
CANADA / JUDGMENT

Finch v. Finch

2014 BCSC 653

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 653 Finch v. Finch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Finch v. Finch,

2014 BCSC 653

Date: 20140416

Docket: E10250

Registry: Chilliwack

Between:

Tija Jean Amy Finch also known as Tija Jean Amy Grouette

Claimant

And

Shane William Finch

Respondent

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for Claimant:

N. Harold

Counsel for Respondent:

C. Stenerson

Place and Date of Trial/Hearing:

Chilliwack, B.C.

January 27 - 31, 2014; and

February 7, 2014

Place and Date of Judgment:

Chilliwack, B.C.

April 16, 2014

Introduction

- [1] The principal issues in dispute in this family law matter are the division of parenting time between the parties and the determination of spousal and child support. There are also some issues around the allocation of certain debts but, to their credit, the parties have been able to agree on a number of matters including joint guardianship of the two children of the marriage.

Facts

The Parties

- [2] The claimant, Tija Finch, was born on November 12, 1975 and was 38 years old at the time of the trial. Ms. Finch was raised in Dryden, Ontario. She has one sibling, a brother, who resides in B.C. Her mother continues to live in Dryden. Her father passed away in 2008.
- [3] The respondent, Shane Finch, was born on October 17, 1969 and was 44 years old at the time of trial. Mr. Finch has lived in British Columbia for most of his life. His parents live here as does his brother and his brother's family.
- [4] There are two children of the marriage:
- a) Hannah Jean Amy Finch, born July 13, 2007; and
 - b) Isabella Margaret Teddie Finch, born July 7, 2008.

History of the Marriage

- [5] The parties met in 1996.
- [6] In March 2006, Mr. Finch moved into Ms. Finch's townhouse. Ms. Finch had purchased the townhouse in 2005 by making a down payment of \$46,000 and taking out a mortgage of \$130,000. Part of the down payment was comprised of \$20,000 borrowed from her grandmother and \$11,000 provided by her parents.

- [7] When they first started living together, Ms. Finch worked as a receptionist in a dental practice and managed the building for the dentists in the practice. She had previously attended the University of the Fraser Valley for two years, studying criminology.
- [8] Mr. Finch was working for the Insurance Corporation of British Columbia ("ICBC") for whom he still works.
- [9] The parties were married on September 16, 2006.
- [10] After getting married, Ms. Finch sold the townhouse and the parties purchased a home in Abbotsford. Both parties contributed to the purchase price. Ms. Finch contributed proceeds from the sale of her townhouse and Mr. Finch contributed money realized from the sale of a property that he owned with his brother.
- [11] Throughout their marriage, the parties maintained a joint bank account into which both put their earnings and out of which family expenses were paid.
- [12] Ms. Finch stopped working in May 2007, when she was pregnant with their daughter, Hannah, who was born in July 2007. Following Hannah's birth, Ms. Finch did not return to work as her father was ill and she spent considerable time with him until his death in March 2008. Ms. Finch also became pregnant with their second child, Isabella, who was born in July 2008.
- [13] In 2009, Ms. Finch returned to school. She and Mr. Finch agreed that it was a good idea for her to do so and to train to become a teacher. Ms. Finch took one course in the summer of 2009 then returned full time in September 2009. She completed her Bachelor of General Studies at the University of the Fraser Valley and then enrolled in the teacher education program which she completed in June of 2012.
- [14] Following completion of her studies, Ms. Finch looked for work as a teacher. As I understand the process, before obtaining a full-time position, teachers typically spend a period of time as a teacher on call. Beginning in September of 2013, Ms. Finch has been employed as a teacher on call with the Seabird Island Indian Band. She is also employed as an on call teacher's assistant.
- [15] While Ms. Finch was completing her studies, she and Mr. Finch separated for the first time in October 2011. He left the family home and moved in with his parents. They reunited for a period in the spring of 2012 but then separated permanently in August 2012, although Ms. Finch stayed in the house until October 2012, when she moved into a rented basement suite with the children.
- [16] Mr. Finch continued to live in the house until December 2013 however the parties stopped making mortgage payments as of August 2012 and the house was eventually foreclosed.

- [17] During the initial period of separation, the parties reached an agreement on a number of issues with the assistance of a mediator, the terms of which are set out in a document entitled "Memorandum of Understanding" dated January 17, 2012.
- [18] Under that agreement, the parties shared parenting time on a two week rotating basis with each parent having the children on alternate weekends plus some overnight time during the week.
- [19] The Memorandum of Understanding, on its face, was to expire on June 30, 2012. However, the parties reunited, albeit briefly, before the date of expiry.
- [20] Following the parties' final separation, there were apparently difficulties in organizing parenting time between the parties as a result of which Ms. Finch brought on an application that resulted in an order dated October 1, 2012 (the "Interim Order") establishing an interim parenting schedule, which is still in place, as follows:
- a) in week one, the children are to be with Ms. Finch from Monday - Thursday at 6:00 p.m. when Mr. Finch picks them up and has them until Monday morning when he delivers them to Ms. Finch;
 - b) in week two, the children are to be with Ms. Finch from Monday morning until Wednesday at 6:00 p.m. Mr. Finch then picks them up and has the children until Friday morning with Ms. Finch then having them through the weekend until Monday morning;
 - c) in week three, the children remain with Ms. Finch until Wednesday at 6:00 p.m. and then are with Mr. Finch until the following Monday morning; and
 - d) in week four, the children are with Ms. Finch from Monday morning until Wednesday at 6:00 p.m. They are then with Mr. Finch from Wednesday evening until Friday morning and with Ms. Finch through the weekend.
- [21] The above schedule reflects the fact that Mr. Finch has every second Friday off work.
- [22] The Interim Order also establishes a "right of first refusal" system whereby Ms. Finch is to have care of the children on any of Mr. Finch's days if he is at work. It also provides that Ms. Finch will pick the children up from school or daycare on Mr. Finch's days if Mr. Finch is unable to do so. As I understand it, this has been a common practice as Mr. Finch typically works until 6:00 p.m. If Ms. Finch is unable to pick up the children from school or daycare on any of Mr. Finch's days, the Interim Order provides that the first request for assistance will go to Mr. Finch's mother, Bonnie Finch. Finally, the Interim Order provides that if Ms. Finch is called into work when she is to have care of the children, they will be placed in the care of their daycare provider.

- [23] Ms. Finch testified that this system, whereby she picks up the children after school on Mr. Finch's days if he is unable, works well. On days when she is working, Mr. Finch's mother generally picks up the children at 3:00 p.m. Ms. Finch then picks them up between 4:00 and 4:30. She takes them home and feeds them before Mr. Finch picks them up after work.
- [24] Whether this right of first refusal system will continue is an issue between the parties. In particular, Mr. Finch no longer wants to permit Ms. Finch to pick up the children after school on his days and care for them until he is done work. I will return to this issue below.
- [25] In addition to dealing with parenting time, the Interim Order also provided that Mr. Finch would pay interim child support in the amount of \$1,071 per month, payable by way of bi-weekly payments in the amount of \$494.30, and interim spousal support in the amount of \$1,265 per month, by way of bi-weekly payments of \$583.85. Mr. Finch has been making those payments.

Post-Separation Events

- [26] After moving out of the family home in October 2012, Ms. Finch moved in to a rental basement suite in Chilliwack. She lived there until September 2013 when she moved to another rental house also in Chilliwack.
- [27] As noted, Mr. Finch remained in the family home until December 2013. Since then, he has resided primarily with his brother's family at a house in Chilliwack.
- [28] One of Ms. Finch's principal concerns about the current parenting arrangement is Mr. Finch's lack of a stable living arrangement. She says that since he left the family home, when the children are with him they have stayed sometimes at Mr. Finch's brother's house, sometimes with his parents, sometimes at Mr. Finch's girlfriend's house and occasionally at another family's home. Ms. Finch says that this instability has contributed to the children's anxiety such that they no longer want to spend overnights with their father.
- [29] In cross-examination, Ms. Finch agreed that the children have changed residences while with her, from the first basement suite to their current house. Ms. Finch also acknowledged that the children stayed overnight at the home of a man with whom she was in a brief relationship.
- [30] As will be seen, the issue of living arrangements is central to the dispute between the parties about parenting time. Ms. Finch testified at some length about problems experienced when the children are transferred from her to Mr. Finch. She says the children regularly express reluctance to go with their father, to the point that they become very upset at the time of the exchange. Ms. Finch attributes this to Mr. Finch's current living arrangements.
- [31] At trial, Ms. Finch sought to introduce into evidence a recording, taken on her cell phone, of an exchange that took place the week before trial. I will deal with that recording below.

- [32] This matter was originally set for trial in September of 2013. Mr. Finch applied for an adjournment which was denied, however the parties subsequently agreed to adjourn the trial on certain terms as follows:
- a) the parties would continue to attend communication counselling;
 - b) the parties would continue to retain a parenting coordinator and each would pay half of his retainer;
 - c) Mr. Finch would begin paying half of the required monthly payments on a student line of credit taken out when Ms. Finch returned to school, without prejudice to his right to argue that he is not liable for this debt; and
 - d) Mr. Finch would transfer his RRSPs to Ms. Finch to be applied against the student line of credit when they matured.
- [33] The parties have continued to attend communication counselling although Mr. Finch is of the view that it is not particularly helpful. They also continue to use the services of the parenting coordinator, Mr. Findlay.
- [34] Mr. Finch has been paying half of the required monthly payments on the student line of credit although the parties have had disputes about the timing of those payments. The payment comes out of a designated bank account on the 1st day of each month. Mr. Finch initially wanted to provide Ms. Finch with post-dated cheques which she refused to accept. As a result, Mr. Finch has occasionally been late in making his payments, although as he points out, there was no agreement about how or when he would make the payments.
- [35] In terms of the RRSPs, Mr. Finch has transferred them to Ms. Finch and she has used one of them to make a payment against the student line of credit. A further payment will be made when the next RRSP matures.
- [36] Ms. Finch complains that Mr. Finch cashed one RRSP and used the net amount of \$1,461.00 that he realized for his own purposes, specifically to pay half of the cost of a mediation they attended, some personal expenses and to finance a trip to Las Vegas. Ms. Finch says therefore that she should be entitled to retain that amount from the next RRSP that is cashed or alternatively, Mr. Finch should reimburse her half of the \$1,461.00.
- [37] Both parties testified about certain events that occurred after separation where there were confrontations between them and other family members. These included an occasion when Ms. Finch returned to the family home to pick up various belongings, a time when Ms. Finch was required to go to the hospital for emergency treatment and an incident at a softball tournament. There are allegations of each saying disparaging things about the other to different people. There was also evidence of two occasions when Ms. Finch wished to speak to Mr. Finch about medical care and school issues for the children and he told her to communicate through her lawyer, as well as another occasion when Mr. Finch was travelling with the children to Washington State and refused to disclose to Ms. Finch their precise

destination.

- [38] Not surprisingly, the parties have different accounts of each incident. Mr. Finch accuses Ms. Finch of twisting events to always portray him in a negative light, whereas Ms. Finch says that Mr. Finch accuses her of lying whenever their recollection of events differs. It is not necessary for me to resolve those differences as these incidents are not, in my view, directly relevant to the issues before me. I will say that regardless of which version of events is true, it is fair to say that the incidents do not reflect well on either Mr. Finch or Ms. Finch and serve to underscore the problems that they have in communicating and the profound lack of trust that has arisen between them.
- [39] This was perhaps best illustrated by Ms. Finch's statement that she intends to continue to record exchanges and other interactions with Mr. Finch and Mr. Finch's statement that he has no interest in speaking directly to Ms. Finch. One would have expected that when given the opportunity to do so, both parents would have expressed a willingness to try to put their differences aside in order to better co-parent their children. Apparently neither is willing or able to do so.

Financial Issues

- [40] Mr. Finch works for ICBC as a bodily injury claims adjuster and earns an annual income of approximately \$73,000.
- [41] During the latter stages of their marriage, Ms. Finch was in school but has since commenced employment as a teacher on call with the Seabird Island Indian Band. Her income currently varies depending on how often she is called into work. In her most recent financial statement, dated January 27, 2014, she estimated her weekly earnings at approximately \$395.00. This was based on an average of what she has earned per week over the number of weeks that she has been employed by Seabird Island.
- [42] As noted above, when Ms. Finch returned to school in 2009, she obtained a \$30,000 student line of credit. Because Mr. Finch and Ms. Finch could not obtain the student line of credit on their own due to their financial situation, Ms. Finch's mother, Doreen Grouette, co-signed the application. The parties both testified that the intention was that they would be responsible for the payments on the student line of credit. Mrs. Grouette confirmed that while she agreed to co-sign the application, it was not her intention to make the required payments.
- [43] The evidence is clear that money from the student line of credit was regularly used to pay family expenses.
- [44] In addition, Ms. Finch's aunt provided her with \$10,000 per year for each of the three years that Ms. Finch was back in school. According to Ms. Finch, her aunt wanted to support her in her education. That money also went to paying family expenses and debts.

- [45] Both parties testified that throughout their marriage, Ms. Finch's mother, and father before his death, provided periodic financial support. As both Ms. Finch and Mrs. Grouette described it, if Mr. and Ms. Finch needed money, Mrs. Grouette would assist if she was able. This typically consisted of contributions towards living expenses.
- [46] This support has continued for Ms. Finch after her separation from Mr. Finch.
- [47] The evidence establishes, and both parties conceded, that during their marriage they lived beyond their means as a result of which there was considerable financial pressure. After their final separation, both declared bankruptcy with Ms. Finch being discharged in or about July of 2013 and Mr. Finch in or about January of 2014.

The Cell Phone Recording

- [48] As indicated, Ms. Finch sought to introduce into evidence a recording taken on her cell phone of a recent exchange of the children that occurred on January 14 or 15, 2014. Mr. Finch objected.
- [49] I decided that I would allow the recording to be played and that I would determine its admissibility once I had seen and heard the recording and had the benefit of the rest of the evidence adduced at trial.
- [50] The recording contains a small bit of video but is largely an audio recording of Ms. Finch and the children at a time when Mr. Finch had come to pick the children up.
- [51] Ms. Finch testified about the circumstances in which the recording was made. She said that she often has her cell phone on and that she has, on other occasions, recorded incidents involving the children and Mr. Finch. No other recordings were produced. She denies that she made this recording for the specific purpose of bringing it to the trial. She also testified that the recording is accurate and that no alterations were made. She transferred the recording from her cell phone to her computer and then on to a flash drive.
- [52] Ms. Finch submits that the recording is not being proffered as evidence of Mr. Finch's conduct or to establish any admissions on his part. Rather, she says that it is evidence of the children's state of mind at the time of the exchange.
- [53] Ms. Finch submits further that this evidence is relevant, of probative value, and that there is no principled reason to exclude it.
- [54] Mr. Finch opposes the admission of the recording. He says that notice of the recording was not provided at least seven days in advance of the trial as required by Rule 14-7(10) of the Supreme Court Family Rules. Mr. Finch submits that the seven day notice is intended to avoid trial by ambush and to eliminate situations like this, where evidence comes forward late in the day. Mr. Finch submits further that the prejudicial effect of the evidence outweighs its probative value. He says that we know nothing about what transpired before or after the recording or the circumstances in which the recording was made. Absent that

contextual evidence, he says that the recording is merely a snapshot in time and is of little or no probative value.

- [55] I have not been provided with any authorities directly on point that consider this type of evidence sought to be introduced for the purpose identified by Ms. Finch. However, a number of cases have considered the admissibility of illegally obtained or surreptitiously recorded evidence and the principles drawn from those cases are instructive.
- [56] The leading authority in B.C. is *Mathews v. Mathews*, 2007 BCSC 1825. At issue in that family case were diary entries of one spouse that the other had surreptitiously obtained. Mr. Justice Barrow reviewed a number of other B.C. authorities, including *A.D.B. v. E.B.*, [1997] B.C.J No. 227 (S.C.) where Mr. Justice Grist considered the admissibility of recordings of telephone conversations between the children and the mother made by the father. Mr. Justice Grist admitted the recordings, stating (at para. 12):

the law is clear that if the information is relevant, the identity of the parties known, and the recording trustworthy, the evidence by way of taped conversations should be received.

- [57] Similarly in *Sweeten v. Sweeten*, [1996] B.C.J. No. 3138 (S.C.), Master Joyce, as he then was, admitted a single tape recording between the father and a child on an application to vary an interim custody order. Master Joyce suggested that the discretion to exclude the evidence was limited and that, in the circumstances of that case, the best interests of the child militated in favour of admitting the evidence.
- [58] Another case of note is *A.M.E.R. v. P.J.R.*, 2003 BCSC 1466. In that case, the mother had, over a period of three and one-half years, secretly taped the father's conversations with the children, as well as some conversations between herself and the father. The issue before Mr. Justice Williamson was whether these recordings should be provided to the author of a report under s. 15 of the former Family Relations Act, R.S.B.C. 1996, c. 128. While noting that he was not dealing with the admissibility of this evidence as part of a legal proceeding, Mr. Justice Williamson considered a number of cases, including *A.D.B. v. E.B.* and *Sweeten*, and concluded that there is a three prong test for determining admissibility of this type of evidence: relevance, identification and trustworthiness (para. 14). He also considered the question of fairness and the effect on the reputation of the administration of justice of allowing evidence of this kind to be used.
- [59] After considering these various authorities as well as a number of Ontario cases, Mr. Justice Barrow in *Mathews* held as follows (at para. 43):

it is clear there is a limited discretion to exclude relevant evidence in this context. The judicial exercise of that discretion involves a balancing of competing interests which can be usefully viewed as assessing the probative value of the evidence as against its prejudicial effect.

- [60] One final authority is worth noting because it expresses well a concern that I have about such evidence. The case is *K.L.K. v. E.J.G.K.*, 2013 BCSC 2030, where one of the orders sought before Mr. Justice Rogers was an order prohibiting the mother from video recording conversations with the children for use in a family law proceeding. Mr. Justice Rogers discussed this practice at paras. 94-97. While the excerpt is lengthy, it is worth reproducing it in its entirety:
- [94] This is a very difficult request. Ms. K maintains that she has recorded the children's conversations with her so that their voices may be heard by the court. There is some merit in that; too often in their affidavits parents paraphrase their children's comments concerning matters in issue. The court is usually left wondering how accurate those paraphrases may be. An actual transcript of the child's words removes doubt about the accuracy of the recounted conversation.
- [95] There are dangers in this as well. I have no guarantee that Ms. K has not withheld conversations that were in Ms. K's favour. If the purpose of recording the children is to put their views to the court, then all of their views, whether they assist the recording parent or not, should perhaps be adduced or at least provided to the other parent as part of the discovery process. There is in this case no agreement to share all of the recordings. I am left with a concern that it may be unfair to the children to permit Ms. K to continue to record and adduce only those conversations that she believes are useful to her case.
- [96] Another danger is that I have no guarantee that Ms. K has put forward the entire recording of those conversations that she has transcribed and exhibited to her affidavits. I note, for example, that the recording of S's conversation on August 6th to begin like an epic tale: i.e.: in the middle of the action. What preceded the taped bits of that conversation? How did S come to be talking about that particular subject? Did S volunteer it out of the blue, so that Ms. K had to ask her to wait a moment then rush to get her tape recorder, then press record and finally signal S to continue? Did Ms. K have the recorder at the ready, then prompt S to talk about the mobile phone, and finally press record only after she had posed her question? Was the recorder running all the while and Ms. K made it seem as if it had been turned on just as S introduced the subject of her phone? These are obvious and troubling questions.
- [97] I am concerned, too, that by recording the children's conversations Ms. K has, despite her avowed purpose to not discuss the litigation with the children, in fact done the opposite and, more to the point, has inducted the children as witnesses in the process. It seems to me that children should be entitled to have unguarded conversations with their parents - they ought not to be put in a position of worrying about whether their words will wind up in a transcript attached to an affidavit.
- [61] Mr. Justice Rogers declined to make the order sought on the basis that he needed more information about the circumstances surrounding the recordings. However, it appears that transcripts of the recordings were attached to affidavits and were considered by the court.

- [62] Turning to the case at bar, the weight of the authorities favours the admissibility of the recording, provided that it satisfies the criteria set out in *A.M.E.R. v. P.J.R.* of relevance, identification and trustworthiness, and that the probative value outweighs any prejudicial effect.
- [63] Taking all of these factors into account, I am prepared to admit the recording into evidence. I am satisfied that it is relevant in that it goes to the difficulties experienced during at least one exchange of the children, which in turn goes to the parenting time issue. I am also satisfied as to its trustworthiness given Ms. Finch's evidence about how the recording was created and saved. Finally, I am satisfied that its probative value, although limited, outweighs any prejudicial effect.
- [64] In coming to this conclusion, I am mindful of the fact that notice of the recording was not delivered in accordance with the time requirements set out in the Rules. However, I am satisfied that this factor alone is not sufficient to render the recording inadmissible given that the recording only came into existence shortly before trial.
- [65] Having found that the recording is admissible, I should also say that I put minimal weight on it. As is the case with all such recordings, it reflects a particular moment in time and says little about what transpired either before or after the recording stopped. Further, it provides no insight into why the children were upset about going with their father, although Ms. Finch agreed in cross-examination that one of the children wished to go to McDonalds which Mr. Finch was not going to do. I also have no reason to doubt Mr. Finch's evidence that the children were fine by the time they got home with him.
- [66] All in all, what I take from the recording is that the children were unhappy about going with Mr. Finch on that particular day. This is not to discount the children's feelings which, from the recording, were obviously genuine but again it is of little use in resolving the issues before me.
- [67] I will conclude this issue by echoing Mr. Justice Roger's comments in *K.L.K. v. E.J.G.K.* about the unfortunate practice of inducting children as witnesses in the proceeding by way of such recordings.

Issues

- [68] The parties have been able to agree on a number of issues and their agreement is set out in the document attached as Appendix "A" to these Reasons. The terms of that agreement will be included as terms of my order herein.
- [69] That leaves the following matters to be resolved by the Court:
- a) Parenting time;
 - b) Child support;

- c) Spousal support; and
- d) Division of assets and liabilities.

Analysis

Parenting Time

- [70] Section 37(1) of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") stipulates that when making an order concerning parenting arrangements or contact with a child, the sole factor to consider is the best interests of the child.
- [71] Section 37(2) provides that in determining the child's best interests, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- [72] In considering the best interests of these two children, it is clear to me that both Mr. Finch and Ms. Finch love their children and want the best for them. I would note that, to their credit, neither party sought to cast aspersions on the other's parenting skills or commitment to the children's well-being. Both readily acknowledged the importance of the children maintaining a strong connection with each parent.

- [73] As noted, the parties currently share parenting under the schedule set out in the Interim Order, which provides for almost equal time. While the schedule appears somewhat complicated on its face, it essentially works out to 13 overnights with Mr. Finch and 15 with Ms. Finch in every 28 day cycle.
- [74] Mr. Finch seeks an order for equal parenting time, preferably on a week on week off schedule. As an alternative, he would accept a 2/1/4 schedule which would allow for one overnight stay during each parent's "off" week.
- [75] Ms. Finch seeks to reduce Mr. Finch's parenting time. She proposes that Mr. Finch have the children overnight every second weekend as well as one or two evenings during the week after he finishes work. Alternatively, Ms. Finch favours retaining the current schedule. Either way, she says the schedule should be reviewed after six months.
- [76] As I understood it, Ms. Finch's position is based on two principal concerns:
- i) Mr. Finch's uncertain living arrangement; and
 - ii) the fact that the exchanges have been going poorly and the girls have expressed a reluctance to stay overnight with their father.
- [77] In terms of Mr. Finch's living arrangement, Ms. Finch sought to characterize it as being unstable but in my view that characterization is unwarranted. Mr. Finch testified that the girls had a sleepover at a friend's home on Boxing Day along with the friend's twin daughters, a sleepover at his parent's home and had stayed two or three times at his girlfriend's home. None of these events is particularly unusual and does not differ significantly from what has occurred with Ms. Finch, who admitted that the girls stayed over at her former boyfriend's house on occasion.
- [78] I agree that it is not ideal that Mr. Finch lives with his brother, Craig Finch, and his family, however Mr. Finch testified that when the children are with him there, they have their own room with their own beds. Mr. Finch also testified that the children enjoy being with their cousins and do not complain about the living arrangements.
- [79] Mr. Finch testified that he intends to get a place of his own for him and the children once he is in a financial position to do so.
- [80] The evidence does not establish that Mr. Finch's current living arrangements are detrimental to the children and I would not accede to Ms. Finch's request to reduce his parenting time based on this factor. One caveat that I would add to this conclusion is that there was evidence of one incident when Ms. Finch came to Craig Finch's house and was subjected to abusive and profane comments directed at her by Craig Finch. Bonnie Finch was present at the time and confirmed that this occurred. She also confirmed that in her view Craig's behaviour was inappropriate. The parties differ on whether the children were present at the time. Ms. Finch says they were, Bonnie Finch and Mr. Finch say they were not.

- [81] While I need not decide precisely what occurred with respect to this one incident, if there was evidence that this was a regular occurrence and that there is significant animus towards Ms. Finch on the part of the family members with whom Mr. Finch currently resides, I would have a different view of the appropriateness of Mr. Finch's current living arrangements given the likelihood of the children being exposed to such behaviour.
- [82] With respect to Ms. Finch's second concern, I do not believe that the difficulties encountered during some of the exchanges of the children warrants the change in parenting time sought by Ms. Finch.
- [83] Mr. Finch candidly admitted that Isabella in particular has had difficulty with the exchanges all along. He says that Hannah has adapted better but that she too has occasional difficult moments.
- [84] It must be remembered that these are young children, ages six and five, who no doubt find the change in their living arrangements difficult. However, the problems that have arisen with the exchanges speak more to the need to better manage or reduce the number of exchanges than to significantly reduce one parent's time with the children as proposed by Ms. Finch.
- [85] It was put to Mr. Finch in cross-examination that if the issue is with the exchanges, that problem is not addressed by taking time away from Ms. Finch, which would be the effect of eliminating the current right of first refusal system. However, the same can be said with respect to Ms. Finch's proposal to reduce Mr. Finch's parenting time. Clearly, the issue of the exchanges needs to be addressed but I view that as a separate issue from how much parenting time each parent should have.
- [86] I am satisfied on the evidence that it is in the best interests of the children that each parent have equal parenting time with the children. On balance, the week on week off schedule proposed by Mr. Finch makes sense in the circumstances in that it would minimize the number of exchanges. However, I am concerned that this might be too dramatic a change for the children who are used to a schedule in which they spend some time with each parent every week. A reasonable compromise therefore is the alternate schedule proposed by Mr. Finch, whereby each parent would have one overnight during his or her "off" week, in other words a 2/1/4 schedule.
- [87] With respect to the right of first refusal, it is Mr. Finch's view that during his weeks with the children, he should be able to choose who cares for the children between the time that they finish school and when he gets off work. However, as submitted by Ms. Finch, that position seems to be based more on what Mr. Finch wants than what is in the childrens' best interests.

- [88] The parties' evidence confirms that the current system works well and I see no reason to change it. I recognize that when Ms. Finch has the children after school during Mr. Finch's weeks, more exchanges are involved. However, the evidence was that these exchanges do not cause the same degree of upset as the exchanges when the children are going to stay with Mr. Finch for his allotted time.
- [89] Accordingly, I order that the right of first refusal system set out in the Interim Order be maintained, subject to one variation whereby Mr. Finch also has a right of first refusal to care for the children when Ms. Finch is unavailable during her time, for example in the mornings when she has to go to work.
- [90] The parties have agreed on the division of parenting time during holidays and as it relates to travel outside of the country, including the handling of passports, as reflected in the agreement appended to these Reasons.
- [91] At the conclusion of the trial, a dispute arose about parenting time on the childrens' birthdays. Ms. Finch says that each parent should have time with each child on the child's birthday, whereas Mr. Finch says that this involves too much shuttling and that the parents should have the children for full days on their birthdays, alternating year to year.
- [92] Given the young ages of the children, I agree with Ms. Finch that the children should spend time with each parent on their birthdays. If the parties cannot agree on how to divide the days, the parenting coordinator can determine an appropriate arrangement.

The Parties' Incomes

- [93] Before turning to the issues of child and spousal support, I will first deal with the question of the parties' income, which is necessary to ascertain the appropriate quantum of support.
- [94] Mr. Finch submits that his adjusted Guideline income is \$72,858.00 and Ms. Finch does not take issue with that figure.
- [95] The contentious issue between the parties is the income to be attributed to Ms. Finch.
- [96] For the purposes of the Interim Order, Ms. Finch's 2012 Guideline income was set at \$5,000.00.
- [97] Going forward, Mr. Finch argues that an income should be imputed to Ms. Finch of \$29,569.00 per year based on his view that Ms. Finch is intentionally under-employed and that she has, or is capable of earning, income from sources other than teaching.
- [98] That figure is arrived at by taking her current weekly earnings from her part-time teaching and extrapolating those earnings over the full school year. This results, according to Mr. Finch, in a figure of \$17,057.00. Mr. Finch then adds to that the sum of \$2,512.80 that Ms. Finch should be eligible for during the summer months and a further \$10,000.00 based on financial gifts and support received from Ms. Finch's mother.

- [99] With respect to her level of employment, Mr. Finch says that Ms. Finch made no effort to obtain employment in the summer after she finished teacher training and before she commenced work with Seabird Island. He says that she has also made it clear that she will not seek alternate employment this summer or during the school year to top up her earnings.
- [100] For her part, Ms. Finch says that she and Mr. Finch always agreed that one benefit of her becoming a teacher is that she would have the summers free to spend with the children. She loves being a teacher, loves the school she is at and sees no reason to change her plans to look for work elsewhere or to find additional employment. She does say that ideally she will continue to get more days and that ultimately she will obtain a full-time teaching position.
- [101] While the plan when Mr. and Ms. Finch were together may well have been that Ms. Finch would take the summers off to be with the children, which no doubt would be ideal, it is not realistic given the financial circumstances of the parties resulting from the breakdown of the marriage and from choices made by them during the marriage.
- [102] I accept that Ms. Finch will continue to work towards obtaining a full-time position but that is unlikely to happen in the near term simply because of the practical realities faced by someone starting out in the teaching profession. I would not find therefore that Ms. Finch is currently purposefully under-employed as a teacher.
- [103] In order to determine Ms. Finch's Guideline income, it is necessary to estimate her earnings from teaching, as the number of days that she works varies from week to week. On this point, I accept Ms. Finch's calculation whereby she has determined her average weekly earnings to date and extrapolated them over the balance of the school year. This approach results in a figure of \$14,597.00.
- [104] I also think it is reasonable to expect that she will seek some additional income during the summer months when school is out or that she will apply for employment insurance benefits. On this point, I think Mr. Finch's proposal of adding \$2,512.80 in anticipated employment insurance earnings is reasonable.
- [105] Mr. Finch also seeks to attribute to Ms. Finch additional income derived from the gifts and support received from her mother. While it is true that Mrs. Grouette has supported Ms. Finch before, during and after her marriage to Mr. Finch, to characterize that support as income for the purposes of reducing Mr. Finch's spousal support obligation is unrealistic. If that were to occur, then Mr. Finch's income would have to be similarly increased by the amounts that he has received from his parents, for example to pay his litigation costs.

[106] The fact is that both sets of parents have done what parents do; they have, to the best of their ability, supported their children through difficult times and likely will continue to do so. Indeed, it is apparent that the cost of this litigation is primarily being underwritten by Mr. and Mrs. Finch senior and by Mrs. Grouette. I do not consider the contributions made by either Mr. Finch's parents or Ms. Finch's mother to be relevant to the determination of their respective incomes.

[107] In summary, for the purposes of calculating child and spousal support, Mr. Finch's Guideline income is set at \$72,858.00 and Ms. Finch's Guideline income is set at \$17,109.80.

Child Support

[108] Having determined the parties Guideline income above, effective May 1, 2014 Mr. Finch will pay child support in the amount of \$818.00 per month using the set off approach contemplated in s. 9 of the Federal Child Support Guidelines, SOR/97-175. Mr. Finch shall make the support payments by way of bi-weekly payments of \$377.54 to coincide with his pay cheques.

[109] The parties' incomes will be reviewed annually as of July 1, beginning July 1, 2015 for the purpose of reassessing child support. The parties will each provide the other with the financial information stipulated in s. 21 of the Federal Child Support Guidelines by June 30 of each year.

Spousal Support

[110] The principles governing an award of spousal support are set out in ss. 160-163 of the FLA:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;

- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

Agreements respecting spousal support

163 (1) An agreement respecting spousal support may provide for the circumstances under which spousal support will change or end, including if a spouse lives with another person or enters a relationship with another spouse, but a condition of spousal support that the spouse abstain from sexual relations after separation is not binding.

- (2) Despite section 160 [duty to provide support for entitled spouse], in making an agreement respecting spousal support, a spouse may agree to release the other spouse from liability for spousal support.
- (3) A written agreement respecting spousal support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.

[111] Similar principles are set out in s. 15.2 of the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.).

[112] The first threshold question in respect of spousal support is whether or not the party seeking a support order is entitled to it. Only if entitlement to spousal support is established must the court move on to consider the quantum and duration of that support (R.A.C. v. V.L.C., 2009 BCSC 825 at para. 283; Yemchuk v. Yemchuk, 2005 BCCA 406).

[113] The conceptual models for entitlement to spousal support were summarized by Madam Justice Ballance in Pickford v. Pickford, 2008 BCSC 380 at paras 28-32:

[28] The Supreme Court of Canada has articulated the conceptual models for determining entitlement to spousal support in the leading decisions of Moge v. Moge, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 and Bracklow v. Bracklow, [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577. In Moge, the Court introduced the notion of entitlement to spousal support based on compensatory principles, recognizing that the purpose of spousal support is to relieve the economic hardship that results from a marriage or its breakdown. It is intended to recognize that when a marriage has come to an end, the spouses are entitled to be compensated for contributions to it and for losses incurred on its breakdown. In Bracklow, the Court expanded the conceptual bases of support to encompass non-compensatory or needs based,

and contractual principles. The three conceptual bases for support are not mutually exclusive. In *Bracklow*, the Court confirmed that all of the factors and objectives of spousal support, not merely the means and needs of the spouses, must be considered in assessing quantum.

- [29] Financial need alone of one spouse may be enough to establish entitlement to support, although it does not invariably follow that the quantum or duration of spousal support must fully satisfy those needs: *Bracklow*; *T.N.P. v. R.P.*, 2004 BCSC 1627. Even in the instances where entitlement is founded on financial need, it may be unfair to order support to fully meet the need for an indefinite period: *Kripps v. Kripps*, [1999] B.C.J. No. 1343 (QL) (S.C.). In assessing need, if the financial means are available, then the appropriate standard of living to look at is a reasonable standard bearing in mind the standard of living enjoyed during the marriage.
- [30] The bases of entitlement for spousal support, being contractual, compensatory or needs based, or a combination, will influence the quantum and duration of a support award.
- [31] In *Moge*, the Court clarified that compensatory support stems from the principal that the financial cost to one spouse of the loss of economic opportunities which may flow from a decision, for example that one spouse take on the role as primary homemaker and caregiver to the children at the expense of his/her full potential to develop a career or be a productive member in the workforce, should be borne equally by the spouses when the marriage is over. Economic disadvantage of this kind may be addressed by ongoing spousal maintenance, asset reapportionment or both: *Moge*; *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1 C.A.; *Tedham v. Tedham*, 2005 BCCA 502.
- [32] As stated, one of the objectives of spousal support is to promote the economic self-sufficiency of the other spouse. The self-sufficiency of a spouse is a goal to the extent that it is practicable in the unique and particular circumstances. Accordingly, an assessment of self-sufficiency is an individualized enquiry which takes into consideration all pertinent circumstances of that spouse, such as age, gender, skills, education, opportunity for retraining and the realistic prospect that he or she will find a job enabling her to become self-sufficient: *Tedham*.
- [114] Mr. Finch does not take issue with Ms. Finch's entitlement to spousal support but submits that it should be limited in duration and should terminate on October 1, 2015. Alternatively, he submits that spousal support should be reviewed as of June 1, 2015. Mr. Finch's principal grounds for seeking a limited duration of spousal support are the relatively short duration of the marriage (five years) and the fact that Ms. Finch has obtained her teaching certification, is currently employed and hopes to obtain full-time employment in the not too distant future.

- [115] Ms. Finch submits that the spousal support established under the Interim Order should continue until May 2014 and that both parties' incomes be assessed at that time and support recalculated as of June 1, 2014. Ms. Finch proposes that this recalculation take place annually for an indefinite period of time.
- [116] I am satisfied that Ms. Finch is entitled to an award of spousal support. This entitlement is compensatory in nature given her role as primary caregiver during the marriage and is also based on need given the income disparity between the parties on the breakdown of the marriage. I set the amount of spousal support at \$846.00 per month effective May 1, 2014, which is the mid-range figure determined in accordance with the federal Spousal Support Advisory Guidelines. As with the payment of child support, the spousal support will be paid bi-weekly in the amount of \$390.46.
- [117] I agree with Mr. Finch that spousal support should however not continue indefinitely given the relatively short duration of the marriage and Ms. Finch's income earning potential following her qualification as a teacher. In the circumstances, I order that spousal support may be reviewed as of July 1, 2017, which is just shy of five years post-separation, in conjunction with the annual review of incomes for the purposes of determining ongoing child support.

Division of Assets and Liabilities

- [118] The principal issue with respect to the parties' assets and liabilities is the treatment of the student line of credit. Mr. Finch acknowledges that it is a family debt but says that it must be dealt with under the former Family Relations Act (FRA) rather than the new Family Law Act (FLA). The significance of this is that the FRA did not deal expressly with family debt whereas the new FLA does.
- [119] In cross-examination, Mr. Finch confirmed that he and Ms. Finch agreed with Mrs. Grouette that they would make the payments on the student line of credit and he further agreed that he was responsible for half of what is owing. However, in terms of past payments, he seemed to draw a line between payments made by Ms. Finch and payments made by Mrs. Grouette and suggested that he is only liable for half of what Ms. Finch has paid.
- [120] There is no basis for that distinction. The fact that Mrs. Grouette made a couple of payments towards the student line of credit to assist her daughter does not change the characterization of the line of credit as a family obligation nor does it relieve Mr. Finch of his responsibility to pay his share of that obligation.
- [121] In light of Mr. Finch's acknowledgement that he is liable for one half of this debt, it is not necessary to determine which Act governs.

- [122] Problems have arisen between the parties about the method and timing of Mr. Finch's payments towards the debt. The required monthly payment amount fluctuates meaning that Mr. Finch's required contribution also varies from month to month. Ms. Finch seeks an order that Mr. Finch be required to transfer his required contribution within 24 hours of the payment being withdrawn from Ms. Finch's account and her notifying him of the amount taken.
- [123] This system is somewhat unwieldy and is likely to result in disagreement, for example if Mr. Finch is out of town and unable to arrange a transfer on short notice. A more workable solution is for Mr. Finch to arrange an automatic monthly transfer of a set amount with a reconciliation or accounting done on an annual basis to account for any over or under payment by one of the parties.
- [124] The required payment on the line of credit as of November 1, 2013 was approximately \$335.00. Mr. Finch will therefore be required to transfer the sum of \$170.00 to the designated bank account on the first day of each month. As of December 31st of each year, an accounting will be done and the party who has paid the lesser amount during the year will make up the difference and pay that amount against the debt. The parties are free to agree on a different monthly amount as the balance of the line of credit reduces.
- [125] The above system will come into effect on May 1, 2014. To be clear, in response to Mr. Finch's submission, the amount to be paid by him is not to be added to or treated as spousal support.
- [126] The other financial issue between the parties concerns the sum of \$1,461.98 realized by Mr. Finch by cashing an RRSP for personal purposes. There is no issue that Ms. Finch was entitled to one-half of that amount. Ms. Finch seeks an order that Mr. Finch reimburse her for her share or, alternatively, that she be permitted to keep \$1,461.98 from the next RRSP cashed, with the balance being paid towards the student line of credit.
- [127] Requiring Mr. Finch to immediately reimburse Ms. Finch an amount in excess of \$700.00 would likely place an undue burden on him given his financial situation. Accordingly, I order that Ms. Finch be entitled to retain the sum of \$1,461.98 from the next RRSP cashed.
- [128] Mr. Finch seeks to set off against his obligations determined herein various amounts that he says he has paid since separation. For example, he says that he paid the mortgage and property taxes on the family home from the date of their initial separation in October 2011 until August of 2012, he paid for the parties' mediation in September 2013 and he says he has overpaid child and spousal support since October 2012, in part because he was unable to claim a portion of the federal dependent child tax credit. He and Ms. Finch had agreed that each party would claim the credit for one of the children but Mr. Finch's claim was denied by the Canada Revenue Agency.

- [129] With respect to the child tax credit, Mr. Finch says that he paid an additional \$1,856.00 in child support between October 2012 and January 2014 due to his inability to claim the credit. However, that is the result of a decision made by the Canada Revenue Agency and not by Ms. Finch. Further, it is likely that Ms. Finch would have benefited had she claimed the tax credit for both children rather than for only one in accordance with the parties' agreement. I would therefore not make any adjustment based on the child tax credit issue.
- [130] With respect to the mortgage and related property expenses, the evidence does not permit an accurate accounting of who paid what and, in any event, payments made by Mr. Finch prior to the parties' final separation reflects their agreement at the time that Mr. Finch would support Ms. Finch and the family while she furthered her education.
- [131] In terms of the mediation costs, there was no evidence of what, if anything, the parties agreed to with respect to that mediation and any apportionment of costs. I would therefore not set that amount off against Mr. Finch's obligations determined hereunder.
- [132] Turning to Mr. Finch's claim that he has overpaid child and spousal support, under the Interim Order he has been paying total support in the amount of \$2,337.00 per month. Pursuant to my decision, his support obligation going forward totals \$1,664.00 per month. This latter figure is arrived at using Ms. Finch's income as a part time teacher, a position she only assumed in September of 2013. Any issue of overpayment therefore only arises after that date.
- [133] For the period of September 2013 to April 2014, Mr. Finch has paid \$18,696.00 in child and spousal support. Under the figures determined herein, Mr. Finch would have paid \$13,312.00 in combined child and spousal support during that period, resulting in an "overpayment" of \$5,384.00.
- [134] In my view, it would not be reasonable to require Ms. Finch to reimburse Mr. Finch the amount of this "overpayment". As noted above, this matter was originally scheduled for trial in September 2013 but was adjourned at the request of Mr. Finch, albeit on terms that were favourable to Ms. Finch. Had the trial proceeded as scheduled, the issue of child and spousal support would have been determined much sooner and no "overpayment" would have accrued.
- [135] Further, Mr. Finch has been paying support pursuant to the terms of the Interim Order which were to remain in place until further order of the Court. I have now determined Mr. Finch's child and spousal support obligations as of May 1, 2014 thus there is no issue of overpayment prior to that date.

Summary and Conclusion

- [136] As noted, the matters agreed to by the parties as set out in the agreement appended hereto form part of my order. In addition, I order the following:

- a) The parties are divorced effective 31 days after the date of this judgment;
- b) The parties shall have equal parenting time with the children based on a 2/1/4 schedule in alternating weeks;
- c) The right of first refusal established under the Interim Order will continue, subject to one variation whereby Mr. Finch also has a right of first refusal to care for the children when Ms. Finch is unavailable;
- d) The parties will share parenting time with the children on the childrens' birthdays;
- e) Mr. Finch will pay child support in the amount of \$818.00 per month commencing May 1, 2014, payable by way of bi-weekly instalments of \$377.46;
- f) Mr. Finch will pay spousal support in the amount of \$846.00 per month commencing May 1, 2014, payable by way of bi-weekly payments of \$390.46. The spousal support obligation may be reviewed as of July 1, 2017;
- g) The parties' incomes will be reviewed annually as of July 1, commencing July 1, 2015. The parties will each provide the other with the financial information stipulated in s. 21 of the Child Support Guidelines by June 30 of each year;
- h) Commencing May 1, 2014, Mr. Finch will transfer \$170.00 on the 1st day of each month to the bank account designated by Ms. Finch for payment on the student line of credit. The parties will do an accounting as of December 31st of each year and the party that has paid the lesser amount during the year will pay the difference against the student line of credit; and
- i) Ms. Finch is entitled to retain the amount of \$1,461.98 from the next RRSP cashed, with the balance to be applied to the student line of credit.

[137] Given that success has been largely divided, the parties will bear their own costs.

"Skolrood J."

Appendix "A"

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