v Gunn*, (1994)100 Man R (2d) 6 at para 5, 1994 CanLII 16720 (MBCA) [*Gunn*]).

[25] The best interests of a child is a “factorial legal standard” (*BJT v JD*, 2022 SCC 24 at para 53 [*BJT*]). As was explained in *BJT*, while different statutes express the relevant factors in different ways, determination of the best interests of a child is “a highly contextual and fact driven exercise that

involves a high level of judicial discretion: a case-by-case consideration of the unique circumstances of each child is the hallmark of the process. Those factors include ‘not only physical and economic well-being, but also emotional, psychological, intellectual and moral well-being’” (at para 53; see also paras 56-58).

[26] The father made several submissions about the record premised on the argument that the trial judge erred by failing to give greater weight to the expert opinion of Berkowitz as opposed to other evidence, such as E.F.’s maturity and voice.

[27] There was nothing inappropriate with Berkowitz giving his opinion on what parenting arrangement was in the best interests of E.F., but his opinion could not be determinative of the question. As the trier of fact, the trial judge was entitled to accept or reject the evidence of Berkowitz, in whole or in part, based on all of the evidence presented at the trial (see *BJT* at para 84; *Gunn* at para 5; *Smithers v R*, 1977 CanLII 7 at 518 (SCC)).

[28] Given that an expert witness cannot usurp the role of the trier of fact, we see no legal error in the trial judge coming to a different conclusion than Berkowitz, provided that the record reasonably supports the decision he reached.

[29] The three reasons the trial judge gave to depart from the recommendation of Berkowitz were based on his own credibility findings and other findings of fact that the record reasonably supported. We see no palpable and overriding error. The trial judge was alive to the complexities of the circumstances and he provided thoughtful and balanced reasons. At the end of the day, what was in the best interests of E.F. was a question the trial judge

alone had to answer, which he did with the requisite critical attention to the record.

[30] In coming to his conclusion on E.F.’s parenting arrangement, we are not persuaded that the trial judge made a material error in fact or in law that would require us to disturb his variation of the final order (see *BJT* at para 52; *Horch v Horch*, 2017 MBCA 97 at para 50). The deferential standard of review requires this Court to act with “restraint” (*BJT* at para 56) in matters of this nature in the absence of material error. The narrow scope of appellate review does not permit a “redo” (*ibid* at para 57) of the lower court’s exercise of discretion, even in the situation where the appellate court does not agree with the initial decision as to what is in the best interests of the child.

[31] In conclusion, we see no basis to interfere with the trial judge’s decision as to the parenting arrangement in relation to E.F. and the related relief he ordered.

Disposition

[32] In the result, the motion to introduce further evidence and the appeal were dismissed with costs.

Mainella JA

leMaistre JA

Turner JA