

CANADA / JUDGMENT

Davenport v. Forliti

2019 BCSC 676

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2019 BCSC 676 Davenport v. Forliti

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Davenport v. Forliti,

2019 BCSC 676

Date: 20190502

Docket: S175593

Registry: New Westminster

In the matter of the Patients Property Act, R.S.B.C. 1996, c. 349

and amendments thereto

Re: Blue Mattino Forliti

Between:

Dawn Irayne Davenport also known as

Dawn Irene Forliti

Petitioner

And

James Joseph Forliti

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Petitioner:

P. Rowlands

The Respondent, appearing in person:

J. Forliti

Place and Dates of Hearing:

New Westminster, B.C.

October 4, 5 and

December 7, 2018

Written Submissions Received from The Public Guardian and Trustee of British Columbia:

August 15, 2018 and

March 22, 2019

Written Submissions Received from the Petitioner:

February 8, 2019

Place and Date of Judgment:

New Westminster, B.C.

May 2, 2019

I. INTRODUCTION

- [1] These are reasons for judgment on two cross-applications concerning the parties' adult son Blue, age 21. Blue is significantly disabled and unable to care for himself. The parties are co-committees of Blue, but not his estate. The parties were divorced 18 years ago. Blue lives with each of his parents on a schedule which repeats every three weeks. The parties seek to vary the schedule under which Blue lives with each of them, and to vary orders concerning their conduct and the care of Blue.
- [2] The Public Guardian and Trustee of British Columbia (the "Public Trustee") is the committee of Blue's estate. The Public Trustee took no position on Mr. Forliti's application except as to costs, and did not appear on the application. Its written response states it is prepared to act as committee of the person of Blue if the Court determines that is in the best interests of Blue. In its further written response, the Public Trustee opposed a portion of Ms. Davenport's application which seeks an order that the Public Trustee be responsible to administer additional funding which is available for caregivers. Ms. Davenport subsequently withdrew that portion of her application and now seeks that she administer those funds. The Public Trustee took no position on the remainder of her application except as to the orders sought regarding fines and costs.

- [3] Both parties seek to vary an order of Mr. Justice Skolrood dated April 26, 2016, following a three-week trial. Mr. Justice Skolrood made two orders on that day: one under the Family Law Act, S.B.C. 2011, c. 25 [FLA] as at the time Blue was still a minor; and one under the Patients Property Act, R.S.B.C. 1996, c. 349 [PPA] to take effect when Blue turned 19 years old in October 2016. The relevant order for these applications is the one made under the PPA, and I refer to it as the "Final Order".
- [4] The April 26, 2016 order made under the FLA continued a parenting time schedule that had been in effect since a 2009 consent order, and made further orders concerning the parties' conduct and the care of Blue. The Final Order appointed the parties co-committees of Blue. The parenting time schedule remained the same except, as Blue was no longer a child, the parenting time schedule now became a term of the committee ship. Similarly, orders concerning the parties' conduct and the care of Blue became terms of the committee ship.

II. LITIGATION HISTORY

- [5] The starting point for the present applications is the reasons for judgment which resulted in the Final Order, and which are indexed at 2016 BCSC 743. I adopt the comments of Mr. Justice Skolrood as applicable to the current issues between the parties, which arose barely a year after he gave his decision:
- [3] It is difficult, if not impossible, for someone who has not faced the reality of living with and caring for a child with significant disabilities to understand the challenges that these parties have lived with for the past 18 years. The evidence is uniform that both parents love Blue, are dedicated to his well-being and do what they perceive to be in his best interests.
- [4] However, the evidence is also uniform that the parties disagree on virtually all matters relating to Blue's care and that they are unable to communicate with each other about issues affecting their son. This is due to the significant degree of hatred and mistrust that they harbour for each other.
- [5] The parties' disagreement about Blue is at the heart of this proceeding where the central issues are the current guardianship and parenting arrangements for Blue as well as the appointment of a committee for him when he turns 19.
- [6] After describing Blue's significant medical challenges and care needs, Mr. Justice Skolrood addressed that Blue would soon become an adult. At that time there would be a transition in his care, and how that transition would occur was an issue at the trial:
- [39] Blue will turn 19 in October 2016. Up until that time, many of the medical treatments and related services that he receives have been provided through BC Children's Hospital and Sunny Hill Health Centre for Children, as well as through his school. When Blue becomes an adult, he will transition into the adult system. How that transition will occur, and who will facilitate or supervise it, is one of the significant issues in this litigation.

- [7] Mr. Justice Skolrood made four key findings of fact, three of which I agree with and adopt. Those three findings are: (a) both parties love Blue and are committed to his well-being; (b) the parties have different approaches to caring for Blue and different opinions on what is in his best interests, with Ms. Davenport more accepting of conventional medical opinions and Mr. Forliti more willing to question those opinions and consider alternate treatment options; and (c) the biggest issue is the parties' enmity toward each other and their inability to communicate.
- [8] The fourth key finding of fact made by Mr. Justice Skolrood is that Blue is well cared for by both parties, despite their different approaches. There were many health care practitioners and other professionals who testified in the trial before Mr. Justice Skolrood. Their evidence is reviewed in his reasons for judgment and contributed to his finding that Blue is well cared for in both homes despite Ms. Davenport's belief that Mr. Forliti is compromising Blue's care.
- [9] Ms. Davenport continues to allege on these applications, as she did in the trial before Mr. Justice Skolrood, that Blue is not well cared for in Mr. Forliti's home. This is an issue in these applications and forms a large part of the basis for the orders she seeks. No expert evidence was filed on the present applications that Blue is not well cared for in either home. The Court has before it only the lengthy affidavits of Ms. Davenport going back several years before and after the trial, and the contrary affidavits of Mr. Forliti and Ms. June Hewko, the owner of an agency that provides care to Blue in Mr. Forliti's home.
- [10] Mr. Justice Skolrood concluded that Blue's interests were best served by having both parties actively involved in Blue's life as co-committees of Blue's person, but with Ms. Davenport having final decision-making authority on significant decisions affecting Blue, subject to certain conditions.
- [11] Mr. Justice Skolrood outlined at para. 226 the two major issues that were to be decided in the trial before him:
1. Should the 2009 order be varied to provide for more limited and supervised parenting time for Mr. Forliti and/or to give Ms. Davenport final authority to make significant decisions with respect to Blue?
 2. Who should be appointed the committee of person and committee of estate for Blue when he turns 19?
- [12] Mr. Justice Skolrood found authority within s. 16 of the PPA to order conditions and restrictions on the co-committees. He commented that alternatively, if he did not have authority within s. 16, he had authority under the *parens patriae* jurisdiction of the court as there was a legislative gap (see paras. 305-6).
- [13] Finally, Mr. Justice Skolrood appointed the parties co-committees on the following conditions and restrictions, which became part of the Final Order, and which both parties now seek to vary:

1. The Petitioner [Ms. Davenport] and the respondent [Mr. Forliti] shall be co-committees of the person of Blue, as a patient pursuant to the Patients Property Act, R.S.B.C. 1996, c. 349, subject to the following terms:
 - a) Blue shall reside with the co-committees in accordance with the schedule established under the Order of Mr. Justice Walker made April 29, 2009 (the "Order of Mr. Justice Walker") [the 2009 order] in the related family matter under action number E00986, unless otherwise agreed by the parties;
 - b) Each co-committee shall have the obligation to advise the other co-committee of any matters of a significant nature affecting Blue, including significant decisions regarding health (except emergency decisions), education, religious instruction and the general welfare of Blue, and the co-committees shall have the obligation to try to reach agreement on those major decisions, subject to the following terms:
 - (i) Both co-committees must engage in such discussions in a good faith manner;
 - (ii) In the event that the parties cannot reach agreement on a significant decision despite their best efforts, Ms. Davenport will be entitled to make those decisions;
 - (iii) Each co-committee shall have the right to obtain information concerning Blue directly from third parties, including teachers, counsellors, medical professionals and third party caregivers; and
 - (iv) The Petitioner [Ms. Davenport] has the sole power as Blue's case manager and sole power to make medical appointments. This restriction of the Respondent's [Mr. Forliti's] powers does not apply to emergency decisions.
 - c) The co-committees shall communicate for the above purposes regarding significant decisions concerning Blue through emails, Co-parently, a written communication book, text, written letter or voicemail, in accordance with the terms of the Order of Mr. Justice Walker [the 2009 order] and as varied pursuant to the April 26, 2016 Order in the related family matter under action number E009867, and subject to the following:
 - a. The co-committees shall communicate respectfully with each other and Blue's team members;
 - b. The co-committees shall provide a detailed exchange letter to the other co-committee via email (or written letter, text or voicemail, only if email is not available) and this shall be the primary method of communicating facts regarding Blue; and
 - c. Each co-committee shall provide to the other co-committee notification of illnesses of Blue, and a full explanation of all injuries, bruises and marks sustained by Blue while in that co-committee's care, in the exchange letter;

- d) The co-committees will follow the advice and recommendations of Blue's medical and educational professionals and will otherwise exercise their best judgment, in consultation with those professionals when caring for Blue.
 - e) Either or both co-committees shall be entitled to attend medical and educational appointments regarding Blue, and shall provide two weeks notice of attendance at an appointment to the other co-committee;
 - f) The Respondent [Mr. Forliti] shall not provide instructions to Blue's medical or educational team without prior discussion with and agreement of the Petitioner [Ms. Davenport];
 - g) Each co-committee shall notify the other co-committee of appointment and meeting dates and times, and shall report the outcome of each appointment together with the relevant information pertaining to Blue's care, if the other co-committee does not attend the relevant appointment or meeting; and
 - h) Each co-committee will exercise their best judgment when hiring a caregiver to ensure that the caregiver is properly qualified and able to properly care for Blue. The other co-committee will be provided with the name and qualifications of the caregiver.
- [14] The three-week parenting time schedule which was established in the 2009 order, and which was continued by Mr. Justice Skolrood is as follows:
- a) Week 1: Blue resides Sunday to Wednesday with Mr. Forliti; Wednesday to Thursday with Ms. Davenport; and Thursday to Sunday with Mr. Forliti;
 - b) Week 2: Blue resides Sunday to Thursday with Ms. Davenport; and Thursday to Sunday with Mr. Forliti; and
 - c) Week 3: Blue resides Sunday to Sunday with Ms. Davenport.

III. EVENTS SINCE THE FINAL ORDER

- [15] The major events leading to the current applications are set out below.
- [16] Blue turned 19 in October 2016; however, he continued to attend and receive care in the public school system until June 2017.
- [17] Upon Blue turning 19, his care and funding transferred to different agencies. In addition to care from his physicians, he now receives care and assistance through Health Services for Community Living ("HSCL"), and funding and programming assistance through Community Living British Columbia ("CLBC").
- [18] Starting in the spring of 2017, funding for caregivers became available through CLBC for Blue. The parties worked with CLBC to select caregivers for Blue to start after June 2017, when Blue was no longer attending public school.

- [19] In choosing caregivers for Blue, the parties had two options. One option was the parties would select an agency, CLBC would pay funds to the agency, and the agency would be responsible to provide the caregivers. The other option was CLBC would pay funds directly to the parties, and the parties would be responsible to privately hire caregivers for Blue (the "individualized funding model"). The individualized funding model is now sought by Ms. Davenport, with her administering the funds. She originally sought an order that the Public Trustee administer these funds, but withdrew that portion of the application when the Public Trustee objected.
- [20] The parties selected the former option, not the individualized funding model, and hired an agency, Swan Community Services ("Swan") in July 2017 to provide caregivers for Blue. Because of Blue's complex care needs, caregivers must be trained to look after him, and the training takes time.
- [21] There is conflicting evidence as to what happened once Swan was hired. Mr. Forliti filed his own affidavit along with the affidavits of Ms. June Hewko, the owner of Swan, regarding services offered by Swan and the attempts Swan made to have caregivers trained in Ms. Davenport's home and Mr. Forliti's home. Ms. Davenport filed affidavits giving contrary evidence.
- [22] Mr. Forliti says that in conjunction with Swan, he selected caregivers and in the summer of 2017 spent time training them. Mr. Forliti is a school teacher, was off work for the summer, and so could be home to train the caregivers. He says they were adequately trained.
- [23] Swan also arranged for a different caregiver to go to Ms. Davenport's home to be trained by her. Unfortunately, Blue was sick much of the summer and Ms. Davenport cancelled approximately 12 sessions of training because of Blue's illness. The parties disagree whether training should take place when Blue is sick. Ms. Davenport believes this is not a good time to train and Mr. Forliti thinks otherwise. A caregiver only attended Ms. Davenport's home for a total of three hours. Ms. Davenport was dissatisfied with Swan and feels the Swan workers in Mr. Forliti's home were not adequately trained. She also had other concerns, for example, she was not immediately provided with the contact information and qualifications of the caregivers in Mr. Forliti's home, something she was entitled to under the Final Order. She also says no adequate care plan and information sharing protocol was put in place.
- [24] Mr. Forliti says that on September 17, 2017, after he had returned to work as a teacher, Ms. Davenport unilaterally fired Swan without discussion with him. Ms. Davenport agrees she terminated Swan's contract, but says that prior to doing so, she had communicated extensively with Mr. Forliti about her concerns. The exact date Swan stopped providing services is unclear on the material, but it appears to be sometime in October 2017.
- [25] Ms. Davenport made this decision pursuant to paragraph 1(b)(ii) of the Final Order which states:

In the event that the parties cannot reach agreement on a significant decision despite their best efforts, Ms. Davenport will be entitled to make those decisions[.]

[26] The termination of Swan's contract caused CLBC to cease funding.

[27] Following the termination of Swan's contract, Mr. Forliti no longer had caregivers to come into his home when he was not there. This put Mr. Forliti in an impossible position because he could not quit his job as a teacher, but he now had no one trained to look after Blue.

[28] This began a 10-month period where, other than school vacations, Mr. Forliti only saw Blue on the two weekends allotted to him within the three-week schedule, contrary to the schedule continued by the Final Order. He had no ability to train and hire new caregivers during this time. He calculates that he lost almost 60 days of Blue living with him.

[29] At the end of May 2018, CLBC decided to reinstate caregiver funding for Blue in Mr. Forliti's home despite that Ms. Davenport was in disagreement with Mr. Forliti's request. In its letter advising that it was reinstating funding, CLBC noted paragraph 1(h) of the Final Order which includes:

Each party will exercise their best judgment when hiring a caregiver to ensure that the caregiver is properly qualified and able to properly care for Blue.

[30] CLBC also noted the following passage from Mr. Justice Skolrood's reasons regarding Ms. Davenport's final decision-making authority:

[254] In concluding that person should be Ms. Davenport, I want to stress that this is not a licence for her to impede Mr. Forliti's access to Blue or to impose her views as to what should and should not happen when Blue is in Mr. Forliti's care. To ensure that Mr. Forliti continues to play a central role in Blue's life, he will continue to have joint custody and joint guardianship of Blue as set out in the 2009 order.

[31] CLBC also quoted from para. 260 of the reasons:

[260] In my view, to remove or diminish Mr. Forliti's involvement in Blue's life is not warranted and is not in Blue's best interests. Indeed, I find that it would be detrimental to Blue's best interests.

[32] Mr. Forliti renewed his working relationship with Swan and he once again started to search for and train caregivers over the summer of 2018.

IV. APPLICATIONS

A. Mr. Forliti's Application

[33] On August 8, 2018, Mr. Forliti filed a notice of application seeking the following orders:

- a) variation of the Final Order so that Blue resides with each parent on a rotating schedule of eight days with Ms. Davenport and six days with Mr. Forliti;

- b) variation of the Final Order so that in the event the parties cannot reach agreement on a significant decision despite their best efforts, the parties shall engage in "binding mediation" and jointly share the costs;
 - c) Ms. Davenport abide by the Final Order by engaging in discussions in good faith with regard to decisions regarding the care of Blue; and
 - d) Ms. Davenport be fined for failure to comply with the Final Order.
- [34] Mr. Forliti filed his application in August 2018 partly because he was not certain whether Ms. Davenport would abide by the Final Order and permit Blue to reside at Mr. Forliti's home with the Swan caregivers when he had to return to work in September 2018. When September came to pass, the three-week schedule that had been frustrated a year earlier resumed, and Blue has resided with Mr. Forliti and Ms. Davenport in accordance with the Final Order since that time. When Mr. Forliti is at work, Swan provides caregivers in his home to look after Blue.

B. Ms. Davenport's Application

- [35] Ms. Davenport opposes each of the above orders, and also argues that the issues are not appropriate for determination in chambers on affidavit evidence. Despite this, on September 6, 2018, Ms. Davenport also filed a notice of application seeking the following orders:
- a) variation of the Final Order so that Blue resides with the parties on a rotating schedule of every weekend with Mr. Forliti, and the remaining time with Ms. Davenport;
 - b) variation of the Final Order so that Mr. Forliti is not permitted to attend any scheduled medical, therapeutic and equipment appointments regarding Blue. Supplemental to this she seeks eight additional orders: detailing the process by which Mr. Forliti may obtain information from such appointments; that the parties follow the advice of Blue's care team; that in the event of conflicting advice that Ms. Davenport shall determine what advice shall be followed; and that both parties will seek medical treatment and administer first aid to Blue when it is required;
 - c) eight further orders concerning various issues in dispute between the parties concerning Blue's care such as disclosure of the impact of medication, strictures regarding communication between the parties, and child support payments;
 - d) Ms. Davenport is entitled to proceed with the individualized funding model of care for Blue, with her to be responsible for hiring, training and coordinating care providers for Blue in both households;
 - e) by March 31, 2019, the parties exchange their views regarding end-of-life decisions for Blue;
 - f) Mr. Forliti be fined for alleged breach of the Final Order; and

- g) the court provide judicial case management including a judge seized of the matter on an interim basis.

V. ISSUES

[36] The issues to be determined are:

- a) Is there authority to vary the Final Order, and if so, what is the applicable threshold for doing so?
- b) Is it appropriate to decide the issues in chambers on affidavit evidence?
- c) If it is appropriate to decide the issues in chambers, has the threshold been met for varying the Final Order, and if so should the Final Order be varied?

VI. JURISDICTION AND THRESHOLD TO VARY THE FINAL ORDER

[37] No appeal was filed from the Final Order.

A. Jurisdiction

- [38] The PPA provides for the appointment, and the rescission of the appointment, of a committee (s. 6). The PPA also provides for terms that may be attached to the exercise of a committee's powers (s. 16). However, the PPA is silent on an application to vary those terms, or any threshold to be met if there may be variation.
- [39] This silence gives rise to a legislative gap with respect to a variation of the conditions or restrictions on a committee's powers. As the Court noted in *Temoin v. Martin*, 2011 BCSC 1727 at para. 47, aff'd 2012 BCCA 250, the court's *parens patriae* jurisdiction can only be exercised where legislation has not "occupied the field", where "the exercise would not conflict with the governing statute", and where there is "a gap in the legislative framework that provides for the protection of incompetent persons". I find there is such a legislative gap here and, on that basis, I find there is authority within the *parens patriae* jurisdiction of this Court to make a variation order if necessary to protect Blue.
- [40] The *parens patriae* jurisdiction must only be exercised in the best interests of Blue: *Temoin* at para. 47.

B. Threshold for Variation

- [41] As Mr. Justice Skolrood has already determined what is in the best interests of Blue, the next issue is what, if any, threshold must be established for the Court to consider variation of the Final Order.

- [42] Counsel for Ms. Davenport and Mr. Forliti were unable to locate any case authority on varying terms of a committeeship, or the appropriate threshold to apply. Counsel for Ms. Davenport argues the test should be what is in the best interests of Blue. A change in circumstances should also be required, but softer than a material change in circumstances. Mr. Forliti did not address this specifically, but argues there was a material change in circumstances.
- [43] There are parallels between situations to which the FLA applies and the PPA applies. Under both Acts, parenting or committeeship orders are prospective, may have effect for many years, and within that time period there may be changes in the circumstances of the parties and their children or the patient which may require a previous order to be varied. In the case of parenting orders, s. 47 of the FLA provides that the Court may vary an order if there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person. This has been interpreted as requiring a material change in circumstances: *Williamson v. Williamson*, 2016 BCCA 87 at para. 31. In my view, the same test should apply to varying terms of a committeeship. Although the material change threshold is primarily a family law concept, the rationale for it applies with equal force in the present context.
- [44] The decisions in *Bell v. Hagger*, 2009 BCSC 327, and *Bell v. Hagger*, 2013 BCSC 1606, reinforce my view. I sought further submissions from the parties on these cases. Counsel for Ms. Davenport made further submissions, and Mr. Forliti did not. Ms. Davenport argues that the decisions may have been made under the family law legislation then in effect rather than under the PPA. I agree that is possible.
- [45] In *Bell v. Hagger*, 2009 BCSC 327, the father of a severely disabled adult sought to vary an order which appointed the mother sole committee and provided the father with limited access to his son. The Court stated at para. 48 that "[a]ny application to vary a final order must be based on a material change of circumstances". See also *Bell v. Hagger*, 2013 BCSC 1606 at paras. 6-7.
- [46] It is not entirely clear in the Bell cases whether the variation applications were made under the PPA or under the family law legislation then applicable. In *Bell v. Hagger*, 2009 BCSC 327 at para. 15, the Court noted that the matter had been converted to a family law proceeding in order to remedy "some of the procedural issues associated with the access issue arising within the context of the petition seeking orders relating to the appointment of committees". The judgments are styled as "In the Matter of the Patients Property Act, R.S.B.C. 1996, Chapter 349", and they address applications to vary an order affecting an adult child. The factual similarities between the Bell cases and the case at bar suggest that the threshold for variation applied in the Bell cases should apply here as well.
- [47] In *Williamson*, the court said the following about the material change test:

- [32] The first step in the analysis set out in *Gordon v. Goertz* is to "determine whether there has been a material change in circumstances since the making of the prior order": *Boychuck* at para. 14. The Court in *Gordon* explained what is necessary to establish a material change in circumstances:
- [11] The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued....
- [12] What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.
- [Emphasis in original.]
- [33] At para. 13, the Court summarized what the applicant must establish before proceeding on the merits of the application:
- [13] It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
- [48] The rationale for the material change threshold applies in the present circumstances. There was no appeal taken from the Final Order. If the material change threshold were not to apply, the parties could attempt to circumvent the appeal procedure by applying to vary the Final Order until they received an order to their satisfaction.

VII. SUITABILITY FOR DETERMINATION IN CHAMBERS

- [49] Ms. Davenport's counsel argues that the determination of these applications is not appropriate for chambers because there is conflicting affidavit evidence, and that at least the parties should be cross-examined on their affidavits. She says credibility and facts are in dispute. Her client does not want another trial, and says this matter is better suited to some form of mediation or arbitration. However, she says another trial may be necessary.
- [50] Mr. Forliti says the applications are appropriate for chambers but he did not give detailed reasons why this is so. He does not want another trial.

- [51] Counsel for Ms. Davenport argued that the court should take guidance from cases such as *MacCathy v. MacCarthy*, 2014 BCSC 2229, aff'd 2015 BCCA 496, a summary trial application in a family law case after a conventional trial, in determining whether this matter should be heard in chambers. Neither Ms. Davenport nor Mr. Forliti bring this application under the summary trial procedure. There has already been a full trial.
- [52] The current applications are made in the context of an underlying petition, which is a summary proceeding. However, that petition was heard as part of the trial before Mr. Justice Skolrood. The history leading to this was that on January 16, 2015 this court ordered that the family law matter be set for trial and that any committee application be heard at the same time. Pursuant to that order, on November 13, 2015 Ms. Davenport filed a petition for an order appointing her committee of the estate and person of Blue. Although there is not an order specifically referring the petition to the trial list and converting it to an action, that is in effect what took place. There has already been a full trial concerning the appointment of the committees and the terms of the committee. It is in this context that both parties filed a notice of application within the petition.
- [53] Under Rule 22-1(4) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, the court may order cross-examination of an affiant; and under Rule 22-1(7)(d) the court may order a trial of a chambers proceeding.
- [54] The initial threshold question the court must determine is whether there has been a material change in circumstances. The record includes the detailed decision of Mr. Justice Skolrood and substantial evidence from the parties of events and allegations both before and after his decision. As discussed below under each order sought, I have found that with respect to almost all of the allegations, in determining whether there has been a material change in circumstances, it is not necessary to make findings of facts on conflicting evidence. The parties' disagreements, allegations and arguments are not new. They were made before Mr. Justice Skolrood and for years prior to that. He made the Final Order knowing them. To the extent that the parties raise specific new factual allegations and argue that they are a material change in circumstances, I find that they either have been resolved, or there is already an existing mechanism within the Final Order to address them.
- [55] As discussed below, what would have been of assistance is some independent and expert evidence. Blue is significantly disabled. I am concerned only with his best interests, a significant and compelling interest, and not with the conflicts between the parties except to the extent those conflicts affect Blue.

VIII. HAS THERE BEEN A MATERIAL CHANGE IN CIRCUMSTANCES?

- [56] For the following reasons, I have concluded that neither party has established a material change in circumstances. I will address each of the orders sought by the parties. When the orders sought concern the same subject matter, I address them together.

A. Change in Schedule

- [57] Both parties seek to vary the schedule under which Blue resides with each of them. Mr. Forliti seeks an 8 day/6 day schedule, and Ms. Davenport seeks a weekday/weekend schedule.
- [58] Mr. Forliti says that at the time of the Final Order, Blue was in school and the time Blue lived with each parent was built, in part, around a school schedule. As Blue is no longer attending school, the schedule is no longer functional. He says this is a material change.
- [59] The Final Order actually considered that Blue would no longer attend school once he became an adult and transitioned to the adult care system. The fact that he has now transitioned cannot therefore be a material change in circumstances.
- [60] Mr. Forliti also argues that his proposed schedule would be beneficial to Blue because it is very difficult to hire caregivers to fit the current schedule. His schedule would make it easier to find, train, and keep caregivers who can become familiar and increasingly skilled with Blue. He also argues there would be fewer moves between the homes and there would be greater opportunities for Blue to have a larger social circle.
- [61] Ms. Davenport agrees the current schedule was based partly on the school schedule, but says there were other factors. She says Blue has an overnight with her mid-way through Week 2 of the schedule so she can check on his status. Ms. Davenport lives in the same home as Blue, and does not have a job outside the home as she spends most of her time caring for Blue. She argues that she is the best person to care for Blue and that when Mr. Forliti is working during the week, it is not in Blue's best interests to have someone other than a parent look after him. She therefore seeks an order that Blue only reside with Mr. Forliti during the weekends. Mr. Forliti could still have caregivers come during that time, but she would be assured that Mr. Forliti, who knows Blue better than the caregivers, would also be present to care for Blue. Mr. Forliti opposes this as it would reduce his time with Blue and would mean that he would not have any free weekends when he is already working outside the home.
- [62] Since at least 2009, Blue has been cared for by outside caregivers when in Mr. Forliti's home and when he and Ms. Forliti are not present. It was actually contemplated by the Final Order. It therefore cannot be a material change in circumstances.
- [63] The three-week schedule, which has been in place since 2009, was in issue before Mr. Justice Skolrood. At the time both parties wanted to vary it. Mr. Justice Skolrood declined to do so, finding it was in the best interests of Blue that it be continued. As seen from excerpts from the reasons, the same issues and allegations were argued by the parties then:
- [256] I turn now to the issue of parenting time and Ms. Davenport's submission that Mr. Forliti's time with Blue should be reduced and should be subject to supervision.
- [257] I reject both propositions.

- [258] Ms. Davenport's position is largely premised on her belief that Blue's health is endangered when he is in Mr. Forliti's care. However, as I have found, the evidence does not lead to that conclusion nor does it support Ms. Davenport's contention that it is in Blue's best interests that he reside primarily with her.
- [259] In terms of parenting time, Blue has had significant time in the care of Mr. and Ms. Forliti since well before the date of the 2009 order. Their home is Blue's home every bit as much as is Ms. Davenport's. I agree with Mr. Forliti's submission that Blue has two dedicated families both of whom have well-modified homes to meet Blue's needs.
- [260] In my view, to remove or diminish Mr. Forliti's involvement in Blue's life is not warranted and is not in Blue's best interests. Indeed, I find that it would be detrimental to Blue's best interests.
- [261] Mr. Forliti submits that parenting time with Blue should move to a 50/50 week on/week off schedule. While that has some intuitive appeal, particularly given the evidence about difficulties that often arise during exchanges, there was insufficient evidence as to how such a schedule would work in practice. There was also minimal evidence about how a change in Blue's current schedule would affect him.
- [262] Accordingly, the current schedule, established under the 2009 order, will continue.
- [301] The evidence presented in this trial demonstrates that Blue's interests are best served by having both families actively involved in his life. The careful balance that has been established by previous court orders and as modified by these Reasons should not suddenly be abandoned when Blue turns 19.
- [64] Both parties raise reasonable arguments regarding the schedule. There are a number of exchanges within the three weeks. It probably would be easier for Mr. Forliti to hire and retain caregivers if the schedule were closer to a week on/week off schedule. On the other hand, Mr. Forliti must rely on outside caregivers for part of the days during weekdays while he is at work, but a weekday/weekend schedule would reduce his parenting time. These were all considered by Mr. Justice Skolrood in determining what was in the best interests of Blue, and in my view, neither party has established a material change in circumstances.

B. The Funding Model of Care for Blue

- [65] Ms. Davenport seeks an order that the individualized funding model of care for Blue be implemented, with Ms. Davenport being responsible for hiring, training and coordinating care providers for Blue in both homes.
- [66] Ms. Davenport argues that the following are material changes in circumstances: Blue has now become an adult and there is a different funding model and fragmented care; Blue's health has deteriorated; and Swan (and Mr. Forliti) are not providing adequate care.
1. Blue is an adult and there is a different funding model

[67] The change in funding and transfer to the adult care system was known and actually contemplated at the time of the Final Order (see para. 39 of the reasons of Mr. Justice Skolrood, quoted at para. 6 of these reasons). There is no evidence of fragmented care that affects Blue's best interests. This is not a material change in circumstances.

2. Blue's health has deteriorated

[68] Ms. Davenport says Blue's health has significantly deteriorated since the trial. He had pneumonia in 2016 and 2017, although in the last year this has resolved. He had conjunctivitis and an infection in the skin near his ear. He had some resurgence of seizures in 2017, but those have now decreased. He has increased tone and secretions, increasing his risk of choking. His communication abilities have deteriorated. Mr. Forliti agrees Blue's health has deteriorated to a degree over the past couple of years.

[69] Ms. Davenport argues this change justifies her now making all the hiring and training decisions for both homes. Mr. Forliti disagrees.

[70] I accept the parties' evidence that Blue's health has deteriorated to some extent; however, no expert evidence was tendered by either of the parties with respect to Blue's health since the Final Order. Ms. Davenport argues that the Court has only seen a small portion of medical evidence that may bear on the issue. The Court cannot guess what that evidence might be. I partially allowed an application by her on the December hearing date to put in evidence the consultation report of one of Blue's treating physicians at a November 2018 appointment. (I disallowed her application to provide evidence concerning Mr. Forliti's behaviour at that visit.) Mr. Forliti consented to the report being tendered. There is nothing in that consultation report that would lead me to believe there has been a material change in Blue's health. It cannot be every decline in health is a material change in circumstances.

[71] More importantly, even if I were to accept the decline in his health is a material change in circumstances, there is a complete absence of any expert evidence based on those circumstances that would lead me to conclude that because of deteriorating health, it would be in Blue's best interests to require that Ms. Davenport be given complete control of hiring and training caregivers for both homes. This leads to Ms. Davenport's third argument, which is that Swan and Mr. Forliti are not providing adequate care.

3. Swan and Mr. Forliti are not providing adequate care

[72] The allegation that the Swan caregivers were not adequately trained and did not provide adequate care (and that Mr. Forliti continues to compromise care) is the most troubling of Ms. Davenport's allegations. The Court is concerned only with Blue's best interests, and that necessarily includes adequate and appropriate care.

- [73] Expert evidence is not required to establish that Blue is not receiving adequate care (for example, if there was obvious neglect). However, as noted previously, there is no expert evidence, and therefore no conflicting expert evidence, that Blue is not being adequately cared for in each home. There is solely Ms. Davenport's assertions, which Mr. Forliti vigorously denies.
- [74] The difficulty with Ms. Davenport's evidence is that she has for years made allegations that the care provided in Mr. Forliti's home is not adequate, yet Mr. Justice Skolrood found otherwise (see e.g. paras. 214-218, 252, 258, and 296). He reviewed the evidence of the many health care practitioners and other professionals who testified at the three-week trial, and found that Blue was well cared for in Mr. Forliti's home. He noted that there were over 20 reports to the Ministry of Children and Family Development over the years, the majority from Ms. Davenport and none of them resulted in child protection concerns concerning Mr. Forliti's care of Blue (see paras. 54-55).
- [75] The following paragraphs from the reasons are also applicable:
- [253] My conclusion that Ms. Davenport should have final decision-making authority is not based so much on the conduct of Mr. Forliti but rather on the practical reality that, at this critical juncture in Blue's life, there needs to be one person with the authority to make important decisions impacting his welfare and that Ms. Davenport is best situated to play that role.
- [254] In concluding that person should be Ms. Davenport, I want to stress that this is not a licence for her to impede Mr. Forliti's access to Blue or to impose her views as to what should and should not happen when Blue is in Mr. Forliti's care. To ensure that Mr. Forliti continues to play a central role in Blue's life, he will continue to have joint custody and joint guardianship of Blue as set out in the 2009 order
- [272] In my view, the best approach in the circumstances of this case is to simply order that the parties follow the advice and recommendations of Blue's medical and educational professionals and otherwise exercise their best judgment, in consultation with those professionals, when caring for Blue. In this regard, I note again the evidence of Ms. Leswal and Ms. Leland that they do not approve equipment used in either home but rather, they consult with the parents and make recommendations. However, it is up to the respective parents to choose what they wish to do with Blue, provided there are no safety concerns.
- [273] In addition to treatments, equipment and therapies employed by either parent, this term will also apply to any caregivers employed by one or both of them. More specifically, each will exercise their best judgment when hiring a caregiver to ensure that the caregiver is properly qualified and able to properly care for Blue. The other parent will be provided with the name and qualifications of the caregiver. Beyond this, however, I decline to impose the numerous and specific conditions sought by Ms. Davenport concerning the qualifications and training of any caregivers hired by Mr. Forliti.

[My emphasis.]

- [76] I accept that in Ms. Davenport's mind, she is the person best able to look after Blue, and that she believes Blue's care is compromised when he is not with her. I do not discount her concerns because, if true, they would affect the assessment of Blue's best interests. However, I am also mindful (apart from Mr. Forliti's disagreement with her assessment) that she has made these assertions for years, they were not accepted after a three-week trial, and that she may continue in the future to make these assertions. This is not to say that circumstances cannot change, and there cannot be legitimate concerns regarding Blue's safety and best interests. The task is distinguishing between those assertions that are based on legitimate safety concerns, and those that are the result of Ms. Davenport's continuing distrust of Mr. Forliti and the dysfunctional relationship between them.
- [77] Ms. Davenport has not filed any expert opinion that Blue's care is inadequate in Mr. Forliti's home. As noted previously, expert evidence is not required. However, given the history of Ms. Davenport's assertions which were not accepted by Mr. Justice Skolrood, it would have been helpful to have some independent and expert assessment of the situation.
- [78] I have considered carefully the specific facts sworn to by Ms. Davenport as opposed to her general conclusory opinions as to the level of care provided by Swan and Mr. Forliti in his home. I note that Ms. Davenport was not present for the training of the caregivers in Mr. Forliti's home, nor has she been in Mr. Forliti's home to view the care provided by Swan or Mr. Forliti. I also note that with respect to the Swan caregivers, Ms. Davenport's evidence only relates to events in the summer and through to October 2017. There is no specific factual evidence of any current issues with Swan's care.
- [79] I list below all of the specific factual allegations and general conclusory allegations Ms. Davenport makes about Swan's care and Mr. Forliti's care, grouped by topic.

Training

- [80] Ms. Davenport alleges that by mid-August 2017 after CLBC had hired Swan, there was no understanding or organization regarding how training was to progress. Ms. Hewko's affidavit sets out the 12 sessions of training at Ms. Davenport's home that Ms. Davenport cancelled. Ms. Hewko's affidavit also sets out some of the training that took place at Mr. Forliti's home. Ms. Davenport asserts that the time period from when CLBC released funding, to when Mr. Forliti returned to work in September 2017, was not sufficient to fully train new caregivers for Blue.
- [81] Ms. Davenport states the "staff were not fully trained by someone who completely understands and accepts Blue's various diagnoses and recommended care plan and symptoms management, including being able to read and respond to Blue's non-verbal cues and report them accurately". What she is saying indirectly, is that the person who has those qualifications is her and not Mr. Forliti. Ms. Davenport disagrees with Mr. Forliti that he has trained the caregivers well. She says this cannot be true given the limited training periods and lack of familiarity of the caregivers, in addition to Mr. Forliti's "oppositional views about

Blue's diagnoses and non-verbal health cues". Ms. Davenport was not in Mr. Forliti's home, so she cannot state what training was done and what familiarity the caregivers had.

- [82] Her view of Mr. Forliti's abilities was the same at the trial before Mr. Justice Skolrood (see e.g. para. 252), and despite that, Mr. Justice Skolrood ordered that each party was able to use their best judgment to hire and train caregivers in their respective homes. This justification for her general conclusory opinion that there was inadequate training is not a material change in circumstances, but rather, is a continuation of her long-held belief that she provides the best care for Blue and his care is compromised when he is not with her. She has no specific knowledge of the training that took place in Mr. Forliti's home.
- [83] Ms. Davenport had a number of specific factual complaints regarding caregivers prior to Swan, and Swan caregivers in September and October 2017.
- a) During the period from January 2016 to June 2017, Mr. Forliti had hired three caregivers for Blue. She had to show these three caregivers how to load Blue into a vehicle "as they were clearly confused about how to secure his wheelchair properly".
 - b) On September 7, 2017, a caregiver (Worker A) strapped Blue into the van in a backward slanted position and could not tell that Blue was struggling with his airway and ability to swallow/drain in that position. Ms. Davenport explained this was potentially dangerous and had the worker secure Blue in a different position.
 - c) On September 20, 2017, Blue was returned to her care by a caregiver (Worker B) who said Blue was fine when Ms. Davenport thought he had a temperature, and nausea and congestion. Wheelchair parts were missing and the wheelchair was dirty.
 - d) When she asked Worker B regarding Blue's tone on October 11, 2017, the worker kept asking her what she meant by tone and did not appear to understand how tone and the poor management of it reflected on Blue's overall status, nor was she aware of a health checklist.
 - e) Worker B did not properly secure Blue's wheelchair in the van during the October 11, 2017 exchange, so Ms. Davenport showed her how to do it.
- [84] These are concerning matters. However, I also consider that training takes time, and that the caregivers were corrected by Ms. Davenport, and that these events took place 1.5 years or more ago. There is no evidence of specific factual concerns with respect to the current Swan caregivers.
- [85] Further, the allegations are not new. In an affidavit filed on an application prior to the trial before Mr. Justice Skolrood, she made a similar allegation concerning another caregiver in Mr. Forliti's home. Despite her concerns, Mr. Justice Skolrood ordered that each party was to exercise their best judgment when hiring a caregiver to ensure that the caregiver is properly qualified and able to properly care for Blue.

- [86] Mr. Forliti acknowledges it would be ideal to have the same caregivers in each home, and that the caregivers would benefit from training from Ms. Davenport. However, he argues this is impossible because Ms. Davenport interrogates the caregivers about what happens in his home. Mr. Forliti argues that Ms. Davenport wants to control what goes on in his home and micro-manage his care of Blue. It is evident from the paragraphs from the reasons of Mr. Justice Skolrood referred to above, that this conflict was anticipated by him and was a factor in making the orders he did.
- [87] In summary, the general conclusory opinions are made without personal knowledge of the training that did take place, and are based on Ms. Davenport's beliefs regarding Mr. Forliti's abilities, which were not accepted by the trial judge. The specific factual allegations made by Ms. Davenport have been addressed, and are 1.5 years old. There is no evidence of current specific factual concerns. In my view, Ms. Davenport has not established a material change in circumstances.

Care plan and information sharing

- [88] Ms. Davenport says there was no adequate care plan in place in 2017 and no method of sharing information, nor had there been agreement between her and Mr. Forliti as to what should be shared. As one of the two persons with the greatest knowledge of Blue, there is no evidence from her of any significant steps she took in 2017 to help remedy the situation if she did not think the care plan was adequate. There is incomplete evidence of the current care plan with Swan. If Ms. Davenport is still concerned, as Blue's case manager, she can remedy this situation by working with Mr. Forliti and Swan, the CLBC, the HSCL, and other health care practitioners involved to create a more fulsome care plan and sharing of information. This is not a material change in circumstances, and there is a mechanism within the Final Order to do what she desires.
- [89] Because Ms. Hewko has sworn an affidavit contrary to her, Ms. Davenport is concerned how this will impact Blue's care and wellbeing as she feels there is little realistic opportunity for an exchange of information between the two households when Swan staff are involved. I agree that Ms. Hewko and Ms. Davenport have filed contrary affidavits. However, Swan is expected to provide an appropriate level of care regardless of their relationship with Ms. Davenport. There is no evidence that Ms. Davenport has attempted to communicate with Swan regarding a more fulsome care plan and sharing of information since Swan's services were reinstated in 2018.
- [90] Ms. Davenport states that Mr. Forliti is not giving her information about the procedures and policies that are being followed while Blue is in his home. She says it is important that there is continuity of care between the two homes, and without knowing the detail of what Mr. Forliti is instructing his caregivers, this is nearly impossible. However, she also says that the absence of a consistent method of tracking health information has been an issue and a source of disagreement for years. Despite that, she and Mr. Forliti have relied on the court-ordered communication guidelines for exchange of important details and have done so over

the years.

- [91] I agree information sharing between the households is important. However, information sharing between the parties concerning Blue is not a new issue. Mr. Justice Skolrood commented that they were not new in 2016 and did not then constitute a change in circumstances that would meet the threshold to change the 2009 order (see para. 240). I similarly do not find they constitute a material change in circumstances now.

Contact information of caregivers

- [92] Ms. Davenport was not immediately given the caregivers' contact information. This was a breach of the Final Order, but it was remedied. It appears Swan was not sure of its obligations when releasing personal information of employees.

Feeding pump

- [93] Ms. Davenport states there has been an issue regarding the use of Blue's feeding pump for many years. Mr. Forliti had not in the past always been using the pump but was syringe feeding. It was an issue at the trial (see para. 148). It therefore cannot be a material change in circumstances. In any event, Mr. Forliti advised the Court at the hearing that he is now using the pump for feeding, so the issue appears to be resolved, although I note the parties are now arguing about the exact proportions of formula versus pureed food. I do not consider this a material change in circumstances.

Bruises and abrasions, poor health, unclean equipment

- [94] Ms. Davenport states that between 2009 and 2017 Blue often returned to her with bruises and abrasions, poor health, physically unclean and with unclean equipment. She says there have been times when medications were not given. She says this has all been well documented for years. This was raised in the trial leading up to the Final Order (see paras. 52, 219), and is not a new allegation, and is not a material change in circumstances. She does not say it has worsened since the Final Order.
- [95] Ms. Davenport makes the following specific factual allegations that have occurred since the Final Order:
- a) She alleges a caregiver sometime in January 2017 was unable to tell that Blue had the flu. At some point later, Blue tested positive for the flu virus.
 - b) She alleges that in June 2017 Blue had aspiration pneumonia, which she attributes to being left alone with a new caregiver. I note that Blue also had aspiration pneumonia in March 2016 and September 2016.
 - c) She says Blue has returned to her care with pink-eye several times and an ear abscess and viral illnesses.

[96] In my view, none of these, without expert evidence showing for example that the pneumonia or other illnesses were a result of poor care in Mr. Forliti's home, are material changes in circumstances.

Conflict at medical appointments and regarding care

[97] Ms. Davenport gives examples of events since the Final Order where there has been disagreements or arguments between her and Mr. Forliti at medical appointments.

- a) Dr. Hui, Blue's physiatrist recommended a referral to a urologist. The parties disagreed whether Blue had certain symptoms. I note this does not make either party wrong - they may simply observe different things, but Ms. Davenport alleges this is Mr. Forliti giving wrong information. Dr. Hui recommended a referral to a urologist. She says Mr. Forliti "became escalated". Ms. Davenport says Mr. Forliti did not agree to the referral, but did not disagree either. They are awaiting an appointment.
 - b) Ms. Davenport says Mr. Forliti threatened legal action against Dr. Randhawa's office regarding a cannabinoid trial. This is hearsay and Mr. Forliti denies this. However, Ms. Davenport also says Mr. Forliti and she recently attended Dr. Rhandawa's office, and although Mr. Forliti did not agree to some products, he agreed to follow the recommendations of Dr. Randhawa.
 - c) She states that at an appointment with Dr. Squires, Mr. Forliti became aggressive and obstructive. She said "this behaviour has occurred at appointments for years".
 - d) She states at an appointment with Dr. Diggle, Mr. Forliti talked over her and made accusations that she had not provided him with information about Blue's new medical team. Dr. Diggle recommended a cannabinoid trial and Mr. Forliti agreed to it.
- [98] Since the Final Order, the HSCL care team attempted to have a meeting with Ms. Davenport and Mr. Forliti to address communication issues, but Ms. Davenport refused to attend. She states that because of past abuse, she feels someone attempting to mediate would have to have "full mediation training, including training regarding power and control and the dynamics of abusive relationships", and she therefore refused.
- [99] Ms. Davenport says there has been a conflict with Mr. Forliti during hospitalizations - for example, Mr. Forliti will instruct the nurses differently than her with regard to medications, needles and feeding. Ms. Davenport states, "Many of the things that Mr. Forliti currently opposes are the same as those opposed since Blue's infancy. He routinely ignores my final decisions and repeats his arguments regularly - sometimes decades-old arguments." If that is true, then Ms. Davenport already has the authority within the Final Order to have the final say on significant decisions concerning Blue. Further, Mr. Forliti has already been ordered to follow the advice and recommendations of health care professionals, and not to provide instructions to Blue's medical or educational team without prior discussion with Ms. Davenport.

[100] The conflict between the parties, and the allegations concerning Mr. Forliti's behaviour at appointments, has been ongoing for years prior to the Final Order. Mr. Justice Skolrood made the Final Order knowing this (see paras. 68-69 and 123). The ongoing conflict is not a material change in circumstances.

C. Summary

[101] In my view, Ms. Davenport has not established there has been a material change in the circumstances since the Final Order. Her complaints regarding Mr. Forliti are substantially the same as they have been for years prior to the Final Order.

[102] Allegations concerning the competency of caregivers are serious. However, the specific factual concerns identified by Ms. Davenport were corrected by her and are concerns that are 1.5 years or more old. As Blue's case manager, she has the opportunity now to have input into Swan's care through care plans and information sharing.

[103] The Court is concerned only with the best interests of Blue. If either party were to establish that Swan or any other caregiver or parent is not providing adequate care, that would be a material change in circumstances, and it would be in Blue's best interests to re-evaluate the situation. If either party were to establish that the ongoing conflict between the parties was affecting Blue's best interests, it may also be necessary to re-evaluate the situation. However, given the facts (as opposed to conclusory opinions) which Ms. Davenport has sworn to, I am not persuaded there has been a material change in circumstances. In the future, should either party have evidence and, given their history, preferably independent or expert evidence, that Blue's best interests are being compromised by inadequate care in either home, they have the right to bring a further application.

IX. OTHER MATTERS

A. Resolving Disputes by "Binding Mediation"

[104] Mr. Forliti seeks an order that in the event the parties cannot reach agreement on significant issues regarding Blue's care despite their best efforts, the parties shall engage in "binding mediation" and jointly share the costs. During the hearing, he described what he envisioned by this. He means a process similar to a parenting coordinator who is given authority to determine certain issues.

[105] Mr. Forliti argues that Ms. Davenport is not abiding by the Final Order and instead of discussing issues with him in good faith, refers everything to her lawyer. He says there are then delays because Ms. Davenport's counsel does not immediately respond.

[106] The parties previously had parenting coordinators. It was a failure. This was addressed by Mr. Justice Skolrood. After detailing the evidence of the parties as to their experiences with the previous parenting coordinators (at paras. 76-82 and 102-106), Mr. Justice Skolrood concluded:

- [224] I agree with Mr. Forliti that the more regular involvement of a parenting coordinator would have been of some assistance to the parties. It is also apparent on the evidence that the use of the parenting coordinators came to an end due to Ms. Davenport's failure to participate fully in the parenting coordination process.
- [225] However, I am also of the view that Mr. Forliti overstates the role of the parenting coordinator and the ability of a parenting coordinator to resolve all issues between the parties. That process can only succeed if there is a common desire on the part of the parents to find solutions that are in the best interests of Blue, something that is sadly lacking in this case.
- [107] Mr. Justice Skolrood ordered that the 2009 order be varied so that the term ordering a parenting coordinator be deleted (see para. 280).
- [108] The crux of the disputes is the parties' failure at communication, their differing views of what is best for Blue, and the enmity they feel toward each other. This is nothing new; it has been ongoing for 20 years. This is not a material change in circumstances.

B. Other Orders Regarding Conduct and the Care of Blue

- [109] Ms. Davenport first seeks a set of orders which will prevent Mr. Forliti from attending any medical, therapeutic and equipment appointments with Blue's caregivers. She seeks orders that:

Paragraph 1(e) of the Final Order shall be deleted and replaced with the following:

1. In advance of scheduled appointments, the Petitioner shall notify the Respondent of the issues she expects to be addressed at the scheduled appointment.
2. The Respondent shall be at liberty to provide a list of questions, comments and concerns for the scheduled appointments at least 24 hours before each of the scheduled appointments;
3. The Petitioner shall produce a list of all of the Respondent's questions, comments and concerns to the relevant professional(s) at or before the relevant scheduled appointments;
4. The parties shall instruct the medical, therapeutic and equipment caregivers for Blue to provide a written summary of the clinical notes, treatment plan, prescriptions or recommendations following the scheduled appointments ("written summary").
5. By no later than the next exchange time, the Petitioner shall provide a copy of the written summary to the Respondent arising from each scheduled appointment.
6. The parties shall both follow the advice and recommendations of all members of Blue's care team, and shall provide all prescribed medications to Blue as prescribed, and in the event that conflicting advice or recommendations are made, the Petitioner shall determine what advice and recommendations are followed;

7. The parties shall both seek urgent or emergency treatment for Blue when it is required;
8. The parties shall administer first aid for Blue when it is required.

[110] In addition, Ms. Davenport seeks the following orders be added to the Final Order:

- a. That the Respondent shall be required to provide the Petitioner with notice upon the Respondent having only 4 days' supply of medication for Blue, and to provide the Petitioner with medication bottles for refill;
- b. Upon request, the Respondent shall provide the Petitioner with comprehensive and timely disclosure regarding the impact of medication changes on how Blue presents (including cannabinoid treatment);
- c. In the event that Blue attends the hospital, either in the emergency room or upon admission, as soon as reasonably practicable, the parent attending the hospital with Blue shall notify the other parent of the hospital attendance and shall provide a copy of the order made April 26, 2016 and this order to nursing staff involved in Blue's care;
- d. In the event that Blue attends the hospital, either in the emergency or upon admission, the Petitioner shall be at liberty to intercede with hospital staff in regards to Blue's care and to take steps that are in Blue's best interests, regardless of whose parenting time it is;
- e. All written communication between the parties must be about Blue and must refrain from personal attacks;
- f. Upon request, the Respondent shall provide the petitioner with further details and clarifying information regarding Blue and his conditions;
- g. The Respondent shall not verbally communicate with the Petitioner;
- h. On or before January 1, 2019, the Respondent shall provide the Petitioner with a series of twelve post-dated cheques representing child support payments for the year, and by January 1st of every year thereafter, for so long as child support payments are required.

[111] Ms. Davenport argues Mr. Forliti has not complied with the Final Order. She repeats her previous arguments and evidence and says: he does not communicate respectfully with her and is verbally abusive; he does not follow recommendations of health care providers (e.g., she said he did not apply eye ointment); he is confrontational and aggressive in medical appointments and with caregivers (e.g., the cannabinoid trial); he gives instructions to health care providers contrary to the Final Order; and he does not allow her to communicate with third-party caregivers. Ms. Davenport says she is struggling with the ongoing conflict.

[112] Although not in an affidavit, Mr. Forliti disagrees with these allegations in his submissions. He agrees he has been agitated at some meetings with medical professionals but it is because Ms. Davenport purports to speak for him or will do things such as muttering "he's lying" under her breath while he is talking. He denies he has not given treatment. He denies

threatening caregivers. He says Ms. Davenport is trying to dictate care in his home. For example, if she has a few minutes of FaceTime with Blue while in Mr. Forliti's care she will then tell Mr. Forliti what Blue's condition is. He says the orders sought by Ms. Davenport are an attempt to get him out of Blue's life. Mr. Forliti also says he is struggling with ongoing conflict.

- [113] The same or similar allegations with the same underlying cause (disagreement on what is best, distrust, enmity, disrespectful communications) were before Mr. Justice Skolrood. For example, Ms. Davenport complained he was abusive at exchanges (see para. 60) and aggressive at hospitalizations and medical appointments and gave physicians information contrary to what she observed (see paras. 65, 68-70, and 123). She alleged that he did not provide fulsome enough information and would impede her speaking to outside caregivers at his home concerning Blue (see paras. 71-72 and 113-115). She alleged he refused to consent to recommended treatments (see para. 75). She alleged he was not respectful in communications with her (see paras. 123 and 274-279).
- [114] Ms. Davenport also sought specific orders before Mr. Justice Skolrood, although the details of those are not in the reasons. I refer to the following paragraphs of his reasons which concern orders sought by Ms. Davenport with respect to communication, who should make medical decisions, and care of Blue:
- [240] Blue's needs and the parties' communication problems are not new issues and do not constitute a change in circumstances as contemplated in cases such as L.M.P. and Dedes. Indeed, those very issues were well-known to the parties at the time the 2009 order was issued and are addressed in that order.
- [241] Moreover, the evidence has not established that Blue's interests have been harmed because of the parties' inability to communicate or as a result of any actions taken, or not taken, by Mr. Forliti. While it is true that on occasion there have been delays in moving forward with certain treatments due to Mr. Forliti wanting to explore alternatives, I do not find that Blue has been harmed by these delays as alleged by Ms. Davenport. Rather, I accept the evidence given by the majority of Blue's treating professionals, in particular Ms. Leswal, Ms. Chowne and Ms. Leland, that Blue is well cared for by both parents.
- [266] Ms. Davenport submits in the alternative that, if supervision is not required, the court should impose detailed conditions governing Mr. Forliti's time with Blue. In this regard, she provided a draft order setting out over 20 terms intended to control virtually every aspect of Mr. Forliti's time with and care of Blue. The draft order also addresses interactions with professionals. For example, it provides that Ms. Davenport will have sole responsibility for obtaining information from Blue's caregivers, such as teachers, medical professionals and community supports.

- [267] I decline to impose the terms sought. To my mind, the level of detail proposed by Ms. Davenport again reflects her lack of trust in Mr. Forliti and her belief that only she knows best how to care for Blue. Further, it is an attempt to, in effect, impose supervision on Mr. Forliti but without a supervision order.
- [268] Moreover, rather than reducing the likelihood of conflict between the parties, as submitted by Ms. Davenport, the degree of micro-management sought to be imposed by her is, in my view, a recipe for continuous disputes between them. That has been the pattern of behaviour to date by both parties as each has accused the other of breaching the terms of previous orders.
- [269] Further, the evidence again of Blue's treating professionals is that although the parties have different approaches to caring for Blue, they are both committed to his well-being. While Ms. Davenport has had concerns about bruising and other marks on Blue which she attributes to exercises and other treatments utilized by Mr. Forliti, she acknowledges that these concerns have lessened in recent times with the regular involvement of Ms. Leswal.
- [270] Lastly, it bears noting that the 2009 order in particular included detailed terms for the care of Blue, many of which were intended to address Ms. Davenport's concerns. Despite this, the acrimony between the parties has continued largely unabated.
- [271] The problem is not with the court's order. What this case illustrates is that no matter how many court orders are issued and no matter how detailed the terms, the court cannot regulate the behaviour of people who are too stubborn, too entrenched in their respective positions and too blinded by their hatred and mistrust of one another to step back and put the interests of their child first.
- [Emphasis added.]
- [115] In my view, Ms. Davenport has not established that any of these complaints is a material change in circumstances since the Final Order, and I decline to make the detailed orders she seeks. Further, there is no expert or medical evidence that Blue's care has been compromised by the ongoing conflicts. Despite the ongoing conflicts, Mr. Justice Skolrood ordered that it is in Blue's best interest to have the active involvement of both parents.
- [116] I also agree with Mr. Justice Skolrood that further orders detailing behaviour are unlikely to resolve the issues. Further, some orders sought would already be addressed by the Final Order. For example, in my view, the obligation in the Final Order to provide information regarding illness includes prompt notification of hospitalization; the obligation in the Final Order to exchange information includes the impact of a significant new medication.

- [117] Finally, I do not condone poor behaviour by either party. I remind them of the terms of the Final Order which they must follow. The Final Order mandates respectful and good faith communications, the need for prompt and detailed sharing of information concerning Blue's condition, the right to receive information directly from third-party caregivers, and the obligation to follow the recommendations and advice of Blue's care team or otherwise exercise their best judgment in Blue's best interests.
- [118] Repeated failure to comply with the Final Order may amount to a material change in circumstances (see *Friedlander v. Claman*, 2015 BCSC 2409 at paras. 77-82; *aff'd* on this point 2016 BCCA 434 at paras. 67-73), but I am not persuaded on the material filed on these applications, that there has been such a change to date.

C. Ms. Davenport's Compliance with the Final Order

- [119] Mr. Forliti submits that Ms. Davenport has failed to comply with the Final Order. Specifically, he argues that Ms. Davenport has failed to engage in discussions in good faith regarding decisions related to the care of Blue. Mr. Forliti does not seek to vary the Final Order in this respect, but asks the Court to order that Ms. Davenport comply with the Final Order. Both parties are expected to comply with the Final Order. A further order of the Court is not needed.

D. Views on End-of-Life Decisions

- [120] Ms. Davenport seeks an order that the parties be compelled to exchange their views regarding end-of-life decisions for Blue. Blue has a limited life expectancy. While it would be wise for the parties to have discussions regarding end-of-life decisions so that they are not discussing this for the first time in the very stressful and emotional time when such a decision might have to be made, I do not think it is appropriate for the Court to make such an order. The parties are co-committees and it should be up to them to have the discussion at a time when they are prepared to do so.

E. Fines

- [121] Both parties seek fines against each other for alleged failures to comply with the Final Order. Mr. Forliti alleges Ms. Davenport abused her final decision-making authority when she fired Swan. Ms. Davenport alleges Mr. Forliti has breached the Final Order on numerous occasions as discussed above.
- [122] The Final Order was made pursuant to the PPA. Unlike the FLA, there is no provision within the PPA for fines when a party does not comply with an order. I therefore decline to make any orders for fines. The parties did not bring a contempt application.

F. Judicial Case Management

[123] Ms. Davenport seeks an order that there be a judicial case management judge assigned on an interim basis. This is based on the premise that this matter will again proceed to trial. There has already been a full trial, and I am not ordering that this matter be referred to the trial list. I do not have the authority to make the order sought. I refer the parties to Practice Direction 4.

G. Post-dated Cheques for Child Support

[124] Ms. Davenport says that sometimes the child support cheques she receives from Mr. Forliti are late by a few days. She wants an order that Mr. Forliti provide her with a series of post-dated cheques. This was not fully argued before me, and I therefore decline to make the order, but adjourn the application generally should Ms. Davenport wish to reset the motion. I think it would be wise for Mr. Forliti to do this, and I encourage him to do so, as it would limit the amount of contact between the parties. I also remind Mr. Forliti that pursuant to court order the payments are due on the 1st and 15th of the month, and he must comply with that order.

X. CONCLUSION

[125] I have not been persuaded by either party that there has been a material change in circumstances. The underlying basis for the conflicting allegations of the parties is the continuing saga of their difficult relationship.

[126] Both parties want resolution of the war that is between them, and both parties want what is best for Blue. We discussed at the hearing what possible solutions there could be to the ongoing conflict, for example, an independent nurse advocate for Blue who could attend at medical appointments and freely attend both homes. Unfortunately, there are limits to what a court order can accomplish, and financial constraints on what the parties and Blue can afford.

[127] Mr. Justice Skolrood has found that it is in Blue's best interests to have the continuing involvement and care of the two most important people in his life - his parents. Day-to-day supervision of the parties' behaviour is neither possible nor realistic. Unless and until the parties communicate effectively and trust and respect each other's ability to care for Blue, there will not be a resolution. The solution to the underlying problem has to come from the parties themselves.

[128] I reiterate that if there is a material change in circumstances, and in particular if there is evidence (given the history of the parties, preferably independent or expert evidence) that Blue's care is being compromised, or the existing arrangements under the Final Order are no longer in his best interests, either party has the right to bring an application to vary the Final Order.

[129] With respect to costs, the Public Trustee filed written responses in which it states that Blue has a modest trust balance and large monthly expenses, and he cannot afford to pay costs from his trust fund. It notes that it is "very concerned about the expense incurred by yet a further court application". I agree that the costs of these applications should not come from Blue's trust funds.

[130] Neither party was successful on their respective applications. If the parties wish to make submissions as to costs as between themselves, they may make arrangements through trial scheduling within the next 30 days to speak to the matter.

"Norell J."

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