
CANADA / JUDGMENT

V.C.K. v. R.W.

2015 BCSC 1418

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1418 V.C.K. v. R.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: V.C.K. v. R.W.,
2015 BCSC 1418
Date: 20150812
Docket: E143246
Registry: Vancouver

Between: V.C.K.
Appellant
And
R.W.
Respondent
Before: The Honourable Mr. Justice Punnett

REASONS FOR JUDGMENT

On appeal from: An order of the Provincial Court of British Columbia,
dated August 7, 2014 ([V.C.K.] v. [R.W.], Vancouver 1326933).

V.C.K.:

In Person

R.W.:

In Person

Place and Date of Appeal:

Vancouver, B.C.

April 8, 2015

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2015

- [1] The appellant, V.C.K., appeals the dismissal by the Provincial Court of her application for sole guardianship of the parties' 15-year-old son, retroactive child support, ongoing child support, extraordinary expenses, as well as the granting of the respondent's application to terminate child support.

Background

- [2] The parties were husband and wife having married on January 12, 1985, separated on June 1, 2007 and divorced on December 21, 2009. They had three children. Only their youngest, R.T.W., born July 17, 1999, remains a child of the marriage.
- [3] On April 23, 2009 the parties signed a separation agreement, filed with the Court a week later, which granted the appellant sole custody of the then two remaining children of the marriage and imposed joint guardianship based on the "Joyce model". Based on the respondent's guideline income of \$58,600 he agreed to pay child support of \$887 for the two children.
- [4] At some point in 2009 the appellant enrolled in the Family Maintenance Enforcement Program ("FMEP").
- [5] When the parties' middle child reached the age of majority on October 30, 2009 this reduced the respondent's maintenance for the remaining child of the marriage to \$580 per month.
- [6] On September 20, 2012, R.T.W. left the appellant's home and moved to the dwelling of his maternal grandmother where he has since remained. This move was apparently prompted by R.T.W.'s arrest for shoplifting and the appellant's response to that incident -- she provided him with the following document and requested that he sign it:

Thursday Sept. 20, 2012

1. You are grounded for six months.
2. If you were taken into custody, that would be a 4,300 hour sentence. Since you are serving this at home in order to attend school, the actual sentence is 1,368 hours.
3. Being grounded means:
 - a. You are confined to the house from 3:30 pm until school the next morning;
 - b. All weekend hours will be spent in the house unless I say otherwise;
 - c. You will be performing community service and volunteer activities as part of your punishment because your offence was against the community;

- d. You will be attending counseling as a part of your rehabilitation because you need to learn how to behave differently;
- e. I may reconsider the duration of the grounding after 3 months of good behavior.
4. If you do not agree, leave your key and make arrangements to relocate your belongings because I will not share my home with a thief.
5. If you do agree, sign this form and prove to me that you are not a thief and that you just made a mistake that will never be repeated.

[R.T.W.]

- [7] As a result of R.T.W. leaving the appellant's home in 2012 the respondent inquired with FMEP regarding his continued liability to pay child support. FMEP then requested that the appellant provide details of R.T.W.'s circumstances. On March 3, 2014 the appellant completed and signed the form provided by FMEP. Two copies of the form were in evidence, one as an exhibit to the affidavit of the appellant and the other introduced by the respondent.
- [8] The FMEP form asked whether R.T.W. was living with the appellant, and if not, requested further information. In response the appellant ticked the box marked "other" and stated:

My son has been temporarily staying with his maternal grandmother since 20 September 2013 while he attends school, with my leave and at my discretion as his primary guardian and custodial parent. [Original emphases omitted.]
- [9] The form also requested that if the child was not residing with her that she provide details of how she was financially supporting the child to which she replied:

Not applicable given I am the custodial parent. [Original emphases omitted.]

- [10] The two FMEP forms tendered by the appellant and respondent are identical to up to this point, but differ thereafter. The form asked the appellant why, if she was not financially supporting the child, she wanted FMEP to continue enforcing child support payments. On the form entered by the respondent, the response to that inquiry was blank. On the copy provided by the appellant the following was present:
 1. The payor has never increased his level of child support figures set out in the 2009 enforceable agreement despite his income commiserate [sic] with his income, but rather has relied upon the increasing by approximately 2% per annum and extensive overtime earnings, hence there obviously remain undisclosed arrears to be accounted for;
 2. The payor has never provided any financial documents setting out his annual gross income despite numerous unofficial and legal requests on my part and in spite of being required to under the provisions of the Divorce Act;

3. Moreover, I have had a pending arrears applications [sic] in the BCPC since July of 2013 for which the payor, although being duly served, has steadfastly refused to provide any response let alone any material setting out a claim that my son was somehow disenfranchised or otherwise rendered ineligible for continued paternal financial support;
4. The payor's obligation to provide child support and maintenance is obviously not extinguished when my son is outside our home whether he be at school, or sleeping at another's residence while he goes to school because the proximity of the child to the primary residence at any given time is irrelevant;
5. The payor's obligation to provide child support reflects the minimum amount necessary to secure my son's present and future needs (barring emancipation proceedings). Extinguishing my son's right to support while at 14 would obviously undermine his future and fails to contemplate his future circumstances;
6. Inasmuch as my restraining order against the payor prohibits him from either contacting me, communicating with me or even coming near me, the FMEP remains the payor's only legal mechanism of providing our son's child support to me, without which he would be able to argue that he was 'unable' to provide for his son and not run afoul of the restraining order's terms of restraint;
7. The payor is required to provide support and maintenance until such time as a court of competent jurisdiction finds my son (aged 14) to no longer be a child of the marriage and I [sic] pretty sure that the FMEP would be ultra vires to adopt a view that it has the authority to act in the Court's stead;

[Original emphases omitted.]

- [11] On May 17, 2013 the appellant filed a notice of motion in Provincial Court seeking, among other relief, to enforce the parties' agreement. There were a number of hearings and resulting orders including an order in the spring of 2014 that the respondent produce financial information. The matter proceeded before the Provincial Court on August 7, 2014. There was some uncertainty at the hearing respecting whether the August 7, 2014 hearing was an application or a trial. The record indicates that no pre-trial conference was held, nor was the matter set down for trial pursuant to the Provincial Court (Family) Rules, B.C. Reg. 417/98 [PCFR].
- [12] That uncertainty is obvious from the transcript of the proceedings, as the appellant apparently thought she was there for a hearing on affidavits and therefore had not arranged to call witnesses. The respondent brought a witness to the hearing. The transcript reads as follows:

THE COURT: [R.W.] Okay. All right. So what are we doing today? What is on today? What's the application today and whose application is it?

[V.K.]: It's my application, Your Honour.

THE COURT: For

[V.K.]: For the termination of guardianship as well as an accounting of Mr. [W.'s] arrears. I do have prepared written submissions that I could hand up. My submissions will take approximately 45 minutes, if you care to stand the matter down so that everyone can review the material I've provided in my submissions. I have copies for Your Honour and the other party.

THE COURT: Okay. But before we get into your submissions, what is your position on this, Mr. [W.]? Because I've noticed you -- you made an application too.

[R.W.]: Yes, Your Honour.

THE COURT: You have an application before the court.

[R.W.]: I filed an application. I'm just looking for a resolution as far as my family maintenance payments go. The child I'm paying maintenance for hasn't been with his mother since September 2012. You know, I do have a financial obligation to [R.]. It's -- my feeling is that the money is not going to the caregiver, pretty plain and simple. I don't -- I don't feel it's right.

THE COURT: Okay. Are there any witnesses in the room on this matter?

[R.W.]: I have --

THE COURT: Could you wait outside, sir, and we'll call you if we need you.

[V.K.]: I do not have witnesses, as I was proceeding based on a hearing, not a trial.

THE COURT: A hearing is a trial, ma'am. All right. Okay. So the -- so you are saying that he owes you arrears. On what basis? Are you saying he hasn't been paying his maintenance?

[13] I conclude the matter was set down under the PCFR as a hearing, not a trial. The appellant did not seek an adjournment when she was told it was a trial. It was suggested she consider calling the child as a witness, but she did not and the hearing proceeded. The appellant relied on the affidavit material filed as well as her written and oral submissions. The respondent called a witness, also making submissions and submitting exhibits. Neither the respondent nor the appellant were sworn.

[14] After reserving judgment, the trial judge made the following orders, supported by written reasons given October 24, 2014:

THAT the Applicant, [V.C.K.'s] Application for sole guardianship, retroactive and ongoing maintenance including retroactive payments for extraordinary or special expenses, be hereby dismissed;

THAT under section 147 of the Family Law Act, no support is payable to the Applicant, [V.C.K.], as of September 1, 2012;

THAT under section 152 of the Family Law Act, the Respondent, [R.W.], is entitled to termination of his child support payments to the Applicant, [V.C.K.];

THAT the Respondent, [R.W.], has a guideline income of \$71,090.82; and

THAT the Respondent, [R.W.], shall pay to the Grandmother, [M.K.], the sum of \$663.00 per month for the support of the child, commencing September 1, 2014 and on the first day of every month thereafter, as long as the child remains in her care, is a child under the Family Law Act, or until further Order of this Court.

Grounds for Appeal

[15] The appellant's grounds for appeal are as follows:

1. With respect to the sole guardianship application, the Appellant submits that the chambers judge erred in:
 - a. declining to grant an unopposed application;
 - b. permitting himself to be misdirected as to the relevant material, and in doing so misconceived the facts underpinning the application; and
 - c. failing to consider either s. 37, s. 38, s. 51(l)(b) of the Family Law Act or the guardianship provisions set out in the party's filed written agreement prior to making the order;
2. With respect to the application for retroactive child support, the Appellant submits that the chambers judge erred in:
 - a. failing to consider the principles set out D.B.S. v. S.R.G. et al, SCC 37, [2006] SCR 231;
 - b. finding the Appellant had not provided the Respondent with a written request for updated financial documentation;
 - c. exempting the Respondent from having to comply with the Order of Dohm, J. requiring him to provide financial information from 2007 onwards;
 - d. finding that the Respondent was not in breach of compliance with s. 25 of the Federal Child Support Guidelines;
 - e. finding that the Respondent owed \$1,984.87 in arrears;
 - f. finding that the Respondent had established a guideline income of \$71,090.82;
 - g. finding the Appellant's request for maintenance payments were either unjustifiably or improperly requested;
 - h. relying on unsworn third-party material;
 - i. finding that the child departed the custodial home 'voluntarily', or in the alternative, failing to consider whether the child remained 'voluntarily' absent after March 2013;
 - j. that the Appellant had converted the child support funds received for her own use;

- k. that the Appellant had begun providing funds for the child only when she had commenced the application;
 - l. that the Appellant's payments were only made to deceive the Court;
 - m. that the Appellant had not forwarded funds to the person providing the child's room and board until it suited her purposes;
 - n. that the Respondent was entitled to recover child support monies paid as of 01 September 2012;
 - o. misapplying and/or failing to consider s. 147, s. 152 and s. 174 of the Family Law Act; and
 - p. making an s. 149 order of his own motion absent consideration of the Family Law Act.
3. The Appellant further submits that the chambers judge erred in deciding that retroactive extraordinary expense claims are extinguished if a child support application fails.
4. The Appellant further submits that the chambers judge erred in failing to consider the Appellant's claim for relief brought pursuant to s. 213(1) of the Family Law Act.
5. Lastly, the Appellant respectfully submits that the chambers judge further erred in:
- a. maintaining that the Appellant was not entitled to receive assistance during the proceedings from a Makenzie [sic] Friend; and
 - b. not providing the Appellant with the right of reply.

Role of Appellate Court

[16] The appeal is brought pursuant to s. 233 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. It provides:

Appeals from Provincial Court orders

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

- (2) The time limit for starting an appeal is 40 days, beginning on the day after the order of the Provincial Court is made.
- (3) After hearing the appeal, the Supreme Court may do one or more of the following:
 - (a) confirm or set aside the order of the Provincial Court;
 - (b) make any order that the Provincial Court could have made;
 - (c) direct the Provincial Court to conduct a new hearing.
- (4) On application by a party, the Supreme Court may extend the time limit for starting an appeal.

- [17] There is a "narrow scope for appellate review" in family law matters: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 11. In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, L'Heureux-Dubé J. stated that "trial judges must be given considerable deference by appellate courts" when reviewing family law decisions, due to their fact-based and discretionary nature. That discretion is "best exercised by the judge who has heard the parties directly," so that an appellate court should only intervene when there is a material error, a serious misapprehension of the evidence, or an error in law (paras. 10, 12).
- [18] In *Phelan v. Findlay*, 2002 BCSC 1066, Mr. Justice Macaulay described the scope of appellate review under s. 16:
- [3] It is useful to start by setting out both what the appellant must demonstrate to succeed as well as the constraints on an appellate court faced with an appeal of this type. Appeals pursuant to s. 16 will fail unless the appellant establishes that the trial judge made a palpable or over-riding error, that is, by adhering to an erroneous principle; disregarding important evidence; or giving insufficient weight to important evidence: *Greeff v. McIntosh ... Greeff* is a reminder, as well, that the fact that the trial judge does not refer to all the evidence or gave more weight to some evidence than other does not, in itself, constitute a palpable or overriding error (para. 14).
- [5] In addition, the Supreme Court of Canada recently stated, in effect, that although a trial judge is required to consider all relevant factors in custody cases, the judge is not obligated to discuss "every piece of evidence in detail, or at all, when explaining his or her reasons": see *Van de Perre v. Edwards ...* The court went on to caution appellate courts as to the narrow scope of review given the fact-based and discretionary nature of custody issues.
- [Emphasis added, citations omitted.]
- [19] As held in *Clayton v. Crosby*, 2011 BCSC 1000, a reviewing court should only intervene if it found a "material error, a serious apprehension of the evidence, or an error in law" (para. 21).
- [20] *Lower v. Stasiuk*, 2006 BCSC 864, the Court noted that proof of contentious issues may only be accomplished "through the tendering of admissible evidence in the context of a trial, where procedural safeguards for fairness are in place." (para. 25). A judge must not rule on a contested substantive issue unless the parties have had the opportunity to tender evidence, test the evidence of the opposing party and make submissions to the court. The matter was remitted to the Provincial Court for re-hearing.

Discussion

- [21] I have concluded that the appeal succeeds for the reasons that follow.

[22] The first relates to the failure of the hearing judge to swear either of the parties. Despite that they gave evidence additional to that contained in their affidavits. As well, upon completion of the respondent's submission which included the filing of various documents as exhibits, the hearing judge did not allow the appellant the opportunity to reply. Instead, at the conclusion of the respondent's submission, he said:

THE COURT: All right. I obviously am going to have to reserve on this, unless -- of course, you've made your submissions, they're all written, so I don't need any further submissions.

[23] The hearing judge refers in his reasons to evidence that was not sworn to, and to documents entered as part of that unsworn evidence.

[24] Rule 20(2)(c) of the PCFR provides that a judge may at any time "permit any other means of proof instead of that required by these rules."

[25] In *O.C.C. v. A.C.*, 2013 BCSC 682, Mr. Justice N. Brown discussed in detail the application of Rule 20(2)(c) to unsworn testimony:

[39] The various statements in the PCFR are somewhat indefinite as to whether a judge on a hearing can accept unsworn statements by the parties as a form of proof. ...

[49] As I interpret the PCFR, sworn oral testimony is the expected norm, both for hearings before a judge and for trials. Affidavits are permissible, but their use requires a judge's permission. And, although Rule 20(2)(c) gives a judge authority to permit any other form of proof other than that permitted by the PCFR, in the case of statements made by parties or witnesses during a hearing of an application or a trial, oral testimony, sworn or affirmed is the expected norm. Of course, sometimes, such as during initial or subsequent hearings, when parties appear briefly before the judge, or when the judge needs to gain a preliminary general understanding of matters, or needs to confirm certain matters for the record, statements made by counsel or unsworn statements by the parties can be considered. Judges generally sense when the nature and extent of unsworn statements being made at a hearing have crossed over the line that makes it clear parties' statements must be sworn or affirmed.

[50] In my view, the statements made by parties at a hearing upon which the judge intends to render a decision should be ones the truthfulness of which the parties have sworn or solemnly affirmed are true. In my view, Rule 20(2)(c) does not allow a departure from this expectation, except in such limited circumstances as those mentioned above.

[52] I note as well the comments of Justice Martinson in *Earle v. Earle*, 1999 BCSC 283. Although Justice Martinson was commenting in *Earle* on the quality of evidence that a payor spouse seeking a reduction or cancellation in arrears in Supreme Court is expected to produce, her statement that a decision on a payor's application to cancel or reduce arrears requires sworn evidence that is reliable, accurate and complete is somewhat relatable to the issues raised here. At paras. 28-30, Martinson J. said:

- [28] The requirement that the information be under oath is an important one. A decision to cancel or reduce arrears can only be made on reliable, accurate and complete information. The Rules of the Supreme Court say that this can only be made based on sworn evidence unless a judge says otherwise. No judge will allow evidence that is not reliable and accurate.
- [29] If there is no such sworn evidence, it is as if the judge has no evidence at all on which to base a reduction or a cancellation of arrears.
- [30] Evidence cannot be hearsay either.
- [53] I fully realize that a judge hearing interim applications often has limited time to canvass facts, particularly when parties are unrepresented. In those circumstances, adopting an inquisitorial, issue by issue, procedure, with the judge asking most of the questions, or at least directing the areas of inquiry issue by issue, may be more workable than an adversarial process.
- [54] But irrespective of the procedure adopted, in any hearing that will see judicable matters decided, the parties and any witnesses called at an oral hearing must be sworn or affirmed. And whatever the procedure used, the parties' rights of cross-examination at an oral hearing should be reasonably accommodated -- to the extent the nature of the hearing, the matters at issue, available time, the surrounding circumstances and all the practicalities proportionately call for. Ultimately, it is always a case of the hearing judge managing this so far as the circumstances allow. In my view, this comment says nothing new or departs from existing principle and practice.
- [55] The inquisitorial style of hearing process the Judge adopted was not inherently deficient, but the parties should have been sworn or affirmed. I note that the petitioner did not ask the Judge for an opportunity to cross-examine the respondent, but the Judge neglected to ensure his particular concerns regarding the nature and extent of the special expenses were canvassed with the respondent. This could have been achieved by asking her about those under oath, and giving the petitioner opportunity to cross-examine the respondent, or at least ensure the respondent addressed his major concerns under oath. In stating this, I appreciate that a certain element of procedural informality, especially with unrepresented litigants, is often necessary, even desirable, and that the new FLA explicitly calls for as much procedural informality as possible.
- [67] I conclude, however, that the Judge erred in neglecting to swear or affirm the parties at the hearing. He had no evidence before him upon which to make findings of fact or make orders. ...

[Emphases added.]

- [26] Likewise in this case I conclude that the reliance on unsworn evidence and the failure of the Court to permit the appellant to reply requires that the appeal be allowed.

[27] The second reason for allowing the appeal relates to the standing of the appellant to apply for child support. During the hearing the hearing judge commented that the appellant was not entitled to claim for support, nor did she have standing in relation to her earlier application for document production because R.T.W. was not in her day-to-day care. He also stated she was not entitled to receive such support because the child had "voluntarily" withdrawn from her care. That latter finding appears to have also supported his view of her standing to bring the application. During the course of the hearing the following exchange occurred:

THE COURT: What do you mean she has been providing room and board? If your mother -- is the child living with you or not?

[V.K.]: He has not been residing with me since September of 2012 based on certain circumstances that occurred, and it's all within my submissions this morning, Your Honour.

THE COURT: But you're saying that you're entitled to maintenance despite the fact that the child was not living with you?

[V.K.]: My child is entitled to child support, Your Honour, regardless of where he resides.

THE COURT: Well, he's not making an application for child support; you are.

[V.K.]: I am -- I am his guardian.

THE COURT: But you're not -- you're not -- the child is not in your care.

[V.K.]: I'm looking out for the best interests of my child.

THE COURT: That is not the point, Madam. If the child is not living with you, how could you be claiming maintenance for the child?

[V.K.]: Because I am his guardian. His grandmother is not.

THE COURT: Well, the grandmother is the only one who can say she wants maintenance to look after him.

[28] The hearing judge determined that since R.T.W. had voluntarily left the appellant's home, there was no obligation for the respondent to pay child support to the appellant. The evidence supported the conclusion that R.T.W. left the home voluntarily because he did not like the rules imposed by the appellant and was estranged from the mother's new partner. As noted, the appellant asked R.T.W. to sign an agreement containing the following:

4. If you do not agree, leave your key and make arrangements to relocate your belongings because I will not share my home with a thief.

[29] The child clearly availed himself of that direction. The hearing judge found as a result that the appellant was not entitled to claim child support given the child's voluntary withdrawal from his mother's care. He said the following:

- [22] In summary therefore, Ms. [K.'s] Application for sole guardianship; retroactive and ongoing maintenance including retroactive payments for extraordinary or special expenses, are hereby all dismissed, and that as of September 1, 2012, no maintenance payments are due and payable to Ms. [K.] for the maintenance of her son, [R.W.], born July 17, 1999.
- [23] I find that under Section 147 of the Family Law Act that no support is payable to Ms. [K.] because the child "voluntarily" withdrew from his mother's charge in September 2012 and continues to this day not to be in her charge.
- [24] I also find that under Section 152 of the Family Law Act that Mr. [W.] is entitled to termination of his child support payments to Ms. [K.], since he has successfully established a material change of circumstances, since the child is no longer in the care of the mother, and has not been since September 2012.
- [30] It appears that the failure of the appellant to remit the child support she received to her mother, who was carrying for R.T.W., led the hearing judge into error by causing him to conflate the right to apply for support as being the same as the right to receive support.
- [31] Section 149(2) of the FLA states that an application for child support may be made by "a child's parent or guardian." On such an application, the court may order that a child's parent or guardian pay child support to a designated person. There is no statutory requirement that the child reside with the applicant or the designated person.
- [32] While s. 149(2) does not appear to have been judicially considered to date, assistance is found in decisions under the former Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. In *Kasper v. Mundy* (1993), 81 B.C.L.R. (2d) 256 (S.C.), Master Joyce (as he then was) considered s. 59 of the FRA which stated that "any person" could bring an application on behalf of a child. That section later became part of s. 91 of the FRA. Master Joyce stated at para. 15:
- The Family Relations Act should be given a liberal interpretation. There must obviously be some limits as to who can apply. An individual who has no connection with or interest in the child's welfare would have no standing. However, the plaintiff is a person who has an interest in the welfare of the children because he has been ordered to pay maintenance for them. In my view he ought to be permitted to advance a claim against the natural father on behalf of the children and for their benefit if the mother fails to do so. ...
- [33] *Kasper* has been applied multiple times, most recently by the Court of Appeal in *Johnston v. Embree*, 2013 BCCA 74, where at para. 50 the Court stated:
- [50] In reaching that agreement, it appears the parties may have lost sight of three fundamental principles: first, child support is the right of the child, not the parents; second, the child is entitled to support in the amount stipulated by the Guidelines; and third, the court is charged with ensuring a child's right to Guideline support is enforced.
- [34] I am satisfied that the appellant clearly had standing to apply for support on behalf of and for the benefit of R.T.W.

[35] Respectfully, the hearing judge also fell into error in finding that s. 147 of the FLA meant that the appellant was not entitled to receive support for the child because the child had "voluntarily" withdrawn from her charge. That is not what s. 147(1) says. I repeat that section here for convenience:

Duty to provide support for child

147 (1) Each parent and guardian of a child has a duty to provide support for the child, unless the child

...

(b) is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were, considered objectively, intolerable.

[36] Section 147 stipulates that the obligation of the appellant to pay support ceased when R.T.W. voluntarily withdrew from her care; R.T.W. withdrew from the appellant's charge, not the respondent's. In other words, applied to this case the provision relates to the obligation of the appellant to support R.T.W., not the respondent's maintenance obligations to R.T.W. (Henderson v. Bal, 2014 BCSC 1347).

[37] This error by the hearing judge led to a finding that there had been a material change when the child moved to his grandmother's, resulting in termination of the respondent's support obligations as of the date of that move. There was in my view no material change relevant to the respondent's support obligation. The respondent's obligation to pay support continued.

[38] The appellant, as recipient of the support paid, was the individual responsible for ensuring that the funds were used for R.T.W.'s support. The appellant has the obligation to establish that the funds were used for that purpose, and if not, is liable to R.T.W.

[39] As a result, I need not address in detail the various other grounds for appeal.

[40] The appeal is granted, the order of the Provincial Court is set aside and a new hearing is ordered.

[41] Each party shall bear their own costs.

"Punnett J."

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