
CANADA / JUDGMENT

Carreiro v. Carreiro

2015 BCSC 714

COURT

Supreme Court of British Columbia

DECIDED

1 May 2015

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2015 BCSC 714 Carreiro v. Carreiro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carreiro v. Carreiro,

2015 BCSC 714

Date: 20150501

Docket: F980310

Registry: Vancouver

Between:

Maria Das Gracas Romao Barbosa Carreiro

Claimant

And

David Elias Carreiro

Respondent

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Counsel for the claimant:

Malini Dyonisius

Counsel for the respondent:

Ryan Dueckman

Place and Dates of Trial:

Vancouver, B.C.

June 9-11;

October 20-24, 2014;

and March 11, 2015

Written submissions

February and March of 2015

Place and Date of Judgment:

Vancouver, B.C.

May 1, 2015

OVERVIEW

- [1] This action concerns a separation agreement signed in 2002 which the claimant alleges was obtained under duress and wishes to have set aside, mainly with respect to property division and spousal support. A claim for child support retroactive to 2002 is also advanced.
- [2] The presentation of the case has been fraught with problems, which I will explain in more detail below.
- [3] The claimant is a native of Brazil. The respondent was born and raised in Vancouver, B.C. They were married in 1987 in Toronto, Ontario. They have four children, aged 18 to 26, born in 1988, 1991, 1993, and 1996.
- [4] The parties moved to Vancouver soon after the marriage. They separated in 1995 and reconciled shortly thereafter. They separated again in 1997, and the claimant commenced this action on October 1, 1998 ("the 1998 action"). She sought a divorce, sole custody of the children, child and spousal support under the Family Relations Act, RSBC 1996, c. 128 (the "FRA"), and an equal division of family assets.
- [5] The couple reconciled after 16 months, but separated a final time in 2001, while on a trip to Brazil.
- [6] The claimant remained in Brazil with the children for some time, but returned at least twice to Canada on her own before returning with the children in April of 2004.
- [7] The respondent commenced his own action on January 31, 2002, and obtained, by default, an order of divorce in that action on November 18, 2002. The order also provided that the corollary relief (custody, guardianship, access, and division of family assets) be dismissed.

- [8] Meanwhile, a separation agreement was signed by both parties on March 1, 2002, during one of the claimant's trips to Canada. The agreement dealt with, inter alia, child support, spousal support (each agreed not to claim it), and division of property (the matrimonial home in Mission, B.C. - "the Mission property" - went to the respondent; a house in Brazil - "the Brazil property" - went to the claimant).
- [9] The separation agreement was not attached to the divorce order obtained by the respondent, but was appended to an affidavit in the file.
- [10] The plaintiff decided she was not happy with the separation agreement, and, in 2004, took some steps in the old 1998 action, which remained outstanding, including filing an application under Rule 18A, to have the separation agreement declared "null and void". This application did not proceed.
- [11] In October of 2004, the claimant filed a Certificate of Pending Litigation ("CPL") against the former matrimonial home in Mission, B.C., without advising the respondent.
- [12] Examinations for discovery were held in 2005. Repeated demands made by the respondent to obtain documents requested at discovery were ignored. After the discoveries, no steps were taken in the 1998 action for many years.
- [13] The respondent learned of the CPL some years later. He eventually brought a motion in 2012 to remove it and to dismiss the 1998 action for want of prosecution. This application was unsuccessful. In October of 2013, the claimant sought to amend the 1998 action to ask for a declaration setting aside the separation agreement and to revisit the issues of division of property, spousal support, and child support, the latter two retroactive to 2002.
- [14] Extensive amendments to the Notice of Civil Claim were allowed pursuant to an oral judgment from another judge of this court in January of 2014, which the respondent appealed. The written reasons and entered order were received three days prior to this trial. The respondent's counsel says the order, which had been entered without his approval or signature, contained some surprises. However, his client chose to proceed to trial rather than pursue his appeal or request an adjournment. The amended pleading was filed only a few days before the trial commenced in June of 2014.
- [15] Despite the order allowing the amendments, the issue of whether the argument on limitations, which was strenuously put forward by the respondent at every opportunity, should succeed, was left for the trial judge.
- [16] The time for trial was seriously underestimated at three days, and although five days were added in October of 2014, submissions, particularly by the claimant, were very limited at the conclusion of the trial.
- [17] After spending a great deal of time trying to come to grips with the issues, which were either not touched on at all in argument or glossed over, I requested the assistance of counsel through written submissions on various topics. This has, with respect, merely complicated

the matter. Counsel for the claimant, in addition to addressing the issues I outlined, has filed lengthy arguments on the entire case, almost wholly concerned with the facts rather than the law, and counsel for the respondent alleges that counsel for the claimant has significantly and erroneously restated the evidence in her written submissions.

- [18] After that brief overview of the fairly difficult and drawn out history of this action, I will set out in more detail the evidence at trial giving rise to the issues presently before the court.

EVIDENCE AT TRIAL

- [19] Much of the evidence was fairly vague and little attention was paid to dates or documents. For the most part, the witnesses were testifying about events that took place twelve or thirteen years ago.
- [20] The respondent is now 49, the claimant a few years older, perhaps as many as eight - it was not clear in the evidence. They met in Toronto, where the respondent was looking for work. The claimant testified she came to Canada on a visitor's visa. The respondent says she was seeking refugee status from Brazil. In any event, her ability to stay in Canada was coming to an end and they married in 1987.
- [21] The respondent found cleaning jobs for them both. The claimant says the respondent kept all the money they earned.
- [22] The respondent wished to move back to Vancouver where he had family support. The claimant did not want to move, but ultimately decided to go with him. The respondent eventually obtained a job at the City of Vancouver in 1989 as a labourer. He is still employed by the City, currently working as a truck driver. The claimant continues to do cleaning jobs.
- [23] In 1990, on a trip to Brazil, the parties bought the Brazil property. They still own this house. Whether it is rented or not is a matter of dispute. The respondent says it is rented. The claimant says it is not, or if it is, the rent is not collected.
- [24] At some point, the couple bought a piece of property in Surrey, B.C., sold it, and in 1994, used the money to assist with a down payment of \$30,000 on the Mission property, about 60 kilometers from Vancouver. The purchase price for the Mission property was \$158,900. This house has a basement suite that is rented.
- [25] The couple later rented out the entire Mission house and lived in a basement suite in Vancouver. This appears to have been after the second separation, which ended in December of 2000.
- [26] After the second reconciliation, the whole family went on a holiday to Brazil in 2001 to stay with Ms. Carreiro's parents. By this time, the youngest daughter was five years old and the rest were in school. The couple intended to return to Vancouver prior to the commencement of the school year in September of 2001.

- [27] Ms. Carreiro wanted, while in Brazil, to have an operation on her legs, which were swollen. She had apparently been on a waiting list for an operation in Canada.
- [28] During the holiday in Brazil, Ms. Carreiro discovered her husband was having an affair with a woman in Brazil. Ms. Carreiro asked Mr. Carreiro what his plans were. He told her he wanted to be single. She told him to go live in the house in Mission, as she needed to stay in Brazil to have the operation on her legs. The children remained with her. Their return air tickets were valid to December of 2001. The tickets expired and an issue arose as to whether Mr. Carreiro would or would not provide travel authorizations for the children.
- [29] Ms. Carreiro claims Mr. Carreiro would not provide authorizations because it was more convenient for him to force her and the girls to stay in Brazil so he could come to visit them and see his girlfriend at the same time. Mr. Carreiro says he did indeed refuse to provide unlimited authorizations for travel on the one occasion he was asked, but in refusing that request, he said he would provide specific travel documents for specific trips. However, he says he was never asked for specific authorizations. He says he was anxious at all times to have his daughters back in Vancouver, but Ms. Carreiro had always had control over the children and wanted to retain it. Ms. Carreiro acknowledged she hid the return tickets from Mr. Carreiro and that she was not ready to return to Canada. Ms. Carreiro testified that she ultimately had to obtain a court order to bring the girls back. She eventually paid for new tickets when the daughters returned to Canada in April of 2004.
- [30] Ms. Carreiro was required to return to Canada to apply for citizenship, so she left the girls with her mother in Brazil and returned to Vancouver in January of 2002. Mr. Carreiro met her at the airport. He told her he had a separation agreement he wanted her to sign. Ms. Carreiro testified she was in shock upon hearing this.
- [31] Mr. Carreiro testified that he had put together this document in the fall of 2001 with his lawyer, Mr. Epp. He said he and Ms. Carreiro met the day after her arrival and he presented the agreement to her. He said they went over each paragraph together, spending one and a half to two hours discussing the agreement. He testified that she took issue only with the provisions regarding spousal support. He said he explained to Ms. Carreiro why there should be no spousal support in his view: they had both always worked by choice and she wanted to stay in Brazil. He testified that she accepted his explanation.
- [32] Mr. Carreiro testified he had spoken to Ms. Carreiro several times by phone while she was still in Brazil. He said that he asked Ms. Carreiro whether she wanted the Mission property or the Brazil property. He said she had never wanted to live in Mission and had previously abandoned him there to go live in Vancouver. He said Ms. Carreiro told him to keep the Mission property and she would keep the Brazil property.
- [33] Mr. Carreiro testified that Ms. Carreiro told him she intended to start a restaurant in Brazil and was not intending to return to Canada as far as he knew. Ms. Carreiro told him she had rented a large home and wanted to give Brazil a good try. He knew she had US\$3,000 with her, and she had kept another US\$3,000 or US\$4,000 that she had taken from his briefcase

before he left in 2001. Mr. Carreiro said he had not discussed child support previously because he did not know what Ms. Carreiro's decision would be about returning to Canada. He testified that he wanted his children back in Canada and felt it was unfair to deny him any input. When Ms. Carreiro returned to Canada in January of 2002, they discussed what child support should be paid if the children remained in Brazil.

- [34] Mr. Carreiro testified that at the end of their meeting, they both signed their copies of the draft agreement. He told Ms. Carreiro they both needed legal advice, and she should ensure she fully understood the document and agreed with it. She should then sign it in front of her lawyer. He said there were no arguments, raised voices, or threats.
- [35] Ms. Carreiro testified she was upset by the agreement and was advised by her pastor not to sign it. She went to see a lawyer in Metrotown, Mr. Routtenberg. She was adamant in her testimony that this man was not her lawyer, even though she paid him, he wrote letters on her behalf negotiating terms in the agreement, and she consulted him again later. Mr. Routtenberg was not available to either party to be called at trial.
- [36] Mr. Routtenberg wrote to Mr. Epp on February 14, 2002, setting out his comments on the draft separation agreement:

We are acting for Maria Graca Carreiro in respect of attempting to propose and negotiate a settlement of some of the issues of the within matrimonial proceeding. We have reviewed the proposed separation agreement and court proceeding but we are not at this time instructed to enter an appearance. We would respectfully ask you to advise us before filing any documents in the court proceeding or proceeding by default.

In summary we propose interim joint custody with child support as proposed by you of \$700.00. In respect of the other issues in this matter we would like to make the following comments:

1. Mrs. Carreiro has not made a decision for herself or the children to permanently relocate to Brazil. As we discussed on the phone, she is undergoing some treatment in Brazil in connection with circulation in her legs, and that we hope such treatment will result in a full recovery. Further, that neither she nor the children have decided if they wish to remain permanently in Brazil. She hopes and expects that a decision about her and the children remaining in Brazil would be able to be made within the next 18 months. This decision will be based on her medical progress, her ability to secure meaningful employment, how the children adapt to living in Brazil, and their progress in adapting to Brazilian schooling.
2. We understand your position about child support being less than the guideline amount in respect of your client having meaningful access costs to the children either by visiting Brazil, or by having the children visit with him. In principle, and subject to a written agreement, we feel the amount of \$700 is sufficient for the interim period of 18 months, and based on my client's ability to secure employment, this may be sufficient longer term.

3. In respect of spousal support my client is willing in the interim period to not seek spousal support. Based on her medical progress and ability to secure employment, my client may need in future to seek some spousal support, although at this time she accepts her obligation to attempt to be self sufficient as best as possible.
4. In respect of the two houses owned by the parties, my client believes the home in Mission has more equity (about \$40,000) than the home in Brazil having equity of about \$20,000. She is not knowledgeable [sic] about the real values of either real estate property, and has not had any professional advice, but repeat our impression there is more equity in the Mission home than Brazil property. Never the less my client does agree that in the interest of concluding a settlement and in order to reduce the number of issues between them, would likely agree to allow the Husband to take the Mission property and her to receive the Brazil property subject to an overall agreement. We would ask for your thoughts or information on the equity in either property to this end.
5. In respect of the interim matter of custody and child support we would be willing to grant your client reasonable and generous access to the children, and would like to know how he sees this access working.

My client is insistent on one issue regarding custody and that is for the interim period, she is free to relocate with the children as she and the children determine, but will agree to keep him informed at all times as to the whereabouts and all matters dealing with the children whatsoever.

We will require a signed authority to travel within Canada and Brazil and in transit between these locations. Such consent to be irrevocable within the interim period of 18 months to 2 years.

We propose these terms as being reasonable to both parties interests.

In this interim period, my client and the children would likely settle the issue about where they wish to live, the matters of Maria's health and employability, and issues relating to access could be clarified. After this interim period, we propose the parties could consider the ability to reconcile, or alternatively conclude a full and complete release of their marital claims on traditional terms.

We acknowledge that in most cases it is usually better to settle these matters once and for all, but that in our view, in all of the circumstances, we suggest the proposed interim terms of settlement are adequate and in the interests of all parties.

Please consider our proposals with your client and advise us in due course. Kindly acknowledge that no further court steps will be taken without proper notice to our client (at least 14 days) in any event to allow both parties time to consider these matters more fully.

[Emphasis added]

[37] If Mr. Epp replied to this letter, it was not put into evidence.

[38] Mr. Routtenberg again wrote to Mr. Epp on March 2, 2002, advising that he had proposed different wording regarding spousal support. The wording set out by the respondent in the draft agreement was:

The parties agree that no spousal support shall be paid from David to Maria or from Maria to David.

[39] The version preferred by the claimant was:

The parties agree that at present no spousal support shall be paid from David to Maria or from Maria to David. Maria recognizes that she has an obligation to become self sufficient and David recognizes that Maria may require medical treatment with respect to a circulatory problem with her legs.

[40] Mr. Epp responded on March 4, 2002, that his client was not prepared to sign that version of the paragraph, and the matter would be litigated if his version were not signed. Mr. Routtenberg responded, indicating Ms. Carreiro would sign Mr. Carreiro's version, and also that he had deleted a clause regarding undisclosed assets. He added a handwritten paragraph stating that the divorce order would not be applied for before May 1, 2003, to give the parties time to reconcile.

[41] Both parties signed the agreement. The handwritten paragraph regarding the timing of the divorce was amended to change the date to September 1, 2002, rather than May 1, 2003, and was initialled by both parties.

[42] The agreement contains the signatures of both parties, each witnessed by their respective lawyers, initials where the word "DRAFT" is crossed out twice on the first page, initials on all the pages, initials on the paragraph regarding spousal support (para. 14), as well as signatures on that page, initials for the deleted paragraph regarding undisclosed assets, and is accompanied by two certificates of independent legal advice, one for each party.

[43] Ms. Carreiro testified that she signed the agreement because she was in a hurry to resolve things and needed money for the girls. She said Mr. Carreiro told her he would not give her any money for child support unless she signed it. Mr. Carreiro denied exerting any pressure on Ms. Carreiro, but he acknowledged that he was reluctant to make payments to her without a separation agreement in place.

[44] The relevant terms of the separation agreement are:

A. The parties married on March 24, 1987, at Toronto, Ontario.

B. The parties have been living separate and apart since September 1, 2000, and intend to continue to do so.

C. (1) Maria operates a restaurant at Ipatinga, Brazil. She has operated this restaurant for the past 3 or 4 months. Maria is self sufficient.

(2) Maria expects to earn a larger income in the future.

D. (1) David whose annual income in 2000, determined in accordance with the requirements of ss. 15 to 20 and Schedule III of the Federal and British Columbia Child Support Guidelines, was approximately \$48,000.00 ("David's Guideline Income").

(2) David expects to earn a similar income in the future.

E. David and Maria have four dependent children, namely:

(a) S. born May 21, 1988;

(b) V. born April 27, 1991;

(c) A. born March 27, 1993; and

(d) K. born July 3, 1996.

(the "Children")

F. (1) All of David's significant assets and liabilities are set out in Schedule A.

(2) All of Maria's significant assets and liabilities are set out in Schedule B.

(3) All of the parties' significant joint assets and liabilities are set out in Schedule C.

(4) For convenience, specific assets or liabilities in this Agreement are referred to by the labels used in the Schedules.

G. David and Maria each intend this Agreement to be

(a) a settlement with respect to guardianship, custody, and support of the Children and access to them,

(b) the final settlement of

(i) spousal support,

(ii) their respective rights in or to the property of the other and the property held by them jointly,

(iii) their respective rights in the estate of the other,

(iv) adjustments respecting

1. disabilities or advantages and disadvantages arising out of the marriage or otherwise between the parties, and

2. the needs of each of them to become and remain economically independent and self-sufficient, and

(v) all issues otherwise arising out of their marriage.

H. The Federal Child Support Guidelines table for British Columbia was not used to calculate support obligations for the Children in this Agreement because Maria lives with the Children in Brazil.

CHILDREN

4. David and Maria remain the joint guardians and have joint custody of the Children. At present the children and Maria live in Brazil. It is hoped that the parties will be able in the next eighteen months to make a permanent decision concerning the residence of the children and Maria.
- (c) Maria must
 - (i) Advise David of any matters of a significant nature affecting the Children, and
 - (ii) Consult with David about any important decisions that must be made concerning health (except emergency decisions), education, religious instruction, and general welfare of the Children, and
 - (iii) Consult with David prior to travelling or moving the children from Brazil.
 - (iv) If it is necessary to travel with the children and after consulting with David, David will provide a signed authorization to Maria to travel within Brazil and in Canada or between Canada and Brazil.
6. The Children will ordinarily reside with Maria.
7.
 - (1) David will have generous access to the Children inclusive of telephone access several times in each week. David will travel to Brazil at least once per year and during such trip to Brazil will visit with the Children.
 - (2) The parties will make future arrangements for access, including overnight visits and vacations, as are appropriate given the ages, needs, and wishes of the Children.

CHILD SUPPORT

8. David will, commencing February 1, 2002, pay to Maria as child support (the "Child Support") on the 1st day of each month:
 - (a) The sum of \$700.00 per month;
 - (b) The parties acknowledge that the Federal Support Guidelines Table amount on an income of \$48,000.00 per year is \$930.00 per month. The parties agree that David will have increased access costs inclusive of, but not limited to, long distance telephone calls and travel to and from Brazil. The monthly Child Support has been reduced in order to enable David to spend as much access time with the Children as possible.
11. The obligations to pay Child Support ceases in respect of a Child who:

- (a) marries;
- (b) becomes self-supporting, or
- (c) becomes 19 years old, unless the Child remains a "child of the marriage" within the meaning of the Divorce Act because of inability to become self-supporting due to illness, disability, the pursuit of education, or other cause.

REVIEW OF CHILD SUPPORT

- 12. (1) The parties will review Child Support and, if necessary, revise it to ensure that it accords with the requirements of the Federal and British Columbia Child Support Guidelines by May 31st of every second year from the making of this Agreement, with the first review to be completed by May 31, 2003.
- (2) Despite subclause (1), either party may request, by delivering a written notice to the other, a review of Child Support if there is:
 - (a) a material change in circumstances, such as custodial changes or a change of a child's primary residence,
 - (b) a change leading to undue hardship for either party as defined by the Federal and British Columbia Child Support Guidelines,
 - (c) a child ceasing to be eligible for support,
 - (d) a child's need for support changing by reason of reaching the age of majority, or
 - (e) a child who ceased to be eligible for support becoming dependent again.

SPOUSAL SUPPORT

- 14. (1) The parties agree that no spousal support shall be paid from David to Maria or from Maria to David.

MEDICAL AND DENTAL INSURANCE

- 15. (1) David will maintain the Extended Benefits Policy available to him through his appointment with the City of Vancouver
- (a) for a Child for so long as David is obligated to pay Child Support for the Child and that Child is eligible for coverage under the City of Vancouver Extended Benefits Policy.

FAMILY RESIDENCE

- 16. (1) When this Agreement is signed, Maria will transfer Maria's interest in the property located at 32833 - 7th Avenue, Mission, British Columbia (the "Property"), to David for David's own use absolutely.
- (2) After completion of the transfer of the Property to David, David will

- (a) be solely responsible for
- (i) all payments due under the VanCity Savings Credit Union mortgage,
- 17. (1) When this Agreement is signed, David will transfer David's interest in the Brazil property located at 690 Rua Quetonia Bairro, Esperanca, Ipatinga, Brazil (the "Brazil Property"), to Maria for Maria's own use absolutely.
- (2) After completion of the transfer of the Brazil Property to Maria, Maria will
- (a) be solely responsible for
- (i) all charges registered against the Brazil Property, and
- (b) indemnify David for any expense or loss David incurs with respect to these liabilities
- (3) Maria is responsible for paying all of the costs (including registration fees and land transfer tax) of transferring the Brazil Property into Maria's name
- (4) The parties will make designations, in a consistent manner and in the manner and form prescribed by the Income Tax Act (Canada), for each year commencing with the year of acquisition of the Brazil Property and ending with the year this Agreement is signed in order to permit Maria to treat the Brazil Property as Maria's principal residence.

CITY OF VANCOUVER PENSION PLAN

- 25. (1) The benefits accrued to David under the City of Vancouver Pension Plan (the "Pension") are a family asset.
- (2) Maria is entitled to an equal portion of the Pension that accrued during the parties' relationship, determined and divided in accordance with Part 6 of the Family Relations Act and this Agreement.

DISPUTES

- 28. (1) If a dispute arises concerning this Agreement, the parties will use best efforts to resolve the dispute through mediation before taking court proceedings.
- 41.(b) [handwritten] The parties agree that neither will apply for an order for divorce before [May 1, 2003 is crossed out and initialled by both parties] Sept. 1/2002.

ACKNOWLEDGMENTS

- 42. Each of the parties acknowledges that he or she:
- (a) Has had independent legal advice in respect of rights against and obligations to the other party under the law and this Agreement,
- (b) Has read the entire Agreement carefully,
- (c) Knows and understands the contents of this Agreement,

- (d) Is fully aware of the effect, purpose, and intent of this Agreement,
- (e) Is signing this Agreement voluntarily without any undue influence or coercion by the other.
- (f) Has fully disclosed financial means and circumstances to the other,
- (g) Is satisfied with this settlement of all matters in dispute between the parties, including the division of assets and allocation of responsibility for debts,
- (h) Is satisfied that this Agreement provides adequately for personal present and future needs,
- (i) After the terms of this Agreement are carried out, will be able to pay current and reasonably foreseeable debts and obligations as they fall due,
- (j) Believes that this Agreement will not result in circumstances that are unconscionable or unfair to the other party, and
- (k) Understands that the provisions of this Agreement, if considered by the Supreme Court to be substantially unfair due to the non-disclosure of a material fact, may be reviewed and varied by the Court despite the mutual agreement of the parties that this Agreement is final and binding.

[45] It appears that there was also a para. 13 that was concerned with financial disclosure. Page 6 starts with:

- (a) a photocopy of the most recent income tax return,

and continues with a list of other information, including a reference to "particulars of the Children's Special and Extraordinary Expenses anticipated for the coming year." However neither party submitted a copy of the agreement that contained paragraph 13. Whether there was a term governing special and extraordinary expenses, and the circumstances under which this financial information was to be provided, or the frequency of disclosure, is not in evidence.

[46] Ms. Carreiro executed the necessary transfer documents, prepared by Mr. Carreiro, for the Mission property and it is now held in Mr. Carreiro's name. The Brazil property has never been transferred to Ms. Carreiro. Mr. Carreiro says he is willing to do so but has never been presented with any documents, which is Ms. Carreiro's responsibility under para. 17(3) of the agreement.

[47] Ms. Carreiro returned to Brazil after signing the separation agreement and learned later in the year through her daughters that Mr. Carreiro had obtained a divorce.

[48] She testified that the restaurant business referred to in the separation agreement soon closed.

[49] Ms. Carreiro returned to Canada with the children in April of 2004.

- [50] Ms. Carreiro testified that she felt the whole agreement was unfair and consulted many lawyers, including Mr. Routtenberg, after she returned to Canada with the children, paying each lawyer a few hundred dollars and moving on to another.
- [51] Ms. Carreiro said she suggested mediation in 2003, apparently to deal with the terms of the separation agreement, but that did not occur. She testified she tried some sort of chambers hearing (apparently referring to the application under Rule 18A filed in September of 2004 in the 1998 action, which was for sole custody and guardianship, child maintenance, a declaration to have the separation agreement declared null and void, an order for retransfer of the Mission property, and a CPL), but that did not proceed either. She testified that she filed the CPL on the Mission property in October of 2004.
- [52] Mr. Carreiro testified that he did not know Ms. Carreiro was unhappy with the agreement until he attended a Judicial Case Conference ("JCC") in November of 2004 to discuss custody. The subject of the separation agreement came up at that time. Spousal support was not raised as an issue at that time and was not part of the Rule 18A application. The couple tried mediation with respect to access with Ross Collver, a former Supreme Court judge who used to offer free mediation services to family litigants.
- [53] An order for child support was made by consent in 2004. Mr. Carreiro paid \$1,064 per month for four children, based on an income of \$48,000. He provided financial disclosure at the time of the order. The term in the separation agreement regarding child support provided for a review every two years, but whether there was a specific term regarding ongoing financial disclosure is not evident because of the missing paragraph 13. In any event, Mr. Carreiro did not provide further financial disclosure and Ms. Carreiro never asked for it, nor did she provide any herself.
- [54] Mr. Carreiro has never missed any child support payments, but he did unilaterally reduce the amount as each daughter turned 19 and adjust it annually based on his yearly income. He testified that he decided upon the amount by accessing the Family Maintenance Enforcement Program ("FMEP") website, using his current income as it increased. In 2007, he paid child support based on his 2006 income of \$51,600, and although his income in 2007 went down to \$40,300, he maintained the higher level of child support. In 2009, he paid child support based on an income of \$59,300. At present, he pays \$895 for 2 children, which is apparently based on an income of \$59,000.
- [55] A second JCC was held on August 19, 2005. The issues in dispute were listed on the Case Management Plan form as:
- custody
 - spousal support
 - setting aside separation agreement.

- [56] The respondent agreed at the JCC to file a reply to the claimant's affidavit file in the Rule 18A application by September 1, 2005.
- [57] Discoveries were held in October of 2005. Documents were requested from Ms. Carreiro in respect of her medical condition and finances, but despite repeated requests she did not produce them and they are no longer available. As far as Ms. Carreiro was concerned, she was no longer concerned about the case because of the CPL. She testified: "We put the lien on and stopped the case".
- [58] Nothing more of significance happened until 2012.
- [59] Mr. Carreiro had not been advised that a CPL had been placed on the house in 2004. He learned of it several years later when he got an appraisal done so he could attempt to sell the home. In 2012, he set down a motion to have it removed, and to have the 1998 action dismissed.
- [60] The motion to dismiss the 1998 action was heard in June of 2013. Counsel for Ms. Carreiro raised the potential for an application to amend the claim. The judge gave Ms. Carreiro six months to set the matter for trial, or Mr. Carreiro could apply to dismiss again. The matter was set down for trial, although it was adjourned. In October of 2013, Ms. Carreiro filed the application to amend the 1998 action. Ms. Carreiro had never questioned the level of child support until she sought these amendments in 2013. She also raised the issue of spousal support for the first time since it had been informally raised at the JCC in 2005. As well, she sought an amendment to allow a challenge to the separation agreement.
- [61] Mr. Carreiro again sought to have the action dismissed.
- [62] Arguments proceeded orally and in writing through December 2013 and January 2014, culminating in lengthy reasons dated January 29, 2014, declining to dismiss the claim and allowing many of the amendments, subject to the trial judge's determination of limitations defences.
- [63] There was some dispute about communications between counsel over the entering of the order, which resulted in it being entered without respondent counsel's signature. The amended Notice of Family Claim was filed just prior to trial in June of 2014.
- [64] This trial proceeded for three days in June of 2014, with a further five days in October.
- [65] As for the present circumstances of the parties, all four daughters have always lived with their mother, and they now occupy a three bedroom rental home in Burnaby, B.C. The eldest is 26, was married and is now separated from her husband. She lives in the basement of her mother's rental home and is working.

- [66] The youngest is still in high school. The middle children are 21 and 23. One daughter is in school, either full time or part time. One daughter has a medical problem that remained unidentified at the daughter's request. None of the daughters assists their mother with expenses. It was unclear which child is considered by Mr. Carreiro to be the second child in need of support. Whether and when each child ceased to be a child of the marriage is in issue.
- [67] The oldest daughter testified at trial, explaining her perception of her parents. She testified that she and her sisters found the divorce stressful, especially since they were in Brazil. They saw little of their father then and not much more when they returned to Canada. Whereas their mother denies them nothing, she finds her father's responses to requests to be generally negative. She testified he does not meet her expectations financially or emotionally, but her mother provides them with whatever they need.
- [68] Mr. Carreiro lives with his wife in the Mission home, which is fairly large with a rental suite in the basement, and commutes two hours each way to his job in Vancouver, for a total of four hours per day.
- [69] Despite many questions about the neighbourhood where Ms. Carreiro lives, premised on the suggestion that she lives in an industrial area, Mr. Carreiro would not admit his home is nicer than the rental home occupied by Ms. Carreiro and his daughters. Counsel for Ms. Carreiro attempted to put in photographs of the properties, but they had not been previously produced or listed and so were not allowed to be adduced in evidence.

CREDIBILITY

- [70] Ms. Carreiro was evasive and non-responsive for many questions, simply saying she could not remember or she did not know or she did not want to discuss it. Her evidence was vague and often not put into a comprehensible context. There was a fair amount of leading in examination in chief.
- [71] Mr. Carreiro was also evasive in his answers, preferring to make self-justifying statements rather than answer the question.
- [72] These events happened twelve years ago when the family was in turmoil. Since both witnesses were testifying about events that took place so many years ago, the reliability of their evidence is naturally fragile. Both parties are, in my view, reconstructing their evidence to some extent, but it is not surprising that they have adjusted their memories to suit their respective positions. It is not useful, nor indeed possible, to delve into their respective motivations now and determine the truth.

VALUATIONS

- [73] The evidence on valuations was not as clear as it might have been.

- [74] The Mission home was purchased in 1994 for \$158,900, with \$30,000 as a down payment, but the value soon decreased. Mr. Carreiro tried to sell it in 1997 during one of their separations, asking \$139,000, but was unsuccessful. He tried again in 2000 and received an offer in the low \$120,000s. According to some documents produced by Ms. Carreiro, the mortgage was about \$112,000 or possibly \$108,000 at the time of the separation agreement in early 2002, and the assessed value was \$164,000.
- [75] The evidence about the Brazil property was vague and confusing. There were no documents to assist, except an undated one-page appraisal presented by Ms. Carreiro. Both parties agree it was purchased in 1990 for US\$11,000. Mr. Carreiro testified that on one of his trips to Brazil, he asked for an estimate of its value in January of 2002 and was told it was worth US\$50,000 at that time. Ms. Carreiro's undated appraisal says it is worth US\$12,000, but she acknowledged it was probably closer to US\$20,000, or Cdn\$25,000, at some unspecified date. She testified that the value has gone up, but asked rhetorically who would buy it.
- [76] At the time of the separation agreement, Mr. Routtenberg wrote to Mr. Epp as set out above, saying Ms. Carreiro believed the Mission property to have equity of about \$40,000 and the Brazil property about \$20,000. However, she was willing to let Mr. Carreiro have the Mission property, and she would keep the Brazil property, "subject to an overall agreement". Ms. Carreiro does not agree with those figures now.
- [77] According to Mr. Carreiro, the Brazil property is rented for \$300-375 per month and the collection of rent is in the control of Ms. Carreiro and her parents in Brazil. Ms. Carreiro disagreed. This was left unresolved.
- [78] The Brazilian property is still in both names, and there was no clear evidence about the problems entailed in transferring property in Brazil. Ms. Carreiro testified that Mr. Carreiro suggested they leave it for the girls, and in any event, she said transferring the property is impossible. Mr. Carreiro says he is willing to transfer it any time and he understands it can be done. This was also left unresolved and was the subject of one of the requests for further submissions.

ISSUES

- [79] The chambers judge who dealt with the application to amend said the submissions from both parties did not assist the court in trying to simplify the legal issues and get at the applicable legal principles. I echo her remarks.
- [80] As mentioned, this case was originally scheduled for three days in June, but an additional five in October were required, and even that did not provide adequate time for submissions. The submissions were not particularly helpful, especially from the claimant. Counsel for the respondent was, as noted, responding to pleadings filed just before the trial began and his client did not want an adjournment. He did present a detailed argument on limitations.

[81] Large books of authorities were filed by both parties, but for the most part were not referred to. The lawyer for the claimant asked to file written notations on the cases included in the book of authorities. Some very brief notes on a few of the cases were provided by her after the trial concluded. Other submissions were made later in response to the Court's requests and will be referred to at the relevant parts of the judgment.

[82] I have characterized the issues as follows:

1. Are the claims made pursuant to the amendments to allow a challenge to the separation agreement barred by the effluxion of time under the Limitations Act?
2. Did Ms. Carreiro make her claim for unequal division of assets while she was still a spouse, that is within the two year period provided for in the FRA?
3. If the claims are not barred by limitation periods, should the agreement be set aside or, in the alternative, varied?
4. If so, what orders, if any, should be made respecting the real property under s. 65 of the FRA?
5. Is the claimant entitled to spousal support, taking into account the separation agreement?
 - (a) If so, in what amount and for what duration?
6. What levels of child support should be paid and in respect of which child, commencing at what date?

LIMITATIONS ISSUES

Amendments

[83] In January of 2014, Ms. Carreiro was allowed to amend the pleadings in the 1998 action to claim:

- spousal support under the Divorce Act
- variation of child support under the Divorce Act, retroactive
- the invalidity of the separation agreement
- an unequal division of property under s. 65 of the FRA arising out of the motion that had been filed in 2004

[84] The chambers judge left open arguments on limitations or any other argument going to the merits of the claims until the trial.

[85] The chambers judge who granted the amendments noted that spousal support under the FRA was sought in the 1998 action so no amendment was required to advance that claim. Spousal support under the Divorce Act, RSC 1985, c. 3 (2nd Supp.) (the "Divorce Act"), had not been claimed previously. An amendment was allowed to permit a claim for spousal support under the Divorce Act, as there was no limitation provision that would prevent it

and a separate action could have been brought to obtain spousal support in any event. Ms. Carreiro seeks spousal support retroactive to 2002.

- [86] Child support was sought under the FRA in 1998, but not under the Divorce Act. Retroactivity was not an issue in 1998. Since issues respecting children are never closed, an amendment was allowed to permit a claim for variation in child support (apparently under both Acts) and for retroactive support. However, the chambers judge said, in view of the lack of notice of any concern with the level of child support, "it would only be fair to consider the date of the application to be, at the very earliest, it appears, the spring of 2013 and, at the latest, the date the amendment is allowed." Nevertheless, Ms. Carreiro claims retroactive child support back to 2002.
- [87] Ms. Carreiro was allowed to amend to ask for a declaration that the separation agreement should be set aside, or in the alternative, an order under s. 65 of the FRA for an unequal division of assets.
- [88] The chambers judge also allowed an amendment to challenge the separation agreement generally. She said this claim rested on the common law of contract, not the definition of "spouse" in the FRA, which is the issue for the amendment respecting the claim under s. 65. On the basis that the respondent had known for many years that Ms. Carreiro was discontented with the separation agreement, and had even participated in examinations for discovery knowing it was in issue, the chambers judge exercised her discretion to allow that amendment.
- [89] Various other amendments for orders in respect of property, including a compensation order, were sought but not granted.
- [90] Mr. Carreiro's counsel's apparent outrage at the amendments respecting the separation agreement and the division of property resulted in attempts to get this court to decide the limitations and statutory interpretation arguments issues before his client had to testify. This argument was made at the outset of the trial, after the claimant closed her case, and again in later submissions. This was based on the position that the chambers judge who made the amendments had merely decided if she had jurisdiction to do so, but had not actually made the amendments. In my view, it is clear the chambers judge made the amendments, but was careful not to constrain the trial judge on any issue. In view of her reasons, I declined to decide the issues until all the evidence had been heard.

Limitations Issues re Setting Aside the Separation Agreement under the Common Law

Respondent's position

- [91] Mr. Carreiro relies on s. 3(5) of the Limitation Act, RSBC 1996 c. 266 (now repealed and replaced by the Limitations Act, SBC 2012 c. 13) (the "Limitation Act,") which provides for a six year limitation period respecting the equitable relief sought by Ms. Carreiro to set aside the separation agreement. That limitation period ran out on March 7, 2008, over six years ago.
- [92] Counsel did not refer to the 2012 Limitation Act and I have not considered its application. Submissions were made under the 1996 Act. Section 4(4) of the 1996 Limitation Act provides:
- (4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.
- [93] The power to allow amendments in this situation is discretionary, and this discretion must be exercised judicially. Relevant criteria for the exercise of that discretion are whether it would be unjust or inconvenient to allow the amendment (*Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 BCLR (3d) 282 (BCCA)).
- [94] There is a presumption of prejudice to the respondent, although that is not determinative (*Chouinard v. O'Connor*, 2011 BCSC 902, aff'd 2011 BCCA 161; *Med Finance Co. v. Bank of Montreal et al* (1993), 79 B.C.L.R. (2d) 222 (BCCA)).
- [95] The principles to be applied when adding new causes of action past the limitation period are set out in *Chouinard* at para. 11:
- amendment should be permitted as necessary to determine the real question and issues between the parties,
 - the party is not required to adduce evidence in support of a pleading before trial,
 - the facts alleged are taken as established,
 - the discretion is to be exercised judicially.
- [96] The factors to be taken into account in the judicial exercise of discretion are outlined at para. 12 of *Chouinard*:
- the extent of delay
 - the reasons for the delay
 - the degree of prejudice caused by the delay
 - the extent of the connection if any between the existing claims and the proposed new cause of action.

- [97] Mr. Carreiro points out that the amendments were made more than six years past the limitation period. He says such a delay in Med Finance was considered extraordinary, and as the plaintiff had not rebutted the presumption of prejudice, the Court of Appeal overturned the chambers judge's decision to allow the amendments. In this case, Ms. Carreiro has adduced no evidence to rebut the presumption of prejudice to Mr. Carreiro.
- [98] Mr. Carreiro says there is no particular reason given for failing to amend on time; Ms. Carreiro did not allege her failure was financial. She simply says she "stopped the case" once she filed the CPL. This is not a justifiable reason for the delay.
- [99] In any event, he says, she was not under duress, nor were the children starving as her counsel alleges. It is obvious she considered staying in Brazil, and the agreement made sense for both of them at that time. However, Ms. Carreiro now says she did not intend to stay there. In April of 2003, she went to a new set of lawyers regarding one issue: the transfer of the Brazil property. By September of 2003, she had problems with the entire agreement. Mr. Carreiro says there was no duress, simply buyer's remorse. He also points out that Ms. Carreiro removed the non-disclosure clause from the separation agreement and now accuses Mr. Carreiro of non-disclosure.
- [100] Mr. Carreiro says that in addition to not rebutting the presumption of prejudice from such a long delay, he has suffered substantial real prejudice. Neither Mr. Epp nor Mr. Routtenberg were available as witnesses, and their testimony, particularly that of Mr. Routtenberg, would be helpful. As well, Ms. Carreiro refused to respond to documents requests once she filed the CPL IN 2004, and those documents are no longer available. For instance, Mr. Carreiro asked for bank and financial records in order to disprove her allegation that she was in financial distress when she signed the separation agreement. He also requested medical documents to disprove her medical condition and her claim that she needed to stay in Brazil to receive treatment. He asked for documents relating to her lease of a vehicle which he says would assist in proving she was not truthful in respect of her income disclosure. These documents were all requested in 2005, with many follow-up requests, which Ms. Carreiro acknowledged she ignored once she filed the CPL.
- [101] As for the CPL, Mr. Carreiro says it is a form of litigation blackmail, as Ms. Carreiro did nothing once she filed it, letting the action sit for years, and taking the position it was Mr. Carreiro's responsibility to move it forward.
- [102] Mr. Carreiro says, relying on Chouinard, and Lui v. West Granville Manor Ltd. 1985 (1985), 18 D.L.R. (4th) 391, that there must be a real and substantive connection between the amendment and the original action, that is some degree of dependence on the original action before an amendment which sets up a separate cause of action can be piggy-backed over the limitation period. The initial 1998 action deals with a temporary separation of the parties that ended in reconciliation. The amendment deals with the circumstances surrounding the negotiation of a separation agreement four years later. In the meantime, Mr. Carreiro's 2002 action was started and settled by the separation agreement and a

divorce order.

- [103] Mr. Carreiro says the factual and legal issues arising out of the 1998 action are different from those surrounding the separation agreement. Child support and spousal support are legitimate claims, but could have been brought in a new action. Instead, the trial has been dominated by statute-barred causes of action, inappropriately added to the 1998 action to circumvent the limitation problem. This has lengthened the trial and substantially increased the costs, which will not be recoverable.
- [104] Mr. Carreiro says the amendments should never have been allowed in the first place, but in any event, the claims arising from them should be dismissed as statute barred.

Claimant's position

- [105] The claimant submits that the delay, which she says is from 2005 (when the discoveries were done) to 2012, is due to nothing but her finances, something for which she blames Mr. Carreiro. Ms. Carreiro says she had no money to pursue the claim as she hired lawyer after lawyer, paying each one a few hundred dollars. There were cryptic references during submissions to present counsel perhaps doing this trial for very little remuneration, and not expecting it to take the course it did.
- [106] Ms. Carreiro's counsel says that Ms. Carreiro received advice from a realtor to file the CPL, and she took that route because she had no money. It was not litigation blackmail.
- [107] Ms. Carreiro argues that the only real prejudice alleged is the failure to produce documents after discovery, but says none of the documents are of real import. Explanations for the relevant subjects and/or the explanation for the failure to produce documents were provided at trial. Although the lawyers are not available to testify, the correspondence has been admitted.
- [108] Ms. Carreiro says the Rule 18A application clearly revived the 1998 action, and that application put the separation agreement in issue. It was followed by a consent order, two JCCs, an exchange of documents, a Notice to Admit, and an Examination for Discovery. Limitations issues were never raised prior to 2013.

Discussion

- [109] Ms. Carreiro commenced this action in 1998. This was four years before the separation agreement was entered into in March of 2002, so of course it was not challenged as part of that action. On September 24, 2004, she filed a Notice of Motion under Rule 18A asking for
- sole custody and guardianship of the four children,
 - child maintenance,
 - a declaration that the separation agreement be declared null and void,

- an order that her share of the Mission property be retransferred to her on the basis that the defendant had not paid her any consideration for it, a CPL, and an asset restraint order.

[110] She stated on the document that the application was made:

Pursuant to Rules 18A, 51A, 52, 44, 57 and 60 of the Rules of Court; Section 9, 65, 56, 68, and all other relevant sections in Parts 2, 5, 6 and 7 of the Family Relations Act; and the inherent jurisdiction of the Court.

[111] Ms. Carreiro filed an affidavit in support of the Rule 18A application. In that affidavit she alleged that the property division was unfair because the house in Brazil was worth \$11,000 and the house in Mission was worth \$159,000. She also said the Brazil property had not been transferred to her as required by the agreement. She deposed that failure to fulfil the agreement was the most important issue.

[112] The values for the houses provided in Ms. Carreiro's affidavit do not give an accurate impression of the respective values of the properties and no mention is made of the substantial mortgage on the Mission property which Mr. Carreiro was paying. However, the likelihood of the division of property becoming an issue is evident, although it appears from the affidavit that Ms. Carreiro's main concern at that time was to have the Brazil property transferred to her, notwithstanding the relief claimed in the motion itself which referred to retransfer of the Mission property.

[113] Ms. Carreiro filed the CPL in October of 2004. A JCC was held in November of 2004, and child support was set by consent at \$1,060 per month based on a Child Support Guideline income of \$48,600. A further JCC was held in August of 2005 and dates were set within the month for the exchange of Lists of Documents and financial statements. Discoveries were held in October of 2005.

[114] Nothing further was done in the 1998 action until Mr. Carreiro applied to have it dismissed in 2012.

[115] Pleadings in family cases are of limited assistance in defining the issues between the parties since the Supreme Court Family Rules, BC Reg. 169/2009 (the "Family Rules"), put in place in 2010, but insofar as it is possible to discern an issue respecting the separation agreement, the amended Notice of Family Claim filed on June 5, 2014 reads:

One or more of the following relates to claims made in this notice of family claim
a written agreement dated:

March 1, 2002

The Claimant signed this written agreement dated March 1, 2002, under duress; the Respondent refused to pay any child support unless she signs the agreement which was prepared by his lawyer and presented to her upon her arrival from Brazil. He also served the Divorce pleadings upon her and compelled her to agree to his terms. Further, the Respondent coerced her to

witness her signature before a lawyer and obtain the Certificate of Independent Legal Advice. The Claimant advised the Respondent of her disagreement and continuously attempted to change or mediate at least some of the terms; when the Respondent refused to resolve it at a mediation or by negotiation, in September 2004, the Claimant initiated a summary application challenging the validity of the said Separation Agreement.

Schedule 5 - Other Orders

The claimant is asking for the following orders:

The following orders under the Family Relations Act

- (a) An Order setting aside an agreement reached between the parties dated March 1, 2002, which agreement was obtained as a result of pressure, undue influence, duress, and unconscionable acts upon the Respondent by the Claimant and non-disclosure by the Claimant to the Respondent
 - (b) In the alternative to an order setting aside the agreement reached between the parties dated March 1, 2002, an Order varying such agreement pursuant to Section 65 of the Family Relations Act to increase the Claimant's share of assets to provide for a fair decision of assets between the parties.
- [116] The chambers judge who dealt with the application to amend treated the Rule 18A application as constituting a claim for reapportionment. She exercised her discretion to allow the amendment on the basis that the respondent was given notice in 2004 that Ms. Carreiro was not happy with the separation agreement, with leave to reargue the issue at trial. I am not sitting on an appeal of the chambers judge who granted the amendments, but am considering the issues having now heard the evidence, an approach the chambers judge left open to the respondent.
- [117] Counsel for the respondent argued the limitations issue using the framework from Chouinard, which deals with amendments beyond the limitation period.
- [118] The usual considerations for amendment are to be considered within the general parameters of fairness, convenience, and a just determination of the real questions in issue between the parties.
- [119] The first consideration is the extent of and reasons for the delay: here, the delay is substantial - over six years. Counsel for the claimant says the delay was due to financial reasons, but Ms. Carreiro testified it was because she simply "stopped the case" once she filed the CPL. She understood Mr. Carreiro could not do anything with the house without talking to her so she left any further steps up to him. She did not search for or produce documents as he requested. She considered it his obligation to move her litigation forward.

- [120] While this was an unfortunate position for Ms. Carreiro to take, as it was not up to Mr. Carreiro to advance the litigation, he could have taken steps to deal with it before 2012 if he had wanted to do so.
- [121] The next consideration is prejudice: Mr. Carreiro says prejudice must be presumed after such a long period of time, and specifically he has been thwarted in establishing his case by Ms. Carreiro's failure to produce documents. Ms. Carreiro testified it was hard looking for documents and it was a relief to file the CPL and stop the case. This is not an excuse, and does not relieve Ms. Carreiro of her obligation to prove her case and to produce documents in that regard. However, most of this information goes to the issue of spousal support, which is before the court in any event, regardless of limitations issues.
- [122] The next consideration is connection between the original action and the amendment: the original action obviously contained no reference to the separation agreement because the agreement was not created for another four years. Mr. Carreiro says this is an entirely new claim being piggy-backed on an unrelated claim.
- [123] Counsel for Mr. Carreiro referred to cases in the commercial context where limitations have been enforced. As has been made clear by the Supreme Court of Canada in the family law context, the usual commercial and contractual principles are not necessarily applicable in the family context (see *Miglin v. Miglin*, 2003 SCC 24; *Hartshorne v. Hartshorne*, 2004 SCC 22; *Rick v. Brandsema*, 2009 SCC 10). However, those same courts have also recognized the importance of enforcing limits on family claims so that the parties know where they stand and can plan their lives for the future (see also *Nichele v. Nichele* (1994), 1 B.C.L.R (3d) 292 (BCSC)).
- [124] In this case, the issue of Ms. Carreiro's dissatisfaction with the separation agreement was clearly before the court from the filing of the Rule 18A application. It was spelled out in the affidavit in support of the Rule 18A application filed on September 24, 2004, in which Ms. Carreiro raised the different values of the properties.
- [125] While it would have been neater to have amended the Statement of Claim in 2004 or even filed another one, rather than tacking new things on to the 1998 action through the Rule 18A application, the respondent could have been under no misapprehension that all these issues now had to be dealt with. In fact, for the next year, proceedings moved forward on that basis. The respondent participated in the process after the Rule 18A application was filed, attending two JCCs, the discovery, sending a Notice to Admit and a List of Documents, and paid child support. He did not raise a limitations defence until very recently.
- [126] As noted, the considerations that govern limitations in the commercial context of the cases presented by the respondent are not directly applicable to a family case. In any event, in none of those cases were the issues put squarely before the court in earlier applications.

[127] Considering the factors to be taken into account in the exercise of discretion to allow amendments, I conclude there was no unfairness in granting the amendments initially, and the limitations defence advanced by the respondent under the Limitation Act should not succeed.

[128] I note the comments of the Court of Appeal in a recent decision, *Halliday v. Halliday* 2015 BCCA 82, in which they conclude at para. 59, after close scrutiny of the Family Rules:

A party seeking an order to set aside or vary a separation agreement must do so by way of application: see Rules 10-5(1) and 10-5(2).

[129] The court noted, earlier in the judgment, the complexity of the legislative regime, and how easily things can go wrong. In that case, they decided to send the entire matter back to begin again.

[130] I recognize that the present proceeding is fraught with problems, and I sent a memorandum to counsel asking them if they wished to address this aspect of *Halliday* specifically in order to avoid the potential for such a result should this case be appealed. Both parties repeated their previous submissions regarding the 1998 Writ and the effect of the Rule 18A proceeding, and each alleged that *Halliday* assisted their respective positions.

[131] Rule 21-5(2) of the Family Rules allows the court to treat a failure to comply with the Rules as an irregularity, not a nullity, and while the Court of Appeal refused to give the parties in *Halliday* the benefit of this saving provision (apparently because the limitation argument respecting property had not been considered under the right statute), I will do so here to the extent that it is necessary to comply with a large and liberal interpretation of Rule 1-3(1) (b):

The object of these Supreme Court Family Rules is to

- (a) help parties resolve the legal issues in a family law case fairly and in a way that will
- (b) secure the just, speedy and inexpensive determination of every family law case on its merits.

[132] In other words, I will not dismiss the claim to set aside the separation agreement because it has been brought as part of a Notice of Civil Claim instead of by way of application, if indeed it should have been (which I do not decide). As long as Mr. Carreiro can make his limitation arguments under the proper sections, he is not prejudiced by the form in which the issue is raised.

CHALLENGING THE SEPARATION AGREEMENT UNDER THE COMMON LAW

[133] The structure of the claimant's argument was not entirely clear, but I will add at this point that, aside from property division, Ms. Carreiro says the agreement as a whole is obviously unfair. She was taken through the agreement in detail in cross examination, and asked to point out the terms she thought were unfair. Her answers were often equivocal. She was vague about most of the terms in the agreement, but clearly thinks the property division

and spousal support provisions were unfair. She had some point to make about the clause respecting pensions, but it was simply not clear and I am unable to restate it. When asked to clarify it in her testimony she said she did not want to talk about it, by which I think she means she does not understand it.

- [134] There is no dispute that Ms. Carreiro is entitled to a division of Mr. Carreiro's pension under Part 6 of the FRA, and the agreement provides for that. If there is some calculation or distribution that has yet to be made pursuant to the agreement, then Mr. Carreiro should ensure it is done.
- [135] One of the concerns that arises in cases respecting setting aside agreements is non-disclosure. There was no evidence or submissions from which an issue of material non-disclosure might arise, except perhaps in the context of rental income and expenses on the Mission house. Mr. Carreiro's lawyer had included a clause regarding non-disclosure in the agreement, but Ms. Carreiro's lawyer was instructed to remove it for reasons that are not clear. Ms. Carreiro could not explain it during cross-examination. Overall, I cannot see that non-disclosure by Mr. Carreiro is an issue in this case.
- [136] The claimant argues that she signed the agreement under duress.
- [137] It would have been helpful to hear from the lawyers who were involved in the negotiations but apparently neither is available after twelve years. The exchange of correspondence is before the Court but does not appear to be complete.
- [138] Ms. Carreiro was presented with the agreement at the beginning of January 2002. She spoke to her pastor and to friends, and saw Mr. Routtenberg. Mr. Routtenberg corresponded with Mr. Epp until the agreement was finally signed on March 1, 2002.
- [139] Ms. Carreiro submits that her children were starving in Brazil, and in order to get money for support, she was forced to sign the document, which she thought was an interim agreement. The alternative was to litigate. She had no money for lawyers. She knew the agreement was unfair - her pastor told her not to sign it. However, she said she had no choice. She said in her mind there was the possibility of reconciliation and if they got back together they could forget about the agreement. She testified as well that she was not too concerned; she wanted to get it over with and go back to the children.
- [140] Ms. Carreiro insisted during her testimony that Mr. Routtenberg was not her lawyer and that he had discussed nothing with her, and explained nothing to her. She said the letters he wrote to Mr. Epp regarding the separation agreement were miscommunications. Despite the signature line with Mr. Routtenberg's stamp and signature stating that she had signed the agreement in his presence, she said she did not do so.

- [141] Despite Mr. Routtenberg's statement in the letter of February 14, 2002, and a further communication from another lawyer acting for her on April 4, 2003, that she wanted to remain in Brazil, at least for the near future, Ms. Carreiro said those were miscommunications and she never intended to remain there. However, it is clear from the documents that Ms. Carreiro's stated position was that she would decide in 18 months whether their children would return to Canada or remain in Brazil.
- [142] It appears from Mr. Routtenberg's letter that Ms. Carreiro hoped the separation agreement was an interim measure only, and that they would reconcile. Maintaining this belief in the face of Mr. Carreiro's obvious determination to end the marriage and get a divorce would be difficult, and the purpose and substance of the agreement is clearly aimed at a final resolution. Although Ms. Carreiro initialed the change in date respecting the date before which a divorce would not be sought, she testified she did not understand it and she did not recall why she did it.
- [143] Ms. Carreiro bears the onus of proving that the agreement was signed under duress. Her case for duress and oppression is not strong. There is no evidence of physical compulsion or threats. Emotional distress arising from a marriage breakup is unfortunate but common, and it is insufficient to prove duress (*Ferguson v. Ferguson*, 2008 BCSC 151). Ms. Carreiro's wish to return to her children does not constitute the type of urgent economic pressures that would vitiate consent. Ms. Carreiro obtained legal advice, but she appears to have been so convinced that reconciliation was a viable option that she did not really turn her mind to what the agreement meant. She wanted to get back to her daughters and she wanted child support, which Mr. Carreiro was reluctant to provide without an agreement. That was wrong of him because he had an obligation to support his children at all times. However, he was faced with Ms. Carreiro's certainty that they would reconcile, something he did not want. An agreement was necessary to allow him to move on. He ensured that Ms. Carreiro had the assistance of a lawyer, and she did obtain advice throughout the process, despite her determination at trial to paint Mr. Routtenberg simply as a witness to the document.
- [144] I am not persuaded that the agreement was obtained by duress and/or oppression. Consequently, I am not willing to set aside the agreement as a whole on this basis. Ms. Carreiro made her choice to sign the agreement with legal advice. Her unilateral hope that it was interim only, the terms did not really matter, and she and Mr. Carreiro would reconcile is not a basis on which to set the agreement aside.
- [145] I will turn to the issue of the division of property under s. 65 of the FRA.

CLAIM FOR REAPPORTIONMENT UNDER S. 65 OF THE FRA

Limitations Issue Respecting the Definition of "Spouse" in FRA for the purpose of claiming a reapportionment of property

[146] A division of family assets was sought in 1998, but there was no mention of an unequal division or reapportionment. An amendment was permitted in January of 2014 to allow Ms. Carreiro to claim an unequal division of property under s. 65 of the FRA on that basis that she made the claim within time as a "spouse".

[147] The Court of Appeal discussed limitations in this context in *Halliday* and at paras. 41 to 43, considered what statutory scheme governs such a claim. The court, citing the transitional provisions contained in s. 252 of the Family Law Act, SBC 2011, c. 25 (the "FLA"), said the FRA continues to govern a claim to set aside or replace a separation agreement dealing with property.

[148] Section 252(2) of the FLA provides

(2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

[149] Thus the FRA continues to govern for property division in this case.

[150] The definition of "spouse" in s. 1 of the FRA is:

"spouse" means a person who

(c) applies for an order under this Act within 2 years of the making of an order

(i) for dissolution of the person's marriage,

(ii) for judicial separation, or

(iii) declaring the person's marriage to be null and void, or

(d) is a former spouse for the purpose of proceedings to enforce or vary an order.

[151] The chambers judge dealt with this argument in the context of the amendment for unequal division of assets and whether it had been brought within the two years required by the FRA in order to come within the definition of "spouse". She said it was a "close call", but she was of the view that the Rule 18A application, although defective in form, was sufficient to raise new issues; it was not necessary to have an originating application.

Respondent's position

[152] Mr. Carreiro argues that Ms. Carreiro was not a spouse at the time she made this claim in 2014. Ms. Carreiro was only a spouse, he argues, pursuant to the definition in the FRA, for two years after the dissolution of the marriage.

[153] Mr. Carreiro points out that the only mention of s. 65 is in the list of relief sought in the Rule 18A application:

Pursuant to Rules 18A, 51A, 52, 53, 57, and 60 of the Rules of Court; Section 9, 65, 56, 68 and all other relevant sections in Parts 2, 3, 6, and 7 of the Family Relations Act; and the inherent jurisdiction of the Court.

[154] Mr. Carreiro says, prior to the current Notice of Civil Claim, a reasonable respondent would only think s. 65 was being mentioned in connection with a determination of whether the separation agreement was null and void, not that a separate claim was being advanced for reapportionment under s. 65.

[155] Mr. Carreiro submits that the Rule 18A application, which was filed in 2004 under the old Rules, was an application for a summary trial. It was not a place to raise entirely new issues: issues are to be raised and defined in the pleadings. While this would give Mr. Carreiro some notice that Ms. Carreiro was not happy with the separation agreement, since she asked that it be declared "null and void", it provides nothing else. If a party is allowed to place a new ground of relief in an interim application and ten years later say she intended to bring it as a claim, it defeats the legislative intention to ensure that such claims are brought quickly. This cannot be a way of keeping a claim alive indefinitely. Since s. 65 was not put forward in a pleading, Mr. Carreiro had no way of protecting himself against such a claim.

[156] Mr. Carreiro argues that the chambers judge who allowed the amendment treated the issue as a procedural one, but he says the law is clear it is substantive. It is the application that puts the status of spouse into question that governs for timing (*Zachata v. Zachata* (1992), 68 BCLR (2d) 180 (BCCA)). In this case, he submits, that is the present application, not the Rule 18A application made in September 2004. He says that application could only be brought in a contested family proceeding and was therefore a nullity. In any event, that application sought to have the separation agreement declared null and void, a remedy not known to the FRA, and without providing any facts.

Claimant's position

[157] Ms. Carreiro says in response that she sought division of assets in the 1998 action and seeks unequal division now, so this should not be a problem. Of course, this argument does not deal with the respondent's concern that it is the change in position that is new.

[158] Ms. Carreiro says, as well, that the application under Rule 18A was filed within the two years, and it reactivated the original action. She filed a lengthy affidavit to accompany her Rule 18A application. The affidavit asks for "a fair settlement of the matrimonial property" and alleges that Mr. Carreiro is enjoying "the most part" of the property.

Discussion

[159] For the reasons already stated, I accept that Ms. Carreiro raised the issue of the division of property within time when she filed the Rule 18A application. That was indeed the application that put that matter in issue, but it was never dealt with, even though those proceedings went on for some time. There could have been no doubt that the division of property was in issue once the Rule 18A application was filed. Whether the Rule 18A application raised issues to be considered in that context, or whether they are now added into the pleadings for this trial, they have been live issues since 2004 when the application was filed.

[160] Therefore, I accept that Ms. Carreiro applied for an order in respect of s. 65 while she was still a "spouse" within the definition in the FRA and is entitled to have it considered.

What remedy, if any, is available to Ms. Carreiro?

[161] The chambers judge who allowed the amendments did not allow Ms. Carreiro to claim a compensation order after the limitation period had expired. The only amendment allowed was the claim under s. 65, which provides for a division of shares in property to be fixed by the court.

[162] Ms. Carreiro claims for a reapportionment of property under s. 65 of the Family Relations Act. Exactly what she wants and how it should be accomplished was not addressed in argument. No submissions were made on how s. 65 should be applied. While the Rule 18A application contained a request to have the Mission property retransferred to Ms. Carreiro, the present Notice of Family Claim (as set out in para. 115 above) does not.

[163] Section 56(2) of the FRA provides for each spouse to have an undivided half interest in the family asset, subject to a separation agreement (s. 56(3)(b)).

[164] Section 65 of the FRA, provides:

- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
 - (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- [165] The parties did not make submissions on the issue, but I am prepared to accept that this separation agreement is a "marriage agreement" within the meaning of s. 61(2)(b) ("an agreement .for ownership in, or division of, family assets or other property on the making of an order for dissolution of marriage"; see also *S. (O.H.) v. S. (M.J.)*, 2004 BCSC 600).
- [166] Section 65 of the FRA allows the court to reapportion property which has been dealt with in an agreement where the agreement is unfair (*Clarke v. Clarke* (1991), 31 RFL (3d) 29 (BCCA), leave to appeal refused [1991] SCCA No. 251).
- [167] The leading case for determining whether the division of property under an agreement is unfair is *Hartshorne*. There, the Supreme Court of Canada said fairness is the primary policy objective guiding the court's role, although the fact that a different result is obtained than would be provided by statute does not by itself contribute to unfairness.
- [168] No analysis was offered by the parties on the *Hartshorne* framework or the application of s. 65 to the present circumstances.
- [169] *Hartshorne* dealt with an agreement signed upon marriage, which was being considered on separation many years later. In the present case, we are dealing with a separation agreement that is being challenged many years later. Nonetheless, the same framework for analysis applies.
- [170] The analysis is done in two stages. First, the agreement is applied to determine what entitlements flow. Second, the factors in s. 65 are applied to determine if the contract operates unfairly. The court must consider the evolution of personal and financial circumstances and whether the current circumstances were within the parties' contemplation when the agreement was signed. If the agreement operates unfairly, the assets may be reapportioned.

What entitlements flow under the agreement?

- [171] I turn first to considering, if the separation agreement is applied, what entitlements flow.
- [172] The only relevant family assets under s. 56 are the house in Mission and the house in Brazil. There are no other assets of consequence. Under the separation agreement, Mr. Carreiro kept the house in Mission and Ms. Carreiro kept the house in Brazil.

Does the agreement operate unfairly?

- [173] Having set out the entitlements envisioned by the agreement, I turn to the second stage of the analysis, which involves an application of the factors in s. 65 and a determination as to whether the agreement operates unfairly.

- [174] Section 65 (a), (b), and (c) are concerned with timing. The parties were married in 1987. The Brazil house was acquired in 1990; the Mission house was acquired in 1994. The parties separated for the final time in late 2001 and divorced in 2002. There is nothing of particular significance in terms of the timing of these events, except that the parties have been divorced for twelve years and Ms. Carreiro has allowed the agreement to operate without objection since 2005.
- [175] The need to become self-sufficient is also a factor under s. 65 (e). Although there is more to say about this in the context of the present claim for spousal support, I note that Ms. Carreiro worked throughout the marriage and continues to do so.
- [176] Section 65(f) allows consideration of a number of general factors to do with the use of the property and the capacities of the spouses.
- [177] Mr. Carreiro, on the assumption that he owns the Mission property, has paid the mortgage on the house and maintained it for the past twelve years, and the value has increased to his benefit. According to Ms. Carreiro's evidence, the value of the Brazil house has also increased in some unspecified amount. The circumstances of the present state of the house in Brazil, its use, its state of preservation, and its value, are all unclear.
- [178] Ms. Carreiro subsequently decided not to remain in Brazil. Obviously the house in Brazil must be transferred to her, as required by the agreement. This will be dealt with further in these reasons.
- [179] At times not long before the separation, the Mission property's value had decreased well below the purchase price. Ms. Carreiro agreed they had tried unsuccessfully for a number of years to sell the Mission property, and that there was a large mortgage on it at the time of separation. She was evasive when asked if she wanted to live in Mission, but the general gist of her answers was that she did not.
- [180] It might seem preferable, in hindsight, to have sold both properties and divided the proceeds, but prior attempts had been made to sell the Mission property, all unsuccessful. The retention of property as reflected in the agreement seemed logical at the time, if Ms. Carreiro remained in Brazil with the children. According to Mr. Carreiro's evidence, which was not disputed, Ms. Carreiro was given the choice to take either piece of property and chose the one in Brazil where she was planning to reside. She was evasive when asked if she could have handled the mortgage herself if the property exchange allowed her to have the Mission property.
- [181] As noted, good evidence on valuations between Mission and Brazil would have been helpful when attempting to determine if the agreement operates unfairly. Mr. Carreiro requested particulars of valuation in order to understand Ms. Carreiro's claim regarding the houses. This was not produced.
- [182] The Supreme Court of Canada said in *Hartshorne* at para. 52:

I find it troublesome that the parties agreed to proceed to trial without having professional valuations of certain assets. To meet the objectives of the legislation, in my opinion, it is problematic for the trial judge to apportion property with no more than "a good idea" of the value of some of the assets. The trial judge must be in a position to determine the exact position of the parties as provided for in the Agreement, together with entitlement to spousal and child support, before he or she can decide whether there is unfairness under the terms of s. 65.

- [183] In submissions, Ms. Carreiro's counsel said they do not agree with the values set out in Mr. Routtenberg's letter. The market value of the Mission property for half the interest inserted in the transfer document from both their names to Mr. Carreiro's name on May 2, 2002, was \$82,050, meaning the value was \$164,100. The mortgage was \$107,000. Mr. Carreiro would put the Brazil property's value at \$25,000, and Ms. Carreiro did not strongly disagree. Therefore, the equity in the Mission house at the time of the agreement was about \$57,000, over twice that of the Brazil house. This is a bigger difference than that reflected in Mr. Routtenberg's letter, which Ms. Carreiro was prepared to accept at that time.
- [184] Ms. Carreiro bears the onus of demonstrating that it would be unfair not to reapportion that piece of property in her favour at this very late stage. The delay in advancing the claim is very significant. Mr. Carreiro has paid the mortgage and all expenses on the Mission property for twelve years, and it would not be fair to simply transfer half of that property interest back to Ms. Carreiro, even if that form of relief had survived the application to amend, which is questionable.
- [185] A compensation order to account for the different in value at the time of the agreement might have been appropriate at some earlier time in a proper proceeding, but Ms. Carreiro did not attempt to make such a claim until 2013, and by that time it was too late. The amendments sought by the claimant for a compensation order or other remedies under s. 66 of the FRA were not allowed by the chambers judge because they were all barred by limitations. (Section 66 was not mentioned in the list of rules relied on in the Rule 18A application, although a retransfer of the Mission property was sought on the basis that no consideration had been paid to the claimant).
- [186] In the current set of amendments, the claimant was allowed to claim only an unequal division of property under s. 65, and that is the only claim made in the current Notice of Family Claim. I am unable to conclude that this is an appropriate remedy in all the circumstances.
- [187] In the face of fairly limited options open to the Court, which have been created by Ms. Carreiro's delay in bringing this claim, I will now return to the issue of the significance of the failure to transfer the Brazil property to Ms. Carreiro, given the second stage of the Hartshorne analysis.

- [188] Since no submissions were made on this issue, which at first blush appears to be a fundamental undermining of the agreement, I sent a memorandum to counsel asking for further information about the ability to transfer this property.
- [189] Counsel for Mr. Carreiro referred to para. 17(3) of the separation agreement which puts the costs of transferring the land into Ms. Carreiro's hands, and also referred to a letter contained in the claimant's book of documents reflecting a further agreement which designated Mr. Carreiro as a bare trustee of the Brazil property for the benefit of Ms. Carreiro.
- [190] Mr. Carreiro says the steps needed to transfer the property are straightforward. In the most recent submissions, Mr. Carreiro agreed to ensure it was done, if Ms. Carreiro pays \$2,000 into trust to cover the costs. However he wished to delay transfer because he was concerned that if he should receive an order for costs, he would have nothing against which to recover if the property were transferred immediately.
- [191] It appears from the position now taken by Ms. Carreiro that she does not dispute that the property can be transferred. However, she says Mr. Carreiro's cooperation is necessary and he has continually thwarted efforts to transfer it. Ms. Carreiro submits that, had she had the property, she could have used it to raise her low standard of living. There is some support in the correspondence in 2003 for Ms. Carreiro's position that she demanded that the property be transferred to her, although there is no reference to Ms. Carreiro's responsibility under the agreement to bear the costs of the transfer.
- [192] It may be that Mr. Carreiro has not facilitated the transfer of the property, although Ms. Carreiro also had an obligation under the agreement to pay for the transfer. Since the matter was pursued so haphazardly at trial, I am not able to find the necessary facts to lay blame. In any event, Mr. Carreiro has now agreed to take whatever steps are necessary and he should do so as soon as possible. He has had the advantage of the title to the Mission property for 13 years and he should not have allowed the Brazil property to remain in his name all this time.
- [193] The issue of a potential remedy for the delay in transfer remains, but there is no claim advanced for it in the Notice of Civil Claim. The only claim for relief in respect of property which survived the application to amend was a claim for reapportionment under s. 65 of the FRA. All other forms of relief had not been claimed previously, even in the cursory manner set out in the Rule 18A application, and were not allowed because of the passage of time. In any event, Ms. Carreiro bears at least equal responsibility for the mechanics of the transfer under the agreement.
- [194] The long delay in making appropriate claims prevents the Court from fashioning a remedy, other than to require Mr. Carreiro to arrange to transfer the Brazil property immediately. Ms. Carreiro must facilitate the transfer. Given the long delay, which is attributable to both parties, the costs of transfer at this late date should be shared, despite the agreement.

[195] The CPL on the Mission property must be removed.

SPOUSAL SUPPORT

[196] A claim for spousal support under the FRA had been made in the 1998 action, so the chambers judge who heard the application to amend said in her reasons from January 2014 that that claim remains outstanding, subject to the agreement. She allowed a claim for spousal support to be made under the Divorce Act since there is no limitation period that would prevent such a claim. This claim was first advanced in 2013.

Spousal Support under the FLA

[197] In Halliday, the Court of Appeal considered what statutory scheme governs a claim to set aside the provisions of a separation agreement dealing with spousal support. The court stated, at para. 44, that:

a party to a separation agreement finalized before the FLA came into force and seeking to vary the spousal support provisions of that agreement would have to proceed under the FLA. The question of whether a spousal support claim under the FLA would be statute barred would then turn on the proper construction of s. 198(3).

[198] In view of the remarks on spousal support made by the Court of Appeal in Halliday, I asked counsel if they wished to make further submissions on spousal support, particularly the application of the Family Law Act, which appears to be the governing statute and which had not been addressed. Nothing of assistance was provided.

[199] In my view, the claim under the FLA to set aside the separation agreement in respect of spousal support is barred by the limitation period contained in s. 198(2) of the FLA. That section provides:

- s. 198 (2) A spouse may start a proceeding for an order for spousal support, no later than 2 years after,
 - (a) in the case of spouses who were married, the date
 - (i) a judgment granting a divorce of the spouses is made, or
- (3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order all or part of an agreement respecting spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

[200] In the circumstances here, the claim for spousal support made in 1998 under the FRA does not, in my view, survive the divorce. The parties reconciled after that Writ was filed and were not divorced until 2002. The Rule 18A application, which has been interpreted fairly liberally to the benefit of Ms. Carreiro in respect of her status as a spouse under the FRA in respect of her claim for property division, does not contain a claim for spousal support. A

claim was never made for spousal support after the divorce, but the issue of spousal support was mentioned in a JCC in 2004. Therefore Ms. Carreiro cannot claim that she did not know of grounds to make an application, as is required in order to take advantage of the discoverability provision in s. 198(3).

[201] Thus I conclude that the claim for spousal support under the FLA is barred by the passage of time, and I will consider spousal support only under the Divorce Act, as there is no limitation period in the that Act regarding spousal support.

Spousal support under the Divorce Act

[202] Under the separation agreement, Ms. Carreiro relinquished a claim to spousal support. Under her present Notice of Civil Claim, Ms. Carreiro claims for spousal support under both the FRA and the Divorce Act, on a compensatory or non-compensatory basis. Her claim is apparently retroactive back to the date of the separation agreement, that is 2002, although no submissions were made on the principles applicable to a retroactive claim.

[203] The issue of whether an award should be retroactive was discussed by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10. The Court clarified, at para. 207, that the analysis set out in *D.B.S. v. S.R.G.*, 2006 SCC 37, regarding applications for retroactive child support applies to applications for retroactive spousal support as well. The factors to be weighed include:

1. the needs of the recipient spouse
2. the conduct of the payor spouse
3. the reason for the delay
4. any hardship the retroactive award may occasion on the payor spouse.

The Court also imported the general three year limit for retroactive awards for child support from *D.B.S.* into awards for spousal support.

[204] Before considering if Ms. Carreiro is entitled to retroactive spousal support, I must consider if it is appropriate for this Court to consider Ms. Carreiro's claim for spousal support in light of her delay in making this claim.

Delay

[205] An application for spousal support will not necessarily be dismissed because of delay, unless the delay is unreasonable. The court will consider any explanation for the delay and events that have transpired during the delay (see *S.K. v. A.K.*, 2004 BCSC 37, and cases cited therein).

[206] The first consideration is whether Ms. Carreiro has adequately explained why she did not raise the issue of spousal support prior to 2013.

- [207] Ms. Carreiro testified that she is not self-sufficient now and she was not self-sufficient in 2001. The explanation for the delay in applying for spousal support seems to be that she was busy raising her children and did not have money to pursue additional claims. However, Ms. Carreiro filed the application under Rule 18A in 2004 and did not raise spousal support as an issue at that time. It was apparently discussed informally at the second JCC in August of 2005, but then seemingly abandoned when the CPL was filed.
- [208] It is part of Mr. Carreiro's argument on limitations that he has been prevented from examining the issues attached to spousal support because of Ms. Carreiro's failure to produce the documents that were requested on discovery. Those documents dealt with her medical condition and income, and are now not available because of the passage of time. Ms. Carreiro testified it was hard looking for documents and once she filed the CPL, she "stopped the case". This is not a reasonable explanation for failing to produce documents or pursuing her claim.
- [209] The second subject for consideration is events that have transpired during the period of delay. In this case, Ms. Carreiro has continued in the employment she had at the time of the separation. This does not suit her as well now as it did twelve years ago, but she has had other opportunities to retrain which she has not taken. This will be discussed in more detail below.
- [210] The issue of delay creates a large hurdle for Ms. Carreiro which she has not done much to overcome. However, given the overall circumstances of the parties, and the claim for non-compensatory support, it is more appropriate to look at the merits of Ms. Carreiro's claim, while not losing sight of the difficulties caused by her delay.
- [211] In assessing the merits of Ms. Carreiro's claim under the relevant statutory provisions, the fact that she relinquished a claim for spousal support in the separation agreement is relevant.

Significance of the Agreement to the Claim for Spousal Support

- [212] The Supreme Court of Canada in *Miglin* dealt with a claim for spousal support made by a wife under the Divorce Act four years after she had agreed in a separation agreement not to claim it. The Court set out in this case the framework for considering a claim for spousal support where a separation agreement exists.
- [213] The Court in *Miglin* moved from its previous position that an unforeseen change in circumstances was necessary to allow a consideration of spousal support to allowing a wider consideration of the circumstances. However, it noted that the Divorce Act sets out economic self-sufficiency as a legislative objective, and advances the objectives of certainty, finality, and negotiated settlements. An unimpeachably negotiated agreement should receive considerable weight unless all circumstances render continued reliance on it unacceptable.

[214] The first stage of the Miglin analysis involves considering the circumstances in which the agreement was negotiated, including pressure, oppression, or other vulnerabilities. I have already concluded that Ms. Carreiro has not made out a case for duress or oppression. Accordingly, I do not deal with this first stage of the Miglin analysis in my discussion below.

[215] A court must then assess (at para. 84):

whether the agreement takes into account the factors and objectives of the relevant Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown.

This includes not only the factors listed in the section dealing with spousal support, but the general objectives of the Act: finality, certainty, and an invitation for the parties to determine their own affairs.

[216] Even if a court is satisfied respecting the circumstances of negotiation and the compliance with the Act, the Court went on to set out the final stage of the analysis at para. 87:

Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

Change per se is not the criterion. Ms. Carreiro must also show that any new circumstances were not reasonably anticipated by the parties and have led to a situation that cannot be condoned.

Does the Agreement Comply with the Relevant Act?

[217] I will now turn to the second consideration required by Miglin of whether the agreement is substantially in compliance with the relevant Act, that is the Divorce Act.

[218] Section 15.2(4) of the Divorce Act provides that the court shall, when making an order for spousal support, take into consideration:

the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse. [emphasis added]

[219] Section 15.2(6) states:

An order that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[220] Considering the factors in s. 15.2(4), the parties were married for about fifteen years, although they had two separations before the final one. The separation agreement was signed twelve years ago. During and after the marriage, Ms. Carreiro was the primary care giver for the four children, although she worked throughout the marriage and, at the time of the agreement, was attempting to run a restaurant in Brazil.

[221] Taking into account the factors considered in Miglin to be relevant to the general principles in the Divorce Act (that is finality, certainty and the ability of parties to determine their own affairs), I accept that it was Mr. Carreiro's intention to achieve certainty and finality by entering into an agreement, and he has relied on it accordingly.

[222] Ms. Carreiro was apparently not so convinced of the agreement's finality.

[223] The agreement was predicated upon Ms. Carreiro sustaining a successful business in Brazil and continuing to live there with the children. In her testimony, Ms. Carreiro was dismissive of the restaurant and said it was a small operation, barely profitable, if at all. I accept that the restaurant business was not as developed as is suggested by the first paragraphs of the agreement, but that seems to be the future Ms. Carreiro agreed to at the time she signed it, although she was determined to reconcile. Once she learned of the divorce, she realized there would be no reconciliation and she would have to live with the agreement. She was not happy with that realization. As well, the restaurant business had come to an end by that time. Ms. Carreiro returned to Canada with the children and began to take issue with the agreement.

[224] Ms. Carreiro made some attempts to deal with some of the issues up to 2005 after she returned to Canada. However, both parties have lived with the agreement since it was signed, and its validity was not raised again as an issue until 2013. The successful operation of the agreement was always undermined by Ms. Carreiro's unilateral belief that reconciliation would occur and the agreement would not really matter. That does not, in my view, negate the purpose of the agreement, which was signed with legal advice - certainty, finality, and the legislative design of allowing parties to determine their own affairs.

- [225] Moving to the specific factors in s. 15.2(6), it is Mr. Carreiro's position that Ms. Carreiro suffered no economic disadvantage from the marriage or its breakdown. Ms. Carreiro did not offer submissions on this point until her lengthy written response to my question about the ability to transfer the property in Brazil.
- [226] I am not able to discern on her behalf any particular disadvantage from the marriage or its breakdown, partly because the evidence was fairly vague and also because twelve years have passed since the separation and over eight years since the discoveries during which no claims have been made. However, I gather that the disadvantage, from Ms. Carreiro's perspective, arises from the same factors that she alleges made the agreement unfair: her devastation at learning of the affair, the suddenness with which she was faced with the agreement, and her continued hope to reconcile and return to Canada with the girls, a hope that was thwarted by Mr. Carreiro, both through the divorce and the alleged failure to provide travel authorizations. As a result, she was forced to stay in Brazil for some time, and upon her return to Canada, she was not able to share in the Mission property. As well, she assumed full time care of the children. The reason Ms. Carreiro gave in her evidence for requiring spousal support was that a woman with four children needs support.
- [227] That brings into play the next consideration under s. 15.2(6)(b): the financial consequences arising from the care of the children. The evidence was vague on this point, but I gather Ms. Carreiro feels she was so busy with the everyday tasks of raising four children that she could not take advantage of any opportunities she may have had to advance beyond the physical job of house cleaning. As far as I could deduce from the evidence, the next two factors - the relief of any economic hardship of the spouses arising from the breakdown of the relationship, and the promotion of economic self-sufficiency (s. 15.2(6)(c) and (d)) - are, from Ms. Carreiro's perspective, also all related to the responsibilities of caring for the children.
- [228] I should mention at this point that the daughters have had some ongoing contact with Mr. Carreiro and maintain a relationship of some sort with him, but the evidence was vague on its extent or quality. There appears to have been no regular or sustained periods of access, even after their return to Canada. Mr. Carreiro testified that he wanted his children near him and resented Ms. Carreiro's assumption of control of the children. In any event, I accept that the child rearing responsibility has fallen entirely to Ms. Carreiro, although I am also of the view that that, along with the control of the children to the exclusion of Mr. Carreiro, was what she wanted.
- [229] If the agreement had worked out as anticipated on its face, with Ms. Carreiro running a successful restaurant in Brazil, owning the house there, and living in Brazil with the children, with Mr. Carreiro paying child support and visiting regularly, I am satisfied there would have been compliance with the general objectives of the Divorce Act at the time the agreement was signed.

Present Circumstances of the Parties

[230] Thus I turn to the present circumstances to consider, pursuant to the third stage of the Miglin analysis, whether the circumstances have changed in such a way so as to make continued reliance on the agreement unacceptable.

[231] Miglin recognizes that circumstances change. At para. 89, the Court referred to various changes that are presumed to be foreseeable: job markets, parenting responsibilities, health, housing markets, relative values of assets. In outlining these examples, the Court continued at para. 91:

Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with objectives of the Act, that the court may be persuaded to give the agreement little weight.

[232] Thus the concern is whether the present situation is one that was not reasonably anticipated by the parties and cannot be condoned by the Court. If it cannot, the Court can consider Ms. Carreiro's entitlement to spousal support. If she has established an entitlement, amount and duration must be set.

[233] One way of looking at whether the present situation is one that cannot be condoned is to consider whether, in the situation that now exists, Ms. Carreiro is clearly entitled to spousal support, but is receiving none because of the agreement.

[234] Mr. Carreiro says Ms. Carreiro has not established entitlement to spousal support. She has taken responsibility for nothing and has taken no steps to improve her situation or ensure her self-sufficiency. She finds it easier to try to get help from Mr. Carreiro rather than become responsible for herself. As well, her bank records show a lot of money coming in that is unexplained. According to Mr. Carreiro, it is obvious she does most of her business in cash.

[235] Mr. Carreiro's position is that a claim for compensatory support should fail. He says Ms. Carreiro did not give up anything during the marriage or as a consequence of its breakdown, and she has no connection to the increases in his income over the years. She has stayed a cleaning lady and has had no other aspirations. There is no evidence of hardship, and all her documents are now gone because of her failure to produce them when requested. Information was requested on her claims after the motor vehicle accidents but has not been provided.

- [236] Mr. Carreiro says a claim for non-compensatory support should fail as well. Ms. Carreiro had an obligation to retrain and had opportunities which she did not take. She found it easier to go after Mr. Carreiro. Their respective qualities of life are roughly comparable. There has been no mention of spousal support from 2005 to 2013.
- [237] Mr. Carreiro continues at the employment he had at the time of separation, as does Ms. Carreiro. He works with the City of Vancouver; she continues to clean houses.
- [238] Ms. Carreiro is self-employed and has sometimes had regular clients. She works 4 - 6 hours a day, although not every day because her clients go on vacation. She testified she has cut down her jobs because she has a problem with her tendons, and the problem she had with the veins in her leg is back. No medical information was provided.
- [239] A consideration of present circumstances is made more difficult because it appears that Ms. Carreiro's income is very likely much more than she has declared in her income tax returns, when the deposits to her bank accounts are considered. In this context, I also note that her document production has not been complete.
- [240] According to Ms. Carreiro's income tax returns, she made about \$1,500 net in 2000, \$2,600 in 2001, \$4,000 in 2002, \$7,800 in 2003, \$12,000 in 2004, \$10,500 in 2005, \$8,200 in 2006, \$13,000 in 2007, \$12,600 in each of 2008 and 2009, \$12,000 in 2010, \$13,500 in 2011, and \$15,000 in 2012.
- [241] Ms. Carreiro was very evasive when questioned about her work. It is Mr. Carreiro's suspicion that she receives most of her income in cash. Ms. Carreiro did not produce all the bank records requested, and only records from 2006 forward are now available. When questioned on the ones that were produced, she was unable to explain why she deposited \$60,000 into her account in 2006; in 2007, close to \$50,000, and \$35,000 in 2008. She agreed that in 2008 she stopped depositing child support into her account, which accounted for some of the difference. In 2009, she deposited over \$46,000, but said that was the year of the first motor vehicle accident. In 2012, she deposited over \$31,000. In 2011, she deposited about \$23,000, in 2012, \$19,000, and in 2013, only \$14,000.
- [242] When asked if these figures were a baseline and not indicative of her true income, she said they could be, she did not know. Ms. Carreiro agreed she earned considerably more gross income than she indicated in a previous affidavit of October 2013, but said she deducted business expenses. She had no records to substantiate her expenses.
- [243] Ms. Carreiro's Financial Statement shows an income of about \$16,000 plus child support of \$895 per month (\$10,740 per year), and expenses of almost \$44,000. She listed the property in Brazil but said the value was unknown. She listed no other assets and no debts.
- [244] Ms. Carreiro acknowledged she has made no attempts to upgrade her education, get long term employment, or find less physical work.

- [245] Ms. Carreiro made a disability claim in 2008 which was approved. No details were provided. She was offered retraining but did not take it.
- [246] Just prior to trial, Mr. Carreiro learned that Ms. Carreiro had been in two car accidents in 2009. Little information was provided about this. Ms. Carreiro testified at trial that she received nothing for pain and suffering or lost income for the first accident, even though she had missed work. She did get some money for the second accident, but has not produced the information respecting any settlement she received, taking the position it is not a family asset. She suffered pain in her neck, arm, back, and wrist, in both accidents but says none of this interferes with her ability to do her cleaning jobs. She says she cannot continue to do heavy physical work much longer because of her age, not because of any injuries suffered in the accidents.
- [247] All four girls live with Ms. Carreiro and she expects them to help, but she says rent is high and they live day to day. As mentioned, although the oldest daughter is working, she does not pay rent.
- [248] During the twelve years since separation, during which she has not pursued a claim for spousal support, Ms. Carreiro has not taken any opportunity available to her to advance her position or to ensure that she would not be reliant on physical stamina as she ages. She is entitled to receive properly calculated child support, and she continues to support her all her grown daughters, one of whom is no longer a child of the marriage, without assistance from them, which is generous but foolhardy. As well, the girls have been of an age to take care of themselves or each other for many years, thus allowing Ms. Carreiro to improve her self-sufficiency.
- [249] Turning to a consideration of Mr. Carreiro's means, the agreement set out Mr. Carreiro's income as \$48,000. His current Financial Statement shows an income of almost \$62,000 and expenses of \$89,000. His assets are \$302,500, of which \$300,000 is the home in Mission. The mortgage, which was \$107,000 at the time of the agreement, is now \$20,000. Mr. Carreiro lists lines of credit at \$76,000.
- [250] Mr. Carreiro rents out the basement suite for \$600/month and receives \$6,000 - \$7,200 per year, depending on how many months it is rented. He manages to write off the entire rental income through expenses, something of which Ms. Carreiro is extremely suspicious. Ms. Carreiro takes the position Mr. Carreiro's income should be increased as a result.
- [251] In 2012, Mr. Carreiro made \$70,803, which he says includes the rental income. He says he expects to make \$61,970 this year, including rental income.

- [252] In my view, as long as Ms. Carreiro was working productively and receiving full child support, the issue of spousal support was not of concern to her. As well, she had filed the CPL on the Mission property which she considered a sort of insurance policy. Now, of course, she finds herself growing older, still working at a physical job, and supporting her four daughters, whether they are still children of the marriage or not. However, some of those factors Miglin says are foreseeable and are not legally significant changes.
- [253] There are other circumstances that are legally significant in a consideration of non-compensatory support. According to *Lee v. Lee* 2014 BCCA 383, income disparity on its own is not sufficient to establish entitlement (a decision which appears to contradict *McKenzie v. McKenzie* 2014 BCCA 383 decided the same week) but disparity in standards of living can be considered in the context of need.
- [254] Twelve years after the agreement was signed, Ms. Carreiro now lives in a rental home in Burnaby that seems to be somewhat crowded, although there is apparently a basement suite where the oldest daughter lives.
- [255] Comparisons in standards of living between Ms. Carreiro's rental house in Burnaby and the Mission house are difficult, because Mission is a fair distance from the Metro Vancouver area where everyone seems to want to live. Mr. Carreiro's daily commute is an extremely long one - four hours per day. Ms. Carreiro did not attempt to suggest she would prefer to move from Burnaby to Mission. Part of the difference in the households appears to rest upon Ms. Carreiro's refusal to retrain or obtain any means of moving beyond the physical work of cleaning houses.
- [256] It is unclear why her daughters do not assist with rent, as at least two of them work. Mr. Carreiro says the women dress very well and deny themselves nothing. It appears from the oldest daughter's evidence that Ms. Carreiro does indeed give the daughters whatever they ask for. Other than this, there was very little evidence on standards of living.

Conclusion on Miglin Analysis

- [257] The agreement was predicated upon the parties receiving roughly equal assets and having equal prospects. It was not a perfect division of assets in that there was more equity in the Mission house than in the Brazil property, but it would have worked as part of the overall agreement if Ms. Carreiro had stayed in Brazil. Now, however, their situations are not equal. Ms. Carreiro has never had title to the Brazil property, owns nothing else, and lives in rental accommodation with sole responsibility for the four girls, assisted by child support from Mr. Carreiro. I am satisfied she makes more than she declares, but she makes considerably less than Mr. Carreiro, who lives in a fairly large house and receives rental income. I conclude that this is a significant departure from the reasonable range of outcomes anticipated by the parties and that the agreement regarding spousal support should be given little weight.

[258] Entitlement to non-compensatory support is a difficult and fluid concept. I note the extensive review of the law and commentaries in the judgment of Newbury J.A. in Lee and her comments at para. 54:

Canadian courts post-Bracklow have tended to "simply fall back on the conventional concepts of needs and means and self-sufficiency in a search for results that appear fair and just" and essentially to resolve the question of entitlement to support as a matter of principle, by making an award and adjusting it in terms of amount or duration to fit the court's view of what seems fair in the circumstances.

[259] While the issue is far from straightforward, I am satisfied that Ms. Carreiro has demonstrated entitlement to spousal support on a non-compensatory basis. There are a number of bases upon which her circumstances are far less favourable than Mr. Carreiro's. Mr. Carreiro has paid child support, but he has taken no responsibility for the children in terms of time, which is a disadvantage Ms. Carreiro bore, albeit apparently willingly. Ms. Carreiro has not had the benefit of title to the Brazil property, and while this appears to be partly her fault, she owns nothing else while Mr. Carreiro owns the property in Mission which had double the equity of the Brazil property at the time of the agreement. He also receives a substantial amount in rent from that property. When Ms. Carreiro does receive title to the Brazil property, it will still be in a country where she and the children do not reside.

[260] While I am not satisfied that Ms. Carreiro has been forthcoming with financial disclosure, and while some of her problems are a result of her failure to pursue opportunities, I am persuaded that she does have a need for some support on a non-compensatory basis, and that Mr. Carreiro has the means to provide it. All of the factors listed above weigh into a determination of what is fair and just in these circumstances.

[261] I am of the view that a retroactive order back to 2002 is simply not appropriate. As I have discussed, a very poor explanation has been provided for the delay. While the word "generous" could not be applied to Mr. Carreiro, there has been no misconduct in a legal sense on his part. He maintains a home many miles out of Vancouver, travelling four hours a day for work in order to be able to afford a residence. He makes a reasonable living, but does not have a high level of income. Twelve years of retroactive support would occasion hardship.

[262] At the time of submissions following the trial, neither party took me to any calculations to demonstrate, in the context of the Spousal Support Advisory Guidelines ("SSAG"), what would or would not have been owing, either for the time of the agreement or presently.

- [263] In the subsequent submissions on spousal support, counsel for the respondent submitted that an application of the SSAG, if applied to the circumstances that existed at the time of the agreement (an income of \$48,000 for Mr. Carreiro and assuming an income of \$12,000 for Ms. Carreiro), would have resulted in a range of spousal support of \$0 to \$74 per month, ending in 2012. I am unable to replicate that result.
- [264] No further calculations were provided to me. I have attempted to consider what the SSAG amounts might be, using a roughly imputed income of \$30,000 for Ms. Carreiro (because of her financial non-disclosure, her inability to support her business deductions, the deposits into her bank account, and her general capabilities), Mr. Carreiro's present income, and a global amount of child support of \$1,300 per month, as the exact calculations on child support are left to counsel (see below). The resulting amount, using this rough assessment, is between \$300 and \$660.
- [265] I am aware of the recent case from the Court of Appeal, *Bodine-Shah v. Shah* 2014 BCCA 191, which says that parties are entitled to have a decision rendered on the material that is put before the court at trial, and no steps to obtain further evidence should be permitted, even where the court attempts to be fair by allowing the potential for further evidence. Perfect justice is not the goal.
- [266] In view of the delay, Ms. Carreiro's non-disclosure and failure to pursue opportunities, and the general lack of evidence put before the court to assist in such a determination, I set support nearer the lower level.
- [267] Doing the best with what I have, which is very little, and given all the circumstances outlined above, I set spousal support at \$350 per month for five years, commencing January 1, 2015.
- [268] Duration of spousal support in this context is difficult because of Ms. Carreiro's age, her means of livelihood, which depends on physical ability, and her delay in bringing her claim. I have chosen five years as a rough measure of what appears to be fair and just. This gives Ms. Carreiro some assistance while she copes with her medical issues in order to maintain her self-sufficiency. The children should be all independent after five years. As well, Ms. Carreiro will eventually be entitled to a share of Mr. Carreiro's pension, although there is no evidence to assist the court to determine when this will come about. Mr. Carreiro is 50 and began work for the City of Vancouver in 1989, according to Ms. Carreiro's evidence. If his pension is based on thirty years' service (perhaps a reasonable assumption, but I was not referred to any evidence about this), he will be eligible for it in about five years.
- [269] As well, there is a rough correlation between the total amount of spousal support in this amount for this duration and the difference in the value of the assets that were divided at the time of the agreement.

CHILD SUPPORT

- [270] Ms. Carreiro claims retroactive child support under the FRA and the Divorce Act back to 2002, although no submissions were made on child support. These claims now fall under the FLA and the Divorce Act.
- [271] Ms. Carreiro testified that she knew the initial agreement on child support was wrong because Mr. Carreiro should have given her more per month for child support but, pursuant to para. 8, he was paying only \$700 because of travel and telephone costs. Ms. Carreiro said Mr. Carreiro did not visit the girls often enough to justify the reduction in child support. I note that Mr. Carreiro increased the amount of his child support payments following an order for child support made by consent in 2004. The amount paid following this order is detailed above in these reasons.
- [272] Mr. Carreiro takes issue with Ms. Carreiro's claim for retroactive child support going back 12 years. The application to amend was made only in August of 2013. No one followed up on disclosure of income, but he paid regularly and adjusted his payments as his income went up. He claims he has not received the necessary information respecting the status of his two middle daughters to enable him to determine if and when they left the status of children of the marriage.
- [273] I agree with the comments of the chambers judge who granted the amendments, who told Ms. Carreiro the retroactive claim would be governed by, at the earliest, the date of the application, that is October of 2013. Ms. Carreiro never questioned the level of child support prior to that date. There is no misconduct on Mr. Carreiro's part that would justify going back more than three years prior to that date when setting retroactive support (see D.B.S.), assuming there is a need to adjust the amounts Mr. Carreiro has been paying.
- [274] Brief evidence was led respecting the daughters, whether they are still children of the marriage, and if not, when they ceased to be so. All four still live with their mother.
- [275] Ms. Carreiro cannot expect Mr. Carreiro to subsidize her choice to continue to live with and support their daughters, regardless of whether they are independent or not. On the other hand, Mr. Carreiro has always stuck to the letter of what he considered to be his obligations. Generosity has not appeared to characterize his approach to his children or their mother.
- [276] Mr. Carreiro unilaterally dealt with changes to child support rather than give notice under the agreement, but Ms. Carreiro, upon receipt of the adjusted cheques, did nothing to challenge them. However, it was Mr. Carreiro's responsibility to follow the agreement if he intended to change child support.

- [277] Mr. Carreiro presently pays child support for two children. The youngest daughter is in Grade 12 this year and is still a child of the marriage. The second daughter turned 19 in 2010. The third daughter turned 19 in 2012. It was unclear if it is the second daughter or the third which is still included in his estimation of the two children currently entitled to child support.
- [278] The eldest daughter is no longer a child of the marriage. She has been married, divorced, and is now working. She lives at home and does not contribute to the household expenses. Mr. Carreiro ceased paying child support for her in 2007 when she turned 19. She married at 19, and although the marriage was not successful and her husband was not always gainfully employed, I can see no reason for child support to have continued beyond the age of 19. She has a job but lives rent free in her mother's home.
- [279] The second daughter, V., now 23, graduated five years ago and is working part time at a restaurant. She is taking various courses, perhaps directed at becoming a teacher. Some documents have been provided from Langara College, showing enrollment in 2012, 2013, and 2014, but Ms. Carreiro said she did not know much about the program her second daughter was taking; it could be a two year program or a four year program. She does not know what year her daughter is in; she keeps asking but she does not know. Mr. Carreiro says the daughter cannot take 7 years to do a four year post-secondary program. He says as well that child support should be adjusted because she is working.
- [280] As for the third daughter, A., now 21, there have been no documents provided regarding her illness. Ms. Carreiro had agreed to provide a medical report, but she said the daughter did not want to participate so she did not provide one. This daughter is not in school now, but has some plans for her future that were not provided. Mr. Carreiro does not disagree that his daughter has a medical issue but he testified that his efforts to obtain information about A.'s illness directly were thwarted by her boyfriend, who is, according to Mr. Carreiro, the son of Ms. Carreiro's counsel.
- [281] There is little to assist the court in determining if V. and A. are still children of the marriage, but it appears from the evidence available that they are dependent on their mother, one through illness and one through the pursuit of a degree. The latter is working part time. I have no information on her level of income. One page of an undated income tax return was produced showing income of \$4,656.95 for an unidentified year. It appears that any reduction for her income would be small.
- [282] Mr. Carreiro should be paying child support for both the second and third daughters and should not have stopped payments without Ms. Carreiro's agreement or a court order. He receives very little information about the children so he is not entirely to blame for this, but if he is unsure of his daughters' needs, he should be paying rather than not until the matter is clarified through agreement or a court application. He should not have made unilateral decisions to stop or reduce payments. On the other hand, there is a clear obligation on Ms. Carreiro's part to supply information if she takes the position that support should continue.

The adult daughters should, as well, be prepared to share information if they want support from their father.

- [283] The next issue is the level of Mr. Carreiro's income to be used to calculate child support under the Child Support Guidelines. Mr. Carreiro receives a T-4 from the City of Vancouver, so that income is easy to determine. There is an issue as to whether the rental income should form part of his Guideline income. According to Mr. Carreiro, it is included in his declared income, but is entirely set off through expenses. Ms. Carreiro claims she did not receive the necessary documents to allow a thorough examination of this.
- [284] Although a complete offset of expenses may be justified in an accounting sense for income tax purposes, it is difficult to see how the rent affords no additional income to Mr. Carreiro in a real sense. I will impute half the amount of rent to be added to his income.
- [285] Since issues respecting child support are never closed, there will likely be further applications, failing agreement either privately or through mediation, respecting whether the middle daughters are children of the marriage. Should this be the case, I would expect a proper application to be brought before the court, which would include information regarding income, if any, earned by the daughters.
- [286] For the time being, Mr. Carreiro should pay child support at the recalculated level for the two children, the youngest and A., retroactive to October of 2010, and for a third V., retroactive to September 2012, which covers the period in the documents provided. The level of income will be based on Mr. Carreiro's line 150 income, and to this income should be added half the rental income received in that year. The total will be the Guideline income used to calculate the amount payable.
- [287] While it is possible to consider making a deduction to compensate for the income earned by children over the age of 19 (see *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (BCSC Master); *Sherlock v. Sherlock* (1998), 36 R.F.L. (4th) 301 (BCSC)), I do not have sufficient information before me to make such a determination.
- [288] I will leave the calculations to counsel, to be spoken to if agreement cannot be reached.
- [289] As noted earlier, the Court was not provided with a copy of the agreement containing para. 13, which may deal with Special and Extraordinary expenses. In the absence of that paragraph, and unless the agreement provides otherwise, receipts should be provided and expenses, including the orthodontic bill, shared as set out below. If the parties do not agree on what constitutes a s. 7 expense, they should attempt mediation under the agreement, or if all else fails, make an application to court.
- [290] I have already noted that, given all the information on Ms. Carreiro's income, deficient as it is, it would be reasonable to impute an annual income to her of \$30,000. Therefore, s. 7 expenses should be shared 1/3 payable by her and 2/3 payable by Mr. Carreiro.

[291] There has been some difficulty in determining the level of s. 7 expenses, particularly with respect to a large orthodontic bill for one daughter's braces which Mr. Carreiro did not feel was necessary. He later decided to put a claim into his insurance and paid for \$500 of the \$3,430 bill, although Ms. Carreiro maintains that if he had claimed earlier he could have recouped 80% of the bill. Mr. Carreiro should pay Ms. Carreiro his remaining portion of 2/3 of this bill.

RESULT

[292] This a brief summary only. Reference should be had to the reasons.

[293] The claims to set aside the separation agreement or vary it under the FRA/FLA are dismissed.

[294] Mr. Carreiro must arrange for the transfer of the house in Brazil to Ms. Carreiro forthwith. Half of the costs of the transfer may be set off against spousal support payments.

[295] The CPL shall be removed from the Mission property.

[296] Ms. Carreiro is entitled to spousal support under the Divorce Act in the amount of \$350 per month for five years, commencing January 1, 2015.

[297] Child support for two children is payable commencing October 1, 2010, and for a third child as of September, 2012, based on Mr. Carreiro's line 150 income plus half the rental income for the relevant year. Further adjustments in child support, including change in status of any of the children, must be done through agreement or court order.

[298] Any outstanding and/or retroactive payments will be added to the present payments at the rate of \$100 per month.

[299] Unless the missing paragraph in the agreement provides otherwise, section 7 expenses will be shared 1/3 (Ms. Carreiro) and 2/3 (Mr. Carreiro) upon agreement and provision of receipts.

COSTS

[300] Mr. Carreiro has been adamant throughout the case that he wants costs from Ms. Carreiro and is determined to collect them, even to the extent of executing against the Brazil property. I think it is quite clear that an order for costs would be extremely difficult for Ms. Carreiro to pay, although that consideration is not determinative. It is of some concern, however, since all four children live with Ms. Carreiro.

[301] I have some sympathy for Mr. Carreiro because the trial was considerably lengthened and made much more complicated by the claims that were added pursuant to the amendments in January of 2014. However, success on those issues has been divided. Mr. Carreiro did not prevail on his limitation arguments, but Ms. Carreiro did not succeed in getting the agreement set aside.

[302] In any event, Mr. Carreiro has always acknowledged that spousal and child support should be dealt with, and Ms. Carreiro has had some degree of success in those areas.

[303] In my view, unless there are factors respecting costs of which I am unaware, the only appropriate and fair result is that each party bear their own costs.

"M.A. Humphries J."

The Honourable Madam Justice Humphries

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