

CANADA / JUDGMENT

Watt v. Shelton

2025 BCSC 101

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 101 Watt v. Shelton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Watt v. Shelton,

2025 BCSC 101

Date: 20250123

Docket: E233012

Registry: Vancouver

Between:

Stephanie Watt

Appellant

And

Jordan Shelton

Respondent

Before: The Honourable Justice Giltrow

On appeal from: An order of the Provincial Court of British Columbia, dated October 12, 2023
(Shelton v. Watt, Surrey File No. F40598)

Reasons for Judgment

The Appellant, appearing in person:

S. Watt

The Respondent, appearing in person:

J. Shelton

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 3-4, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2025

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Introduction

- [1] This is an appeal brought from an order of the Provincial Court after trial in this family law matter.
- [2] The parties met in 2014 in Toronto, began a relationship, and their daughter Niveah was born December 22, 2015. By the fall of 2016 the family had relocated to Vancouver to be closer to Ms. Watt's family. The parties separated in 2017.
- [3] The proceeding in the Court below was begun by an application filed May 17, 2022 by Mr. Shelton seeking equal and shared parenting time of Niveah, as well as shared parental responsibilities, but with final decision making authority granted to Mr. Shelton if the parties cannot agree.

- [4] Ms. Watt filed a reply and counterclaim July 4, 2022 agreeing to shared parenting time, and seeking to maintain a parenting time split of approximately 54 percent to 46 percent, with her having Niveah 5 nights while Mr. Shelton would have Niveah for 3 nights on the alternating 4 day blocks of parenting time. In her pleadings Ms. Watt agreed to shared parental responsibilities, but sought final decision-making authority. By way of counter application Ms. Watt sought child support starting January 2022 based upon shared parenting time, and sought retroactive child support on the basis of her claim that Niveah's primary residence was with her from the date of separation to January 2022. Ms. Watt additionally sought special and extraordinary expenses under s. 7 of the Federal Child Support Guidelines, SOR/97-175.

Judgment Below

- [5] After a five-day trial, the Court ordered:
- a) equal and shared parenting time between the parties;
 - b) the parents will share all parental responsibilities for the child pursuant to s. 40(2) and s. 41 of the Family Law Act, S.B.C. 2011, c. 25;
 - c) no ongoing child support is payable by the respondent to the appellant;
 - d) the appellant's application for retroactive child support was dismissed;
 - e) the appellant's application for special and extraordinary expenses was dismissed; and
 - f) the appellant's request for an order that the respondent pay \$96,164 as compensation for legal fees was dismissed.
- [6] The Court further ordered that for as long as Niveah is eligible to receive child support, the parties shall exchange (a) copies of their respective income tax returns for the previous year by June 1 each year, and (b) copies of any Notice of Assessment or Reassessment provided to them by the Canada Revenue Agency immediately upon receipt.
- [7] The Court also confirmed that a conduct order directing the parties to engage in respectful communications with each other, made in an interim order June 7, 2023, remains in place.

Issues on Appeal

- [8] On appeal to this Court, the appellant appeals the trial judge's order:
- a) Granting the parties equal and shared parenting time;
 - b) Refusing to grant the appellant final decision-making authority with respect to the child;
 - c) Dismissing the appellant's application for retroactive child support;
 - d) Determining that no ongoing child support is owed by the respondent to the appellant;
 - e) Refusal to make an order for special and extra-ordinary expenses; and

- f) Refusal to award costs against the Respondent.

Standard of Review on Appeal

- [9] The scope and process for review of Provincial Court orders in Supreme Court are governed by ss. 233 and 234 of the FLA. In *Kane v. Proffit*, 2018 BCCA 106 at paras. 42-44 our Court of Appeal confirmed that appeals from Provincial Court orders under the FLA to the Supreme Court are subject to the following standard of review:
- [42] The scope of appellate review in family matters is a narrow one; intervention by an appellate court is subject to a high standard of review. The function of appellate review is not to re-try a case or to continue the trial at a different stage. Rather, its purpose is to examine the record below to determine if material or reversible error has been demonstrated, including an error of law, an error of principle, an error of fact, or a serious misapprehension of the evidence that could reasonably have affected the result and therefore warrants appellate intervention. See *Scott v. Scott*, 2006 BCCA 504; *Jens; R.E.Q. v. G.J.K.*, 2012 BCCA 146; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 832-833; and *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.
- [43] In *R.E.Q.*, Madam Justice Newbury summarized the appellate review jurisdiction as follows:
- [33] The Supreme Court of Canada has said that the standard of review is a high one, i.e., that in family cases as elsewhere, an appellate court may not interfere with the exercise of discretion of a trial judge in the absence of a material error (including a "significant misapprehension of the evidence", the trial judge's having "gone wrong in principle or [his] final award [being] clearly wrong"): see *Moge v. Moge* [1992] 3 S.C.R. 813, at 832; and *R.M.S. v. F.P.C.S.* 2011 BCCA 53, at para. 43, citing *Hickey v. Hickey* [1999] 2 S.C.R. 518 at para. 12 and *Van de Perre v. Edwards* 2001 SCC 60, [2001] 2 S.C.R. 1014 at paras. 14-5. In the latter case the Court wrote:

Second, an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. [At para. 13]

Thus the authorities make it clear that it is not for an appellate court to re-weigh the evidence or to interfere on the basis that the appellate court would give more weight than the trial judge did to one factor or another - or, in the words of the Court in *Hickey*, that it would have "balanced the factors differently."

Did the judge exceed the appellate review jurisdiction?

[44] Appeals from provincial court orders under the FLA to the Supreme Court are subject to the same standard of review as outlined above. However, their scope and process are governed by ss. 233 and 234 of the FLA, which sets out the types of orders the Supreme Court can make on an appeal from the Provincial Court, and R. 18-3 of the Supreme Court Family Rules [SCFR], which sets out rules for the conduct of the appeal.

[emphasis added]

[10] More than once in argument on appeal, the appellant pointed to matters of evidence that she alleges the trial judge misapprehended. In her written submissions the appellant alleged at least 15 errors of fact or misapprehension of evidence by the trial judge. When asked by the Court what ground of appeal certain of the alleged errors pertained to, the appellant responded: if the trial judge made this many mistakes, how could the judgment be right?

[11] This, however, is not a basis upon which a reviewing Court may overturn a trial judgment. As set out above, only "a serious misapprehension of the evidence that could reasonably have affected the result" will warrant appellate intervention. The Supreme Court of Canada said in *Housen v. Nikolaisen*, 2002 SCC 33 at para. 14:

Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

[12] I have addressed the errors alleged in this appeal with this guidance in mind.

Shared Parenting Time

[13] The issue before the trial judge was whether, under the shared parenting schedule the parties had been following of alternating four-day blocks each with Niveah, Mr. Shelton should have the overnight with Niveah on his fourth day of parenting time. This would be a change from the status quo in which Ms. Watt would have five nights with Niveah and Mr. Shelton three nights.

[14] The trial judge approached the question of shared parenting time as: "The issue to be determined on the shared parenting application is whether it is in the best interests of Niveah to spend the additional night with her father so that both Ms. Watt and Mr. Shelton have shared parenting time" (RFJ para. 36).

[15] The trial judge observed that Ms. Watt pled in her reply that the parties do exercise shared parenting time, including her pleading that they have a 54/46 percent split in her favour, which constitutes shared parenting pursuant to the 40 percent threshold established by s. 9 of the Guidelines.

[16] However, despite Ms. Watt's pleadings, the trial judge was required to address the different position she took at trial: that in fact the parenting time was 66/34 percent, in her favour. This was based on an excel spreadsheet Ms. Watt produced calculating the time Mr. Shelton spent with Niveah in 2021 and 2022.

- [17] It is not entirely clear what arguments were advanced at trial by Ms. Watt based on this position. On appeal Ms. Watt argues:
- a) the trial judge should not have presumed that equal parenting time is in the best interest of Niveah; and
 - b) as Ms. Watt had Niveah more than 60% of the time, Mr. Shelton should be ordered to pay retroactive child support rather than a set-off between spouses based on shared parenting.
- [18] The trial judge rejected Ms. Watt's approach to calculating Mr. Shelton's parenting time. This was open to him, as stated by Madam Justice Saunders in *Berry v. Hart* 2003 BCCA 659 paras. 9 and 10:
- [9] One must also ask, considering that this approach may satisfy only the law of unintended consequences, whether the minutiae of such record keeping really determines whether s. 9 of the Guidelines applies. Rarely can anything be measured with precision. Even science recognizes that all measurements are subject to a margin of error.
- [10] In my view the issue is a matter of judgment not amenable to simply a time accounting exercise. I consider that in determining whether the threshold level for application of s. 9 is met the question is whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved. It follows, in my view, that a court may assess child-parent time as meeting the s. 9 criteria without a tight accounting. That assessment should be made by considering the broader context of the parenting arrangement. It perhaps bears mentioning, further, that simply finding that a parental regime comes within s. 9 does not compel an automatic reduction in child support. That determination must be made considering all of the criteria in ss. (a) to (c) of s. 9.
- [emphasis added]
- [19] In this case, the trial judge considered the broader context of the parenting arrangement between the parties. He found that the parties have had shared parenting time since October 2020 (RFJ para. 39). He found that the parties had agreed to a four-day rotation of parenting time for each of them, and, to the extent that Mr. Shelton's blocks of time with Niveah were shortened from a full four days, it was because of what the trial judge found to be arbitrary decisions made by Ms. Watt. The trial judge cited examples: On Pro-D days when Niveah was out of school, Ms. Watt would not permit Mr. Shelton to pick Niveah up before 3:00 pm, depriving him of time with Niveah on his scheduled parenting day. Another example was that on the fourth day of Mr. Shelton's parenting time he would drop Niveah off, but Ms. Watt insisted that only she could pick Niveah up from school. The trial judge found this further deprived Mr. Shelton of parenting time during his scheduled parenting day.

- [20] On appeal Ms. Watt argues that the trial judge misapprehended the evidence. She says she did not insist Mr. Shelton drop Niveah off at school on Mr. Shelton's fourth day--she had testified she would have done so. This however misses the point the trial judge evidently concluded: by not allowing Mr. Shelton to also pick Niveah up from school Ms. Watt was depriving Mr. Shelton of the full fourth day of his parenting time.
- [21] The trial judge accepted Mr. Shelton's testimony that Mr. Shelton did not challenge Ms. Watt on these decisions because he didn't want to cause tension.
- [22] The trial judge held:
- [42] I do not accept Ms. Watt's position that the hours Mr. Shelton has spent with Niveah should be added up to determine the percentage of his parenting time. Both parties have had shared parenting consisting of four day rotations with their daughter. They are each entitled to exercise the full four days of parenting time without interference from the other parent. The issue to determine is whether there should also be four consecutive nights to run with the four days of parenting time with each parent.

[emphasis added]

- [23] Having reviewed the history of the parties' parenting time with Niveah, as well as the Views of the Child report that was available to him, and the arguments advanced by each party for why the fourth night of Mr. Shelton's four day block should be allowed to them, the trial judge found:

It is in Niveah's best interest to have equal parenting time with both parents, which includes four consecutive nights with the four days of parenting time for each parent. (RFJ para. 45)

- [24] Both parties advanced evidence and arguments at trial as to why their respective positions relating to the "fourth night" of Mr. Shelton's parenting time block were reasonable. Mr. Shelton appears to have pointed to the grandmother Beverly Watt's testimony that Niveah "spent at least one night per week on her own at their residence in Vancouver during the last school year." Ms. Watt argues on appeal that the trial judge misconstrued Beverly Watt's evidence, and that a review of the transcript reveals that Beverly Watt did not attest that Niveah was at her grandparents "on her own" but rather, with her mother. I note however that it is not clear that in his reasoning the trial judge was of the view that Niveah was on her own--he says "There is no reason why Niveah should have been staying with her grandparents instead of her father" (RFJ para. 44).
- [25] The trial judge also considered the evidence that Mr. Shelton works an early morning shift as a corrections officer in Maple Ridge, which would require him to leave home before Niveah is awake if she were to spend the fourth night of parenting time at the Mr. Shelton's. The trial judge further considered evidence that Mr. Shelton's wife has a very good relationship with Niveah, and can get her ready for school, and further that Mr. Shelton anticipated his work schedule would change to allow him to get Niveah ready for, and drop her off at, school.

- [26] Ms. Watt argues that under s. 40(4) of the FLA the Court must not presume parenting time should be shared equally. However, the problem with this submission is that the Judge found that "it is in Niveah's best interest to have equal parenting time with both parents" (RFJ para. 45). This was not a presumption, but a finding, based on a consideration of the evidence before him after five days of trial.
- [27] Ms. Watt further argues on appeal that the trial judge unfairly criticized her for placing "arbitrary" restraints on Mr. Shelton's parenting time during his four day block, when in fact Ms. Watt had always accommodated a parenting schedule that was built around Mr. Shelton's work schedule. Initially the blocks of parenting time were three days, not four, which reflected Mr. Shelton's work schedule. When his work schedule changed to four day blocks, Ms. Watt agreed to change the parenting schedule to four day blocks to reflect that. It was not until Mr. Shelton married Vanessa that he sought the fourth night, which Ms. Watt resisted.
- [28] The trial judge was faced with Ms. Watt's pleadings, which was that the parties had been following a shared parenting arrangement. He was then faced with Ms. Watt's different position at trial which was that in fact the arrangement was something other than that. It was in this context that the trial judge determined that any limitations within Mr. Shelton's four day blocks were at Ms. Watt's behest. This determination was made only to address the basis upon which Ms. Watt argued at trial the parenting time should be determined for the future--that the 66/4 split she alleged had been in place should continue. The trial judge's is determination of the existing parenting time arrangement was not, as the appellant argues, used "against" Ms. Watt in the ultimate determination by the trial judge of what is in Niveah's best interest.
- [29] It does appear that Ms. Watt has historically been accommodating of Mr. Shelton's work schedule to enable shared parenting. This is certainly to her credit. However, this does not ground a basis for interfering with the trial judge's determination that it is in Niveah's best interest to have equal parenting time with both parents.
- [30] I see no reversible error in the trial judge's determination that it is in Niveah's best interest to have equal parenting time with both parents, including four consecutive nights along with the four days of parenting time for each parent. I would not accede to this ground of appeal.

Parental Responsibilities and Decision Making

- [31] By final consent order dated January 17, 2023 the parties agreed to share equally all parenting responsibilities.
- [32] At trial each party sought final decision making authority in the event the parties could not agree.
- [33] After a thorough review of the parties' existing parenting schedule and sharing of responsibilities the trial judge held (RFJ para.55):

I see no reason why the current shared parental responsibilities should not continue. I decline to order that either parent have final decision making in the event of conflicting views. The parties have to learn to solve these issues together.

[34] While pled, this ground was not pressed by Ms. Watt on appeal, and I heard no basis upon which to disturb the trial judge's determination on this point.

Retroactive Child Support

[35] In considering the appellant's application for retroactive child support, the trial judge weighed the five factors set out by Justice Punnett in *K.A.M.R. v. W.H.G.*, 2014 BCSC 103, at para. 28, which in turn refer to the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.*, 2006 SCC 37.

[36] The first factor is the existence of any prior orders or agreements for child support. As the trial judge noted, there are no prior court orders for child support in this case. The trial judge did consider a temporary agreement that was set out in an email dated October 24, 2019 with the subject line "temporary absence", in which the Mr. Shelton confirmed he would pay a minimum of \$400 a month during an approximately six month period he would be working in Oliver, BC. The email indicates that Mr. Shelton would resume "split custody" of their daughter when he returned home. The trial judge found that in fact Mr. Shelton paid \$600 a month during this period.

[37] On appeal, the appellant argues that this agreement was not for child support, but rather was for daycare costs while the respondent was away and "unable to satisfy his parenting duties." The appellant further points to the respondent's testimony at trial that he never paid child support for their daughter and that the money he contributed was toward "childcare."

[38] I need not decide whether these were costs for child care or child support in this case, as the period during which this agreement was in place was relatively brief, from December 2019 to the summer of 2020. The trial judge does not express having attributed any particular weight to this agreement, which is understandable, given its temporary nature for a relatively brief period more than three years before trial.

[39] The second factor is whether the parent seeking retroactive child support has a reasonable excuse for any delay in making the application. The application for child support is contained in the appellant's counterclaim filed July 4, 2022, which was filed with the reply Ms. Watt had been ordered by the Court to file when she had not filed a reply to Mr. Shelton's application in accordance with the Provincial Court Family Rules. The trial judge held that the appellant provided no explanation for why she did not pursue child support after the parties separated in 2017, nor any reasonable excuse for the delay in making the application for child support.

[40] On appeal, citing D.B.S. at para 121 that "effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached", Ms. Watt pointed to four pieces of evidence in which she had previously asked the respondent for increased support:

- a) a text exchange in August 2018 in which Ms. Watt told Mr. Shelton that she needed him to contribute to their daughter's child care on a regular basis;
- b) a text exchange in August 2019 in which Ms. Watt says that if Mr. Shelton has extra money to use to sign Niveah up for soccer, she would rather have that contribution to child care, beyond the \$300 he said he could afford; and
- c) the October 27 2019 email containing the temporary agreement I have described above, in which Ms. Watt wrote:

The majority of the agreement is fine for the time being but I expect that you will work toward contributing more financially toward Niveah's care, in accordance with the statutory guidelines.

- d) There is also a text message a month later, in November 2019, in which Ms. Watt says "I really need more than \$300/\$400 contribution toward Niveah's care. As I mentioned before, December is particularly expensive. I have to pay a total of \$2785 on December 1st for Niveah's daycare and preschool. I really need more help from you financially."
- [41] This evidence does demonstrate that Ms. Watt broached the topic of the need for greater financial support during this period from 2018 to the end of 2019. I note that in response, the evidence is that Mr. Shelton replied that he was giving what he could, and that Ms. Watt could take him to court so that what he owes could be determined if necessary. Additionally, as I have noted above, Mr. Shelton did increase the amount he was sending to Ms. Watt after her November 2019 request. The trial judge found, and it was not disputed on appeal, that Mr. Shelton paid \$600 instead of the minimum \$400 a month set out in temporary agreement in the email to which the appellant was responding in October 2019. He paid this for the approximately seven month period that followed, while he was away working in Oliver until the summer of 2020.
- [42] In the fall of 2020 Niveah started school; at the same time Mr. Shelton's work schedule shifted to a four day rotation, the parties' shared parenting schedule resumed, shifting to the four day blocks each that have been in place since then.
- [43] This Court was taken to no evidence on appeal that Ms. Watt broached the topic or requested more financial support after November 2019, including after the parents resumed the shared parenting schedule and increased the blocks to four days each in the fall of 2020. There is no evidence that Mr. Shelton had "effective notice" that Ms. Watt was seeking child support during this period up to the filing of her counterclaim in July 2022.

- [44] Accordingly, I see no basis upon which to interfere with the trial judge's determination that no reasonable explanation was provided for Ms. Watt's delay in bringing the application for retroactive child support.
- [45] The third factor to be considered in an application for retroactive child support is whether the conduct of the payor parent is blameworthy. The trial judge considered:
- a) the respondent's agreement that he would pay at least \$400 a month while he was away working, and that upon his return the parties would resume shared parenting;
 - b) the respondent's position that the parties have shared parenting of their daughter since separation and that no child support is owed; and
 - c) that in addition the respondent testified that he does support his daughter while she is in his care and does contribute to her expenses.
- [46] The trial judge found that in these circumstances he was unable to find that the respondent had engaged in blameworthy conduct concerning the financial support of the parties' daughter. I see no basis upon which to find the trial judge erred in that determination.
- [47] The next factor concerns the circumstance of the child. The trial judge noted that the child lives with both of her parents in a shared parenting arrangement. He held: "Both parents provide a consistent living standard for their daughter. There is no discrepancy of income between the households."
- [48] The appellant argues on appeal that based on the 2022 tax returns before the Court, Mr. Shelton's household income, including that of his spouse, is 15% higher than Ms. Watt's household income.
- [49] This difference in household income does not, in my view, establish a basis upon which to interfere on appeal with the trial judge's determination on the whole of the evidence that Niveah enjoys a consistent standard of living between the two households.
- [50] The final factor is any hardship a retroactive child support award would cause. The trial judge was satisfied that a retroactive award of child support would cause hardship to Mr. Shelton. The appellant argues that the trial judge made this determination without reference to evidence in support of the point.
- [51] The trial judge stated that a retroactive award of child support would negatively affect Mr. Shelton's ability to provide for his daughter while observing: "As the parties agreed to shared parenting of the child, any retroactive award would have to apply a set off based on their relative tax assessments."

- [52] On appeal Ms. Watt appeared to confuse this determination by the trial judge, which was made in the context of the five part test to assess a claim for retroactive child support established at common law in D.B.S., and a hardship application under the Guidelines, an application she says Mr. Shelton did not bring. Ms. Watt is correct that Mr. Shelton did not bring a hardship application, however that was not the context in which hardship was considered by the trial judge, as I have explained.
- [53] The trial judge had the whole of the evidence at trial before him in considering the fifth factor in the D.B.S. analysis for retrospective child support. I see no basis upon which to interfere with his determination that an order for retroactive child support would cause hardship to Mr. Shelton.
- [54] Ultimately the trial judge weighed all of the factors set out in D.B.S. and found it would be inappropriate to order the respondent to pay the appellant retroactive support from the date of separation in 2017 to July 2022. He said: "In particular, I find that Ms. Watt's failure to file a reply to Mr. Shelton's application of December 2017, as well as her failure to seek child support until July 2022, after being served Mr. Shelton's application, weigh heavily in this determination."
- [55] On appeal the appellant says that the first of these factors is mischaracterized. While the respondent did file an application for parenting time in 2017, he then had the application adjourned generally before the 30 day deadline for the filing of the appellant's response. Accordingly, the appellant argues, it was not incumbent upon her to file a response to that December 2017 application. However, that does not address the second particular factor the trial judge weighed heavily in his determination: Ms. Watt's delay in bringing the application for retroactive child support, including the lack of any notice that she was seeking support in the period between November 2019 and the filing of her application by counterclaim in July 2022, as I have set out above. I am not persuaded that even if the trial judge misapprehended the timing of the filings relating to Mr. Shelton's 2017 application, the result of his determination with respect to Ms. Watt's claim for retroactive child support would have changed given the import of this factor.
- [56] I dismiss the appeal from the trial judge's dismissal of Ms. Watt's claim for retroactive child support.

Ongoing Child Support

- [57] The trial judge calculated the child support set off payable between the parties based on shared parenting, and found that based on the 2022 tax assessments in evidence Ms. Watt would owe Mr. Shelton \$23 a month. However, because Mr. Shelton had not applied for child support, the trial judge declined to make an order for child support.

- [58] The trial judge went on to consider Ms. Watt's application for support for 2023. He decided to rely upon the 2022 assessments for 2023 despite Ms. Watt's claim in her Financial Statement that her 2023 income was only \$10,000. The trial judge held that since no documentation was before him to support that claim, he would proceed on the basis of the previous year's income, which had been established on the evidence.
- [59] On appeal Ms. Watt argues that she testified her 2022 income was a combination of salary, employment insurance payments during maternity leave, and rental income, the latter of which would not continue in 2023, as she and her family had moved back into her Vancouver condominium. She further testified that a more appropriate income to project for 2023 would be \$4,673 a month (approximately \$56,000 for the year) based on her salary before maternity leave.
- [60] Ms. Watt argues on appeal that the trial judge improperly imputed income to her, and further, that this penalized her for being on maternity leave through part of 2023. However, that is not what the trial judge did. He did not impute income under s. 19 of the Guidelines against Ms. Watt on the basis that she was under-employed, or at all. Rather, as explained by the trial judge in his reasons at para. 60, in the absence of sufficient evidence to establish Ms. Watt's 2023 income, he relied upon the previous year's income as an indicator of Ms. Watt's current income. The trial judge referred to this Court's decision in *K.A.M.R. v. W.H.G.* 2014 BCSC 103 [K.A.M.R.] in support of that approach. In *K.A.M.R.* this Court explained:
- [9] The Guidelines provide that a spouse's annual income should be determined "using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and adjusted in accordance with Schedule III" (s. 16). Where the court is of the opinion that a determination under s. 16 "would not be the fairest determination of that income," the court can refer to three years of income information and set "an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years" (s. 17). Section 2(3) indicates that where any amount "is determined on the basis of specified information, the most current information must be used."
- [16] Calculating maintenance on the current year's income can create practical difficulties, particularly where the payor's income fluctuates or is uncertain. As a result courts often rely on the previous year's income as the best indicator of current income: *Bell*, para. 7. In addition, where yearly updates are necessary it is often more practical to order that the parties rely on the previous year's income.
- [61] That is what the trial judge did in this case. This was understandable, given that the trial judge was tasked with determining Ms. Watt's 2023 income from various sources based on evidence presented at trial mid-way through 2023, as well as the apparent disparity between Ms. Watt's projected income in her Financial Statement and her testimony. I see no error in the trial judge's approach.

- [62] Further, I see no basis to the argument that the trial judge improperly penalized Ms. Watt for being on parental leave in 2023, when he relied upon her 2022 income as an indicator of her 2023 income. As the trial judge noted, Ms. Watt had been on parental leave in 2022 as well: "Ms. Watt testified that she worked for six months in 2022, before starting her parental leave" (RFJ para. 21).
- [63] In any event, the trial judge ordered that for as long as Niveah is eligible to receive child support, the parties shall exchange (a) copies of their respective income tax returns for the previous year by June 1 each year, and (b) copies of any Notice of Assessment or Reassessment provided to them by the Canada Revenue Agency immediately upon receipt.
- [64] Accordingly, any future child support obligations that arise based upon actual incomes will be known to the parties.
- [65] I see no error in the trial judge's decision not to make an order for ongoing child support in Ms. Watt's favour based upon the evidence before him at trial.
- [66] On appeal Ms. Watt also argues that the trial judge improperly declined to consider her payment of Niveah's Fraser Academy tuition in determining Ms. Watt's income. Ms. Watt's sole responsibility to pay this tuition was established under the January 17, 2023 final consent order I have described above.
- [67] Ms. Watt advises that she raised this issue in final argument at trial. She did not plead that this was relief she was seeking. I note there was no application before the trial judge to vary the terms of the January 17, 2023 final order. While the trial judge did not address this argument in his reasons for judgment, the transcript from trial reveals that the trial judge advised Ms. Watt he would not be considering the issue. I see no error in that.
- [68] I dismiss this ground of appeal.

Special and Extraordinary Expenses

- [69] The trial judge dismissed Ms. Watt's claim for special and extraordinary expenses under s. 7 of the Guidelines. He noted that Ms. Watt did not set out what the expenses are in her pleading, nor any dollar figure for which she is seeking reimbursement.
- [70] The trial judge had before him the pleadings and the evidence he had heard at trial. Ms. Watt's counter application for special and extraordinary expenses was blank in relation to the compensation she was seeking. The trial judge nevertheless evidently went beyond the blank application, to consider whether the evidence supported the claim. He considered the definition of special or extraordinary expenses under the legislation, and the observation by Justice Punnett in *K.A.M.R.* at para. 48 that "extracurricular activities do not normally constitute special or extraordinary expenses, unless the child's participation in the activity goes beyond the average child" (RFJ para. 71).

- [71] The trial judge then went on to conclude: "I am not satisfied that Ms. Watt has enrolled Niveah in any extracurricular activities that would fall within the definition of special or extraordinary expenses" (RFJ para. 72).
- [72] On appeal Ms. Watt argues that the trial judge improperly dismissed her claim for child care expenses as the spouse with the majority parenting of time under s. 7(1)(a). However, given: the trial judge's review of the parenting time that had been exercised between the parties since separation; the general pattern of shared parenting except for the nine-month period in 2020, while Mr. Shelton was working in Oliver and during Covid; as well of the lack of documentary support for the claim as noted by the trial judge at his reasons at paras. 70 and 72, I see no error in the trial judge's determination that the claim had not been justified by Ms. Watt.
- [73] I dismiss this ground of appeal.

Compensation for Legal Fees

- [74] Similarly, I dismiss the appeal from the trial judge's order declining to order Mr. Shelton to compensate Ms. Watt for \$96,164 in legal fees. The trial judge determined he had no jurisdiction to award compensation for legal fees under the Provincial Court Family Rules. I see no error in that.

Result and Costs

- [75] The appeal is dismissed and the order of the Provincial Court confirmed.
- [76] Rule 16-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 applies to appeals under s. 233 of the FLA. Rule 16-1(7) provides that "costs of a family law case are to be awarded to a successful party, unless the Court otherwise orders". In *Kucher v. Brown*, 2016 BCSC 194 at para. 23, the Court held that Rule 16-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 applies to appeals under s. 233 of the FLA.
- [77] Accordingly, the costs of the appeal shall be paid forthwith by Ms. Watt to Mr. Shelton pursuant to Appendix B of the Supreme Court Family Rules, to be assessed as a matter of ordinary difficulty.

"Giltrow J."

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