

Date: 20250311
Docket: [redacted]
(Brandon Centre)
Indexed as: B.C. v. C.B.
Cited as: 2025 MBKB 35

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

B.C.) <u>Courtney Buckman</u>
	petitioner,) for the petitioner
)
- and-)
)
C.B.) <u>Self-Represented</u>
	respondent.) for the respondent
)
)
) <u>Judgment delivered:</u>
) March 11, 2025

LEVEN J.

SUMMARY

[1] This was a dispute about where the two children of the marriage should attend school. To protect the privacy of the children, I will refer to "Mother's Community" and "Father's Community." The two communities are about 46 kilometres apart.

[2] The two children were born in 2011 and 2013. The parents have a shared parenting arrangement. The children have always attended school in Mother's Community.

[3] The older child experienced some “bullying” at school in the past. Because of this, Father wants both children to begin attending school in Father’s Community immediately. Mother would prefer that they keep attending school in her community, at least for now. There are no allegations that the younger child has ever experienced bullying or any other issues at school. The only evidence about the older child’s current situation is that he is happy and doing well in school.

[4] For reasons explained below, I find that it would be in the best interests of both children for them to continue attending school in Mother’s Community.

BACKGROUND

[5] This is not a comprehensive recitation of all evidence and argument; it is a concise summary of certain important matters.

[6] The parties agreed on some agreed facts. The parties separated on July 28, 2015. At the time, neither child had started Grade 1 yet. In February 2016, Mother registered the older child at a public school in Mother’s Community.

[7] The Court issued an Interim Order on or about June 9, 2016 dealing with parenting time, child support and some property issues. Clause 7.2 of the Interim Order said: “The issues of where the children shall attend school and daycare and spousal support are both dismissed.”

[8] On or about February 21, 2017, Father filed a Notice of Motion to Vary in respect of child support.

[9] This court issued a Final Order on March 20, 2017. It dealt with, among other things, parenting time and child support. It did not mention where the children would go to school. Clause 3.11 of the Final Order said: “[names of parents] shall consult with one another on major decisions respecting the children. In the event of disagreement, the parties shall attend mediation at Family Conciliation to attempt to resolve significant parenting decisions prior to making a court application.”

[10] The Divorce Judgment was signed on March 20, 2017.

[11] On or about May 1, 2017, Father filed a Notice of Motion to determine where the children would attend school and daycare, and about the cost of daycare. Father wanted the children to attend school and daycare in his community. On or about August 21, 2017, the Motion was denied, with costs payable to Mother.

[12] On or about March 15, 2018, Father filed a Notice of Motion to Vary, in respect of his proposed parenting plan and child support. In response to this motion, the Court issued a Variation Order on June 28, 2018. It varied child support. It dismissed Father’s motion to vary parenting time and other matters. It awarded costs to Mother.

[13] The Court issued an Order on or about March 19, 2018, granting a limited, temporary stay of some child support payments.

[14] On or about June 28, 2018, the Court signed a Variation Order, varying child support, with costs to Mother.

[15] On or about March 24, 2020, Father filed a Notice of Motion to Vary, in respect of parenting time and child support. On or about April 20, 2023, he filed a Notice of Abandonment in respect of this Motion.

[16] On February 17, 2023, Father filed a Notice of Motion to Vary. The Motion was in respect of parenting time and the school that the children would attend, as well as exchanges and consultation about education, health and extra-curricular activities.

[17] On March 29, 2023, Mother filed a Notice of Motion to Vary in respect of final medical decision-making (i.e. that Mother have it). Father opposed the Motion. On or about September 26, 2023, I signed an Interim Order that Mother “shall be able to fill any prescriptions written by [the older child’s] medical professionals in relation to his ADHD diagnosis” and that the parents “will follow the medication instructions to the best of their abilities and ensure [the older child] takes the medications as prescribed”.

[18] On or about May 23, 2023, Father requested an “emergent hearing” [*King’s Bench Rules*, Man Reg 553/88 (the “*Rules*”), Rule 70.24(12)]. The duty judge granted the request for a hearing and specified that the first issue at the hearing would be whether or not there were any emergent issues. Father requested that the oldest child be moved to a specific school in Father’s Community.

[19] On or about May 30, 2023, Father filed a Notice of Motion, seeking to vary the Final Order in respect of the children’s school and parenting time. Also parenting time should change to week-on-week-off (with exchanges on Mondays).

[20] The Notice of Motion did not mention any alleged contempt of court by Mother.

[21] On June 8, 2023, the “emergent” hearing was held. The Court ruled that there were no “emergent” issues. The dispute was adjourned to triage.

[22] Triage took place on September 18, 2023. At several case conferences, Father requested that amicus be appointed for the older child. Mother opposed the idea. The case conference judge declined to appoint amicus.

[23] Prior to the trial, Father requested and received (on June 29, 2023) various documents from the children’s school division under the ***Freedom of Information and Protection of Privacy Act***, CCSM c F175 (***FIPPA***). Some documents were redacted.

[24] The parents have equal parenting time, on a rotating 2-2-3 schedule. Both children attend school in Mother’s Community.

[25] The hearing took place from November 4 to 8, 2024.

FACTS

[26] As Father was self-represented, the court made extensive efforts to explain to him trial procedures and the law of evidence.

[27] Father voiced miscellaneous complaints about Mother about matters which were not the subject of this litigation.

[28] Father testified that he felt the older child had been bullied at school. Through his ***FIPPA*** application, Father obtained school records about the child.

Father felt that the child had suicidal thoughts in 2021. He felt that the child's school took "insufficient measure" to address the bullying problem.

[29] It became clear that Father felt that the older child had been "bullied" at school for seven years. However, there was no evidence to that effect. The fact that Father inserted this claim into the preambles to many of his questions and into his closing argument does not make it evidence. If he had called a witness (e.g. a teacher) who might have testified that bullying occurred seven years ago, that would have been evidence. If he had filed business records (e.g. school documents) that described bullying actually happening seven years ago, that would have been evidence (subject to weight). Again, Father tendered no evidence that any bullying occurred seven years ago.

[30] Father called the guidance counsellor from the children's school (the Guidance Counsellor) as a witness. She met with the older child many times in the past. Some of her counselling notes (redacted) were provided to Father through his **FIPPA** request. Father did not ask her when she met the child. Her notes suggest that she met him a number of times in the 2020-2022 time period. Her notes mentioned "bullying". She testified that, in general, her notes are not comprehensive. She does not write down every conversation that she has. Today, she does not remember every detail of the conversations she had with the child.

[31] A note from February 2020 said that the older child told the Guidance Counsellor that "some of his peers that he thought were bullying him - have ended

up spending time with and hanging out with. There doesn't appear to be any big concerns this time."

[32] A note from April 2021 said that a substitute teacher told the Guidance Counsellor that the older child had "expressed to her that he wanted to die." The teacher said that the child "prays to God to kill him." The Guidance Counsellor spoke with the child. He said that "his life is too rough". She asked him why. The first thing he said was that his dog recently died. Then he said that there are two "bullies" at his school that are "bothering" him, calling him names and putting their hands on him. Then he said that he was very worried about Ontario relatives because of COVID danger. Then he complained that his younger sibling likes to roughhouse, but he does not. The notes say that the child "did not have a plan for suicide".

[33] A note from June 2021 says that the older child told the Guidance Counsellor that "the bullying has stopped" and "he doesn't want to change schools".

[34] A note from November 2021 refers to the older child trying to "choke" himself with his hands around his neck. The note does not mention bullying or any actions by other students. On the contrary, it mentions the disagreement between Mother and Father about what school the child should attend.

[35] A January 2022 note refers to an incident on the last day before winter break. The older child "felt bullied" and went home early. There are no details.

[36] A note from early April 2022 refers to the older child being "bullied" by a peer who "poured water on his head". There are no details.

[37] A note from late April 2022 refers to a noon recess incident in which two other boys tried to push the older child off some playground equipment. The older child remained at school.

[38] A note from a teacher to both parents, from January 2023, summarized an incident involving the older child. He was upset after recess. He “started to pull his library lanyard around his neck to the point where it got very red in the neck area...I walked with him to the office where he could hopefully speak with an adult.” Later, the teacher asked the older child about what happened and he “said it was due to his fun group being made fun of and he was upset.” The teacher asked “if he realized how hard he pulling [sic] on the lanyard around his neck, and he responded with ‘it was okay because I could still breathe’.”

[39] A note from January 2023 mentioned that the Guidance Counsellor met with the older child. “He told me he had a good week. He had a rough time during basketball at lunch. A classmate took [the child’s] basketball and threw it across the gym. [The child] reacted by leaving...”

[40] A note from May 2023 said there was a substitute teacher one day. The older child wrote “just let me die” on a whiteboard. The teacher met with him. The child “said he had come to school in a bad mood because he thought he would be grounded because he hadn’t picked up his clothes on his floor at dad’s. At school later that morning [the child] was able to reset. In the afternoon, a boy in his class said something inappropriate to [the child] – something he had heard another boy say. This really upset [the child] and he wrote the message on the

mini whiteboard. He said he didn't really want to die and he didn't have a plan...He said he was feeling better when he left to go back to class."

[41] A May 2023 letter (in Father's Book of Documents] from the school's Student Services Coordinator "to whom it may concern" mentioned that the older child met with the Guidance Counselor 23 times from September 2022 to May 2023.

[42] Father asked the Guidance Counsellor about the definition of "bullying". She replied that she doesn't worry about definitions; she worries about the mental health of students.

[43] Father asked the Guidance Counsellor about how her notes about the older child were requested, redacted and shared through **FIPPA**. She doesn't know who made the decision to release them or who redacted them.

[44] The Guidance Counsellor testified that, at one point, she asked the older child if he wanted his counselling notes released to his father. The child said "no".

[45] Father's Book of Documents included a letter to Father from the superintendent of the children's school division, dated April 10, 2024. The letter mentioned that the two had met at the school board office. The letter summarized some of the things the children's school had done. It mentioned guidance counsellor support. It mentioned "whole class participation in Project 11 lessons." The note explained that these "lessons are preventative – educating children about mental health, kindness and how to deal with difficult situations in healthy ways." It mentioned "Classroom lessons from the Guidance Counsellor on respect,

followed by lessons on growth mindset. Focusing our energies on preventative education is a priority in building the skills of our students to prevent bullying behaviors. It mentioned increasing “supervision at less structured time, for example at lunch.”

[46] The superintendent’s letter went on to say: “In our conversation at the board office, you stated that you felt the school’s actions were one-sided and focused on [the older child], and that they did nothing to the other students to make them stop. I suspect this perception is reinforced due to the confidentiality that principals are bound by to not discuss other students with anyone other than their parents. There are very good reasons for this, just as you would not want us to disclose private information about [the older child] to others.”

[47] Father called the older child’s Grade 6 teacher to testify. He mentioned that “a lot of kids had disagreements about how to treat each other as friends”. He described his relationship with the child and characterized it as “healthy”.

[48] Father called the current acting principal of the children’s school to testify. She answered general questions about how the school deals with bullying. She could not answer more specific questions because she didn’t have her files with her.

[49] Father called the former vice principal of the children’s school to testify. She recalled meeting with both parents to discuss the older child. She recalled that Father wanted to know how other students had been disciplined, and the school was not able to tell him, for privacy reasons.

[50] She testified about different measures the school took. The school implemented numerous instructional lessons with students. The school increased supervision during unstructured time. The school had the Guidance Counsellor go into the classroom. There was small-group instruction. She mentioned the “Mindset” program and the “Second Step” program but was not asked to elaborate upon these programs.

[51] Mother testified. Among other things, she talked about how the school reacted to the concerns about the older child. In general, her comments about the school were positive. Things are going well for both children in the current school year. There have been no recent incidents of concern.

[52] Mother talked about the older child’s ADHD diagnosis. She said that, before the medication, he had explosive overreactions to minor triggers and many other problems, such as extreme difficulty focusing. She described her battle with Father to get ADHD medications started.

[53] Mother was upset about Father’s **FIPPA** request. She feels that Father received confidential documents that the older child did not want him to receive.

[54] Mother feels it would be in the best interests of the children to remain at their current school for now. Mother would not object to changing the parenting schedule to a week-on-week-off schedule, but she did raise a few concerns about Father’s parenting (see below).

[55] MH testified. He is a counsellor who met with both children. This started in about November 2023. He met with the older child about every other week.

The last meeting (before the trial) was in October 2024. He testified that the older child hasn't mentioned any bullying to him. The child is "a relatively happy boy". Things are "going well at school." He seems "pretty happy" at his current school.

[56] The children's longtime family doctor (the Doctor) testified. He discussed the older child's ADHD medication (see below). He said that Mother had not discussed any bullying with him.

Contempt of court?

[57] Father made various submissions about how he felt Mother was in contempt of court for not agreeing to mediation in the past, allegedly in violation of clause 3.11 of the 2017 Final Order.

ADHD

[58] There was an issue about the older child's ADHD diagnosis. The child attended the Child and Adolescent Treatment Centre (CATC). A child and adolescent psychiatrist diagnosed the child with ADHD on September 13, 2023. A report was sent to the Doctor for ongoing care.

[59] On November 1, 2022, the Doctor prescribed a low dose of medication for the older child's ADHD. Mother advised Father later that day. Mother wanted him to begin taking the medication. Father was reluctant, Mother asked Father if he would consider a herbal (non-prescription) alternative. He said he would research it. He never got back to Mother. Finally, Mother asked the court to resolve the issue. As noted above, on March 29, 2023, Mother made a Motion. As noted above, on September 26, 2023, I made an interim ruling that Mother could fill

ADHD prescriptions, and that both parents would ensure that the child takes his ADHD medications.

[60] The Doctor eventually increased the prescribed dosage for the medication. The Doctor testified that he has treated ADHD in young people before, and that he has prescribed this medication before. It is not a new or experimental medication.

Week-on-week-off

[61] Father argued that the current parenting time schedule be changed to a week-on-week-off schedule. Mother said she did not necessarily oppose the idea. She did raise three concerns. She alleged that sometimes Father allows the children to stay up too late, so they are tired at school the next morning. She alleged that sometimes, when one child is sick, Father keeps both children out of school. She alleged that the older child does not always take his ADHD medication during Father's parenting time. She did not provide any dates (or even approximate dates) for these alleged concerns. Nor did she say anything about the frequency of these alleged concerns.

[62] Father argued that week-on-week-off would be in the best interests of the children.

[63] In his February 14, 2024 letter to Mother's lawyer (found in Mother's Book of Documents), MH wrote that the older child "finds the current 2-2-3 schedule too short of a time with each parent and would prefer alternate weeks at each parent's home."

LAW

Divorce Act

[64] Relevant sections of the ***Divorce Act***, RSC 1985, c 3 (2nd Supp.) include:

Parenting order

16.1 (1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

- (a) either or both spouses; or
- (b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

Contents of parenting order

(4) The court may, in the order,

- (a) allocate parenting time in accordance with section 16.2;
- (b) allocate decision-making responsibility in accordance with section 16.3;
- ...
- (d) provide for any other matter that the court considers appropriate.

Terms and conditions

(5) The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate.

Variation order

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively...

- (b) a parenting order or any provision of one, on application by
 - (i) either or both former spouses....

Variation of parenting order

(2.1) If the court makes a variation order in respect of a contact order, it may make an order varying the parenting order to take into account that variation order, and subsections (3) and (11) apply as a consequence with any necessary modifications....

Conditions of order

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought, and the court has the same powers and obligations that it would have when making that order....

Factors for parenting order or contact order

(5) Before the court makes a variation order in respect of a parenting order or contact order, the court shall satisfy itself that there has been a change in the circumstances of the child since the making of the order or the last variation order made in respect of the order, or of an order made under subsection 16.5(9).

Family Law Act

[65] Relevant sections of the ***Family Law Act***, CCSM c F20 (***FLA***) include:

Best interests of the child

35(1) The court must only consider the best interests of the child in making a parenting order, a contact order or a guardianship order.

Primary consideration

35(2) When considering the factors referred to in subsection (3), the court must give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors to be considered

35(3) In determining the best interests of a child, the court must consider all of the factors related to the child's circumstances, including the following:

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each person who has or is seeking parental responsibilities or contact

with the child or who is a guardian or seeks guardianship of the child, as well as with siblings, grandparents and any other person who plays an important role in the child's life;

(c) the willingness of each person seeking parental responsibilities, guardianship or contact with the child to support the development and maintenance of the child's relationship with other persons to whom the order would apply;

(d) the history of care of the child;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

...

(g) any plan for the child's care;

(h) the ability and willingness of each person in respect of whom the order is to apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order is to apply to communicate and cooperate, in particular with one another, on matters affecting the child;

...

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on matters affecting the child...

Variation of parenting order

39(1) The court may vary, suspend or terminate a parenting order on application by

(a) a parent....

Factors

39(2) Before making a variation order, the court must be satisfied that the child's circumstances have changed since the original order was made or last varied.

Manitoba Evidence Act

[66] Relevant sections of ***The Manitoba Evidence Act***, CCSM c E150 include:

Definitions

49(1) In this section

"business" includes every kind of business, profession, occupation, calling, operation, or activity, whether carried on for profit or otherwise, and whether carried on by or as part of the operation of government;

"record" includes any information that is recorded or stored by means of any device.

Where business records admissible

49(2) Any writing or record made of an act, transaction, occurrence or event is admissible as evidence of the act, transaction, occurrence or event if

- (a) it is made in the usual and ordinary course of any business; and
- (b) it was in the usual and ordinary course of business to make the writing or record at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter....

Surrounding circumstances

49(4) The circumstances of the making of any writing or record to which reference is made in subsection (2), including lack of personal knowledge by the maker, may be shown to affect its weight, but the circumstances do not affect its admissibility.

Freedom of Information and Protection of Personal Privacy Act (*FIPPA*)

[67] Relevant sections of ***FIPPA*** include:

Conflict with another Act

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless the other enactment expressly provides that the other enactment applies despite this Act....

Disclosure harmful to a third party's privacy

17(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's privacy....

Notice to third party

33(1) When the head of a public body is considering giving access to a record the disclosure of which might

(a) result in an unreasonable invasion of a third party's privacy under section 17; or

(b) affect a third party's interests described in subsection 18(1) or (2); the head shall, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (3)....

Complaint by a third party about access

59(2) A third party notified under section 33 of a decision by the head of a public body to give access may make a complaint to the Ombudsman about the decision.

Exercising rights of another person

79 Any right or power conferred on an individual by this Act may be exercised...

(d) by any of the following persons if the individual is a minor and, in the opinion of the head of the public body concerned, the exercise of the right or power by that person would not constitute an unreasonable invasion of the minor's privacy:

(i) the parent or guardian of the minor...

Personal Health Information Act (PHIA)

[66] Relevant sections of ***The Personal Health Information Act***,

CCSM c P33.5 (***PHIA***) include:

Right to make a complaint about privacy

39(2) An individual may make a complaint to the Ombudsman alleging that a trustee

(a) has collected, used or disclosed his or her personal health information contrary to this Act; or

(b) has failed to protect his or her personal health information in a secure manner as required by this Act.

Public Schools Act (PSA)

[67] Relevant sections of ***The Public Schools Act***, CCSM c P250 (***PSA***)

include:

Interpretation: "bullying"

1.2(1) In this Act, "**bullying**" is behaviour that

(a) is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property; or

(b) is intended to create, or should be known to create, a negative school environment for another person.

Characteristics and forms

1.2(2) Bullying

(a) characteristically takes place in a context of a real or perceived power imbalance between the people involved and is typically, but need not be, repeated behaviour;

(b) may be direct or indirect; and

(c) may take place

(i) by any form of expression, including written, verbal or physical, or

(ii) by means of any form of electronic communication — also referred to as cyberbullying in section 47.1.2 — including social media, text messaging, instant messaging, websites or e-mail.

When does a person participate in bullying?

1.2(3) A person participates in bullying if he or she directly carries out the bullying behaviour or intentionally assists or encourages the bullying behaviour in any way....

Codes of conduct and emergency response plans

47.1(1) The principal of each school must, in consultation with the school's advisory committee prescribed under clause 4(1)(p.1) of *The Education Administration Act*,

- (a) establish a code of conduct for pupils and staff and an emergency response plan for the school; and
- (b) review that code of conduct and emergency response plan at least annually.

Content of code of conduct

47.1(2) A school's code of conduct must include

- (a) a statement that pupils and staff must behave in a respectful manner and comply with the code of conduct;
- (b) a statement that the following are unacceptable:
 - (i) abusing physically, sexually, or psychologically — orally, in writing or otherwise — any person,
 - (i.1) bullying....

...

- (e) the disciplinary consequences, in as much detail as is reasonably possible, of violating the code of conduct, and the process for appealing disciplinary decisions;

...

Reporting to the principal

47.1.1(1) The following persons must, if they become aware that a pupil of a school may have engaged in unacceptable conduct while at school, at a prescribed school-approved activity or in other prescribed circumstances, report the matter to the principal of the school as soon as reasonably possible:

- (a) an employee of a school board, school division or school district;
- (b) a person who has care and charge of one or more pupils during the prescribed school-approved activity.

Principal to notify parent or guardian

47.1.1(2) Subject to the regulations, if the principal believes that a pupil of the school has been harmed as a result of the unacceptable conduct, the principal must, as soon as reasonably possible, notify the pupil's parent or guardian.

Content of notice

47.1.1(3) When notifying a parent or guardian under subsection (2), the principal must provide the following information:

- (a) the nature of the unacceptable conduct that resulted in harm to the pupil;
- (b) the nature of the harm to the pupil;
- (c) the steps taken to protect the pupil's safety, including the nature of any disciplinary measures taken in response to the unacceptable conduct.

Limitation re personal information

47.1.1(4) When notifying a parent or guardian under subsection (2), the principal must not disclose the name of or any other identifying or personal information about a pupil who engaged in the unacceptable conduct, except in so far as is necessary to comply with subsection (3).

Additional obligation

47.1.1(5) An obligation to make a report respecting unacceptable conduct under this section is in addition to, and not in derogation of, the obligation to report unacceptable conduct under any other enactment.

Definition of "unacceptable conduct"

47.1.1(6) In this section, "**unacceptable conduct**" means

- (a) abusing another pupil physically, sexually or psychologically, verbally, in writing or otherwise; or
- (b) bullying another pupil.

King's Bench Act

[68] Relevant sections of the ***The Court of King's Bench Act***,

CCSM c C280 include:

Order restraining vexatious litigant

73(1) If a judge is satisfied that a person has persistently instituted vexatious proceedings or conducted proceedings in a vexatious manner, the judge may order that

- (a) the person must not institute a further proceeding; and
- (b) any proceeding already instituted by the person must not be continued; except with leave of a judge.

Obtaining order

73(2) An order under subsection (1) may be made

- (a) on the judge's own motion; or
- (b) on application by
 - (i) a party against whom the alleged vexatious proceedings have been instituted or conducted, or
 - (ii) any other person, with leave of a judge.

Application for leave to proceed

74(1) Where a person governed by an order under subsection 73(1) seeks to institute or continue a proceeding, the person may apply for

- (a) leave to institute or continue the proceeding, or
- (b) rescission of the order,

and for no other relief, including costs.

Leave to proceed or rescission

74(2) For purposes of an application under subsection (1), where a judge is satisfied that a proceeding to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding, the court may, by order,

- (a) grant leave to proceed, or
- (b) rescind the order made under subsection 73(1).

Case law

[69] ***Barendregt v. Grebliunas***, 2022 SCC 22, was a relocation case. A large part of the decision dealt with the law regarding “new evidence”. At paragraph 96, the majority observed that the “best interests of the child are an important legal principle in our justice system”.

[70] In ***Winkler v. Winkler***, 1990 CanLII 7968 (MB CA), one parent launched several rounds of family litigation without success. Costs were awarded against the unsuccessful parent. The costs ordered were not paid. The parent (self-represented) began yet another round of litigation in respect of, among other things, parenting time (then called “custody and access”). At paragraph 21, the court warned: “Whether it relates to arrears in costs, or posting security for costs, caution should be exercised in the use of a stay order to bar further steps in litigation in domestic disputes where the focus is on custody, access or maintenance.”

[71] In ***College of Registered Nurses of Manitoba v. Hancock***, 2023 MBCA 70, the court thoroughly discussed vexatious litigants. At paragraph 65, the court observed that the term “vexatious” is “synonymous with the concept of abuse of process.” At paragraph 66, the court added that vexatiousness is to be determined by objective, rather than subjective, standards.

[72] ***Kalo v. The Law Society of Manitoba***, 2010 MBCA 64, dealt with security for costs.

DECISION

[73] Under legislation and the common law, the best interests of the child are always paramount.

[74] Father's allegations that Mother was in contempt of court because she did not agree to mediation of past disputes are not properly before the court. Father's Notice of Motion did not include a request for any contempt-of-court finding.

[75] In any event, the essence of clause 3.11 of the Final Order is that parties must attempt mediation before going to court. Although both parties filed Notices of Motion, the main issue at this trial was Father's request that the children's school should be changed from one in Mother's Community to one in Father's Community. It was Father, not Mother, who brought this issue to court. Therefore, clause 3.11 of the Final Order does not assist Father in this instance.

[76] Finally, a mere failure to comply with a clause of a court order does not necessarily constitute contempt of court. Many factors will be relevant. The general litigation principle is that "they who assert must prove". The general civil standard of proof is on a balance of probabilities. Father did not prove on a balance of probabilities that Mother was in contempt of court.

[77] Therefore, I decline to find Mother in contempt of court.

"Bullying"

[78] Father used the term "bullying" to describe various negative experiences the oldest child had at school. There are few details in evidence about those experiences.

[79] There is a definition of “bullying” in section 1.2 of the **PSA**. This definition is relevant to section 47.1 of the **PSA**. This section creates specific duties for specific individuals. For example, it requires principals to establish codes of conduct. The codes of conduct must deal with “unacceptable” conduct. “Unacceptable” conduct includes “bullying”. There are other specific provisions.

[80] In short, the definition of “bullying” in the **PSA** is not an all-purpose definition. It is valid for certain specific purposes under the **PSA**. It is not necessarily valid for purposes of determining where children should go to school, in the context of family litigation.

[81] In common usage, “bullying” is used in many different ways by different people, to describe everything from minor discourtesy to aggravated assault.

[82] In a perfect world, no child would ever be discourteous to another child. For that matter, no adult would ever be discourteous to another adult.

[83] In the real world, sometimes children are discourteous to other children. That is a fact of life in every school in Canada.

[84] Schools should always encourage all their students to be courteous. Schools should take reasonable measures in this regard. They should respond in good faith and with reasonable diligence. However, no school should be held to a standard of perfection.

[85] I will give Father the benefit of the doubt and assume without deciding that some of the things that happened to the older child in the past can be described as “bullying”.

[86] Firstly, the evidence is that the older child's school reacted reasonably to information about the "bullying" incidents. The school employees who testified were all extremely credible witnesses. Their sincere concern for the welfare of the students they deal with was obvious. Although they were not able to recall every detail of events several years ago, they did recall that the school took reasonable steps to address concerns about the older child. For that matter, I found Mother to be an extremely credible witness. It was obvious that she did not ignore concerns about her child, or take those concerns lightly.

[87] Mother and the school behaved reasonably. It became apparent that Father did not agree with them. That, in and of itself, does not make them unreasonable.

Suicide attempts

[88] Father made repeated references to "suicide" attempts, in preambles to his questions and in closing argument. Father linked these "suicide" attempts to bullying. The objective evidence before the court is that there were no suicide attempts caused by bullying.

[89] A school note from April 2021 said that a substitute teacher told the Guidance Counsellor that the older child had "expressed to her that he wanted to die." The teacher said that the child "prays to God to kill him." The Guidance Counsellor spoke with the child. He said that "his life is too rough". She asked him why. The first thing he said was that his dog recently died.

[90] A school note from November 2021 refers to the older child trying to "choke" himself with his hands around his neck. The note does not mention

bullying or any actions by other students. On the contrary, it mentions the disagreement between Mother and Father about what school the child should attend.

[91] A note from a teacher, from January 2023, to both parents, summarized an incident involving the older child. He was upset after recess. He “started to pull his library lanyard around his neck to the point where it got very red in the neck area...I walked with him to the office where he could hopefully speak with an adult.” Later, the teacher asked the older child about what happened and he “said it was due to his fun group being made fun of and he was upset.” The teacher asked “if he realized how hard he pulling [sic] on the lanyard around his neck, and he responded with ‘it was okay because I could still breathe’.”

[92] Again, the objective evidence is that there were no suicide attempts linked to bullying. The child’s behaviour certainly raised concerns, but the school employees took reasonable steps to address these concerns.

The proposed school

[93] Secondly, even if the older child were being bullied today, there is no evidence before the court about the school in Father’s Community that Father wants both children to attend. I suppose it is possible that there is no bullying at the proposed school, but there is no evidence to this effect. There is no evidence that there is less bullying in one school than in the other. Father did not tender even basic factual information about the proposed school (e.g. approximate population).

The child is happy now

[94] Thirdly, there is undisputed evidence before the court that, whatever might have happened in the past, the older child is happy and healthy and doing well at school today. Even if the school had acted inappropriately in the past (and there is no finding to that effect), I do not have a time machine at my disposal. I fail to see how moving a happy successful child to a different school today (a school about which we have no information) would be in the child's best interests.

The younger child

[95] Fourthly, I will give Father the benefit of the doubt and assume that there would be some advantages to both children if they were to attend the same school. Mother never suggested otherwise. That being said, there is no evidence at all that it would be in the best interests of the younger child to order him to move from his current school to the school in Father's Community.

[96] Therefore, I will not order either child to move from their current school as of today. On a balance of probabilities, it would not be in their best interests.

[97] I note that the Final Order does not actually say that the children must go to school in Mother's Community. Although Father's motion might have been worded more artfully, there is no dispute that Father wants to vary the Final Order to include a new clause saying that the children must go to school in Father's Community effective immediately. I decline to insert any such clause.

[98] There may come a day when the older child wishes to attend a high school in Father's Community for various valid reasons. The parents might agree on this.

For that matter, there may come a day when the younger child wishes to attend a high school in Father's Community. There is no point in speculating further about these theoretical possibilities. The parents are both expected to behave reasonably.

Week-on-week-off

[99] Father argued for a change to a week-on-week-off parenting time schedule. Mother did not necessarily oppose the idea. This was a very minor issue at the trial.

[100] Mother alleged that sometimes, during Father's parenting time, the children stay up too late. She alleged that, sometimes, during Father's parenting time, when one child is sick, Father keeps both children out of school. She alleged that, during Father's parenting time, sometimes the older child does not take his ADHD medication. Mother did not provide any dates or even approximate dates. She didn't say if any or all of these things happened in recent weeks, or how frequently these things happened.

[101] Even if all of Mother's concerns were valid, Mother didn't explain how a week-on-week-off schedule would exacerbate any or all of these concerns. The proposed schedule change would not increase Father's net parenting time or his net parenting time on school days. Essentially the Mother's concerns, valid or not, are a separate issue from whether week-on-week-off would be in the children's best interests.

[102] The only third-party evidence on the subject was the 2023 letter from MH explaining that the older child would prefer week-on-week-off. MH testified at trial, so both parents had an opportunity to question him about this matter.

[103] It is common for parents to use parenting schedules such as 2-2-3 when children are younger, and then to change to week-on-week-off when children are older. In this case, the children are now about 13 and about 11.

[104] Therefore, in the best interests of the children, I am ordering that parenting time change to week-on-week-off. The parents are free to agree to modifications during summer, to special arrangements during school breaks, and to other reasonable modifications for special occasions.

[105] Both parents said that Tuesday after school would be a good time for exchanges. They disagreed about where exchanges should occur. Currently, they occur at the children's school, unless the parties agree otherwise. In the absence of any admissible evidence about why there should be a change in the status quo, I order that exchanges continue to be at the children's school on Tuesdays, unless the parents agree otherwise.

[106] I don't know on which day of the week this decision will be released. There should be a short grace period before the schedule change occurs. If the relationship were amicable, I would let the parties work it out for themselves. However, out of an abundance of caution, I will specify that the new schedule does not have to start within the first 14 days after release of this decision, unless the parties agree that it will start on an earlier date.

Medical decision-making

[107] Both parties agree to the general principle that both parties should provide each other with timely information about the children's health.

[108] Father argued for joint decision-making on all issues, including health issues. Mother argued that she should have final decision-making authority on health decisions.

[109] I find that Father's behaviour in respect of the ADHD medication was unreasonable. Father called no health-care professionals as witnesses. He called no expert witnesses to say anything negative about ADHD medications. Father is not a medical doctor.

[110] The fact is that a psychiatrist diagnosed the older child with ADHD. The Doctor (who had been the child's family doctor for years) prescribed an ADHD medication. Father expressed reluctance to let the child take the medication. Mother asked Father if he might consider a herbal (non-prescription) alternative. He said he would research the subject. He never got back to Mother on this. Finally, Mother was forced to resort to litigation to get Father to cooperate in respect of ADHD medication. As I said, Father's behaviour was unreasonable. By contrast, I find that Mother's behaviour was very reasonable. I am extremely concerned that Father will behave unreasonably in the future, in respect of health-care decisions.

[111] Father's unreasonable behaviour in respect of ADHD medication constitutes a material change in circumstances after the Final Order.

[112] Therefore, Mother will have final decision-making authority in respect of health-care decisions for both children. Of course, Father can respond reasonably to medical emergencies during his parenting time (e.g. he can phone an ambulance before contacting Mother, and then contact Mother afterwards). Mother will make reasonable efforts to request Father's views about health-care issues. If they agree, so much the better. Mother will also make reasonable efforts to inform Father without undue delay about health-care decisions that have been made.

Order that Father cannot make FIPPA requests

[113] Mother was upset that, through his **FIPPA** request about the older child, Father obtained documents that she considered to be invasive of her privacy and of the privacy of the older child. Therefore, she requested an order under the **FLA** that Father not be allowed to request documents about the children in the future. This remedy was not mentioned in any of the case conference memoranda. It was not explicitly included in any of the pleadings.

[114] The **FLA** contains no provisions that would make it paramount over **FIPPA** in the event of a conflict between the two statutes. On the contrary, section 5(2) of **FIPPA** makes **FIPPA** paramount in the event of conflicts.

[115] Therefore, I question whether I have the authority to make any sort of order in this litigation that would have any effect on Father's rights under **FIPPA**.

[116] In any event, **FIPPA** includes explicit provisions protecting the privacy of third parties (such as Mother). Moreover, **FIPPA** includes its own enforcement

mechanisms and procedures (such as appeals to the Ombudsman). If Mother feels the school division has made an error under **FIPPA**, she is free to avail herself of **FIPPA**'s internal remedies, now and in the future. Even if **FIPPA** were not paramount over the **FLA**, I would be reluctant to do an end-run around the Ombudsman and the other procedures spelled out in **FIPPA**.

[117] I note that **PHIA** also has its own internal remedies and procedures, including a role for the Ombudsman. Mother can use these procedures if she feels aggrieved about a **PHIA** information disclosure.

[118] Therefore, I decline to make the sort of order that Mother has requested.

Security for costs, "vexatious litigant" order

[119] Mother noted that Father made several unsuccessful variation motions in the past. Costs were awarded to Mother, and Mother was forced to use the garnishment process to collect her costs. Father is now self-represented. Therefore, Mother requested an order that, if Father wishes to made variation motions in the future, he be forced to pay security for costs. Rule 56 deals with security for costs. This remedy was not mentioned in any of the case conference memoranda or pleadings.

[120] Mother also asked that I make a "vexatious litigant" order against Father (as per section 73 of the **King's Bench Act**). He would have to obtain permission from a Justice before being able to commence new Variation motions. This remedy was not mentioned in any of case conference memoranda or pleadings.

[121] Rule 56 does not appear to contemplate the sort of order that Mother is requesting. If and when Father files a new variation motion, Mother is free to bring a motion under Rule 56. However, the Rule does not contemplate a permanent, enduring order for security for costs that would apply to an unlimited number of hypothetical future actions. Therefore, I make no order under Rule 56.

[122] A “vexatious litigant” order is at least theoretically available. The ***King’s Bench Act*** says it is available where a “person has persistently instituted vexatious proceedings or conducted proceedings in a vexatious manner”. It is true that Father has made various unsuccessful motions in the past. However, the current litigation was not about a trivial or frivolous concern. Protecting a child from alleged bullying is a serious objective. Although Father was unsuccessful on the merits, and although his pattern of unsuccessful litigation raises some concerns, I am not satisfied that he can be labelled “vexatious” as of today.

[123] That is not to say that Mother may not be able to make a successful argument in the future. It is possible that Father will make no future motions at all. If he does make a future motion, much will depend on the timing and content of the motion. Depending on the details, Mother might theoretically make a successful vexatious-litigant argument in the future. Father should govern himself accordingly.

Costs

[124] Mother requested tariff costs. Father opposed this request. Mother was substantially successful, and I award her tariff costs. She submitted a bill of costs

and disbursements, itemizing tariff costs of \$30,525, and disbursements (plus tax) of \$5,439.24, for a total of \$35,964.24. I see no errors in that bill, so I award Mother \$35,964.24.

[125] I thank the parties for agreeing to a short agreed-statement-of-facts.

_____ J.