

CANADA / JUDGMENT

Arcand v. Arcand

2023 BCSC 747

COURT

Supreme Court of British Columbia

DECIDED

5 May 2023

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2023 BCSC 747 Arcand v. Arcand

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Arcand v. Arcand,

2023 BCSC 747

Date: 20230505

Docket: 14837

Registry: Campbell River

Between:

Blake Arcand

Claimant

And

Shirley Darlene Arcand

Respondent

Corrected Judgment: The front page of the judgment was corrected on June 5, 2023;

Before: The Honourable Justice Lamb

Reasons for Judgment

Counsel for Claimant:

G.W. Currie

Counsel for Respondent:

B.R. Vining

Place and Dates of Trial:

Campbell River, B.C.

November 21-25, 2022

Nanaimo, B.C.

February 28, 2023

March 1, 2, 2023

Place and Date of Judgment:

Campbell River, B.C.

May 5, 2023

Overview

- [1] The main issue in this family law dispute is whether Blake Arcand, the claimant in this matter, is entitled to an equal share of the equity in the family home at [address redacted], Nanaimo, BC (the "Family Home"). Shirley Arcand, the respondent, says that Mr. Arcand agreed to give her the Family Home when he signed a Form A transfer while he was in an American jail awaiting sentencing for drug trafficking. Mr. Arcand denies that the Form A transfer is evidence of an enforceable settlement agreement.
- [2] If there is no enforceable settlement agreement, Ms. Arcand says in the alternative that division of family property should be unequal in her favour to account for the retroactive child support and spousal support that she says Mr. Arcand owes her. Mr. Arcand denies that Ms. Arcand is entitled to spousal support or that the court has jurisdiction to order retroactive child support.
- [3] Mr. Arcand and Ms. Arcand were the only two witnesses at trial. The parties' evidence as to the history of their relationship was generally consistent aside from a few minor differences on matters that are irrelevant to the outcome of this action. The main divergence between their evidence relates to the circumstances that led to Mr. Arcand's signing the Form A transfer and the date the parties separated. For the reasons that follow, I accept that Mr. Arcand signed the Form A transfer to afford Ms. Arcand the option to sell the Family Home if she needed to do so while he was in prison. I do not accept that the transfer document represents an agreement by Mr. Arcand to give up his claim to an interest in the Family Home.

- [4] I find the date of separation is January 19, 2020. I accept Mr. Arcand's submissions that the Court lacks jurisdiction to award child support and that Ms. Arcand is not entitled to spousal support. I find that family property and family debt should be equally divided, subject to crediting Ms. Arcand for expenditures she made to preserve the Family Home post-separation.

Issues

- [5] The principal factual and legal issues that must be decided are as follows:
1. Did the parties separate and enter into an enforceable settlement agreement in November 2017?
 2. If the parties did not separate in November 2017, what is the date of separation?
 3. Is retroactive child support payable?
 4. Is spousal support payable?
 5. Would it be significantly unfair to divide family assets equally?
- [6] Although there was a great deal of evidence about real estate the parties bought and sold before and after the parties purchased the Family Home, neither party asserted a claim for excluded property pursuant to s. 85 of the Family Law Act, S.B.C. 2011, c. 25. As a result, I have not made any findings of fact regarding the financial contributions made by each party to the purchase price of the Family Home.
- [7] Before turning to my analysis of the issues to be decided, I will set out some background facts to provide context.

Background

- [8] The parties met in 1982. At the time, Mr. Arcand was 21 years old and working as a rigging slinger in the logging industry. Ms. Arcand was 18 years old and working at Suzie Creamcheese. They started dating in April 1982.
- [9] Ms. Arcand moved in with Mr. Arcand on April 1, 1986. By then, Ms. Arcand had completed a medical office assistant course, and she was working in that field. Mr. Arcand continued to work regularly in logging camps. They lived in a house on Black Diamond Road in Nanaimo that Mr. Arcand owned with his brother. Both Mr. Arcand and Ms. Arcand enjoyed an active social life that involved consuming alcohol and using cocaine, though Ms. Arcand only used cocaine infrequently. Around that time, Mr. Arcand started buying small amounts of cocaine to sell to his friends to subsidize his own use.

- [10] The parties separated in June 1987 after Mr. Arcand came home unexpectedly and found Ms. Arcand engaged in a dalliance with another man. Ms. Arcand moved back home to live with her parents. She travelled to Europe with her friends for three months in the fall of 1987, and Mr. Arcand travelled to Brazil with his friends for a month. They maintained what Ms. Arcand described as a "friendship relationship", and they continued to be intimate quite often.
- [11] Ms. Arcand moved back in with Mr. Arcand in February or March 1988. By then, she was working part-time as a medical office assistant and part-time as a server in a pub. Mr. Arcand continued to work as a logger.
- [12] In 1989, the parties went to work at the same logging camp: Ms. Arcand as a bull cook and Mr. Arcand on a logging crew. They lived together in the married persons quarters. After a year and a half, an incident led to both parties quitting their jobs and breaking up. Mr. Arcand moved back into the home he owned on Black Diamond Road in Nanaimo with his brother. Ms. Arcand moved into a house on Jingle Pot Road she purchased with a friend in February 1991. Mr. Arcand and Ms. Arcand continued to see each other; they continued to be intimate but were not living together.
- [13] In October 1992, Ms. Arcand moved back in with Mr. Arcand in a home on Doumont Road in Nanaimo that he had purchased a few months earlier using his share of the proceeds from the sale of the Black Diamond Road property, a gift of \$100,000 from his mother, and a mortgage of approximately \$100,000. By then, in addition to logging, Mr. Arcand was selling cocaine. Ms. Arcand was aware of this illegal activity.
- [14] In late December 1992, the parties went on vacation with some friends to the British Virgin Islands. They married somewhat spontaneously while they were there on January 4, 1993. At that point, Mr. Arcand owned the house on Doumont Road, and Ms. Arcand co-owned the house on Jingle Pot Road with her friend.
- [15] The parties purchased and moved to a new residence on Planta Road in Nanaimo in May 1993. They financed the purchase by borrowing \$60,000 and by applying Mr. Arcand's equity from the sale of the Doumont Road property. Ms. Arcand did not contribute her own funds to the purchase price. Mr. Arcand continued to work as a logger and continued to traffic in cocaine. With Mr. Arcand's support and encouragement, Ms. Arcand stopped working while she took the real estate license course.
- [16] In 1995, Mr. Arcand's only brother died in a logging accident. This was a significant event for Mr. Arcand, especially because he had introduced his younger brother to the logging industry.

- [17] Also in 1995, Mr. Arcand was arrested briefly for conspiracy to sell cocaine. By then, he had been out of the drug trade for a few months, having sold his contacts to one of the other people who was arrested. The charges against Mr. Arcand were stayed. When Ms. Arcand was asked in cross-examination why these events did not cause her to end the marriage, she said it was because she was in love.
- [18] Mr. Arcand's brother's death and his close brush with the law caused him to reconsider his career choices. From his perspective, the logging industry was becoming more cut-throat, and crews were taking more chances to try to remain profitable. Mr. Arcand was more interested in spending time with family, including his wife, his nephew, and his mother. Mr. Arcand knew other loggers who had become disillusioned with forestry and who were retiring from logging to grow marijuana. This idea appealed to Mr. Arcand, though he continued to work as a logger for periods of time for another few years.
- [19] The parties decided to move from the residence on Planta Road. By this time, Ms. Arcand had secured her real estate license and was working as a realtor. She listed the Planta Road property for sale. The parties sold the Planta Road property and purchased a home on Glenayr Drive in Nanaimo on August 30, 1996.
- [20] The parties purchased the property where the Family Home is located on July 30, 1997 with the help of bridge financing. At that time, the property was vacant land. The parties wanted acreage so they could have privacy and peace and quiet. They discussed Mr. Arcand's plan to grow marijuana: Mr. Arcand assured Ms. Arcand that, if caught, he would be shut down and have equipment confiscated, but there would be no arrests. Although she now insists that she was opposed to Mr. Arcand's plan to grow marijuana, I accept that he was able to convince her that it was a good idea.
- [21] The parties hired Mr. Arcand's friend, Rick Easthom, to build the Family Home on the property. Construction started in October 1997 and finished in January 1998.
- [22] Through the fall of 1997, Ms. Arcand continued to work as a realtor. She was pregnant with their first child. Mr. Arcand continued to work as a logger in logging camps. They sold the property on Glenayr on September 26, 1997, and applied the proceeds to pay out the mortgage they had taken out against the Family Home. The parties had clear title to the Family Home as of September 26, 1997.
- [23] The parties' first child was born in early 1998. Ms. Arcand took parental leave from her career as a realtor and decided not to return to work because she wanted to have more babies. In the meantime, Mr. Arcand continued to plan for a marijuana grow-operation. He thought it would be "pretty good" if he could "make a living off the property and hang out with the kids".
- [24] In the summer of 1998, the parties hired Mr. Easthom to build a large garage on the Family Home property. The garage was built on a suspended slab with a basement in which Mr. Arcand planned to grow marijuana.

- [25] By the fall of 1998, the parties were getting low on cash. They secured a \$200,000 mortgage against the Family Home on September 3, 1998.
- [26] Mr. Arcand started growing marijuana hydroponically soon after the garage was constructed. Mr. Arcand had no experience growing anything, and he described it as a learning experience. He recounts that he got pretty good at growing marijuana after a few crop failures. Mr. Arcand did not keep records of his earnings or profits. Neither did Ms. Arcand. The money earned from the sale of marijuana was kept somewhere in the Family Home familiar and accessible to both parties. Other than profits from the marijuana grow-operation, the family had no other source of income from early 1998 until Ms. Arcand started a limousine business in 2003.
- [27] Despite having many guests to the Family Home, it apparently did not become common knowledge that they were growing marijuana there.
- [28] The parties' second son was born in late 1999, and their third son was born in the summer of 2001. When the children were young, both parties spent a lot of time at home, and both parties were involved in taking care of the children. Ms. Arcand had given up her realtor's license, and Mr. Arcand was growing marijuana full-time in the basement of the garage of the Family Home. Although Ms. Arcand describes herself as the children's primary caregiver because she took them to medical appointments and organized extracurricular activities, I accept that both parties were involved in day-to-day parenting of the children.
- [29] By 2001, Mr. Arcand would grow five or six crops per year. He would work long days at the beginning of each crop to get things ready. Once the plants were growing, he would spend an hour or two per day tending to them. He would have to refill the fertilizer and water tanks once per week, which would take four or five hours. The crop would take approximately six weeks to reach full size. Mr. Arcand would then cut it down and trim it, which would take 17 or 18 hours. The harvest would dry for a week or so before being sold.
- [30] Mr. Arcand describes his marijuana operation as profitable. Once he became proficient, each crop yielded approximately 15lbs, and he was paid an average of \$2500 per pound. Expenses included nutrients and utilities, and he paid a friend to assist with harvesting and marketing. The profits from the marijuana grow-operation were used to pay the family's expenses. Mr. Arcand testified that the parties generally did not accumulate money but instead lived paycheque to paycheque. Neither party kept track of Mr. Arcand's earnings from the drug trade.
- [31] In August 2003, Ms. Arcand decided to start a limousine business because her brother had been a limousine driver in the past, and she had enjoyed driving around with him. She also thought a limousine business would provide a career that would allow her to work from home. Ms. Arcand purchased a Cadillac for \$26,000 using money from the marijuana grow-operation profits. In 2004, she purchased/financed a 2004 black Suburban to use in the business. Ms. Arcand ran the business and hired drivers. Mr. Arcand assisted by washing and waxing the vehicles. They built an addition to the garage to accommodate the

limousines in approximately 2007.

- [32] In May 2005, Ms. Arcand sold the property on Jingle Pot Road, which (by then) she owned on her own after buying out her friend eight years earlier. Ms. Arcand netted approximately \$100,000 from the sale, which went into the family coffers.
- [33] By 2007, the parties had a mortgage registered against the Family Home with a balance owing of \$100,000. They also had a line of credit registered against the Family Home with a nil balance and an available credit limit of \$150,000.
- [34] In 2007 or 2008, Mr. Arcand stopped growing marijuana in the garage when the parties became aware that they risked losing the Family Home as proceeds of crime if he was caught growing marijuana in the garage. Mr. Arcand also stopped a small grow-operation he had in a friend's home. Around this time, in need of a new line of work, Mr. Arcand participated in an enterprise that exported marijuana to the United States in exchange for cocaine that would be imported into Canada. After a few years, one of the drivers was arrested for taking marijuana across the border, and he gave Mr. Arcand's name to the authorities. Mr. Arcand was not detained or arrested, but he stepped away from the drug smuggling operation for a year.
- [35] In 2007, Mr. Arcand borrowed \$20,000 to start a tree farm business at the Family Home property. The tree farm was not profitable. The parties only paid interest on the loan until the bank demanded payments toward the principal in late 2013. This loan was eventually paid off on September 21, 2018.
- [36] Starting in 2008, Mr. Arcand had an affair that lasted more than a year and a half. He promised Ms. Arcand repeatedly that he would end the affair. In retrospect, Ms. Arcand says that his affair caused her to fall out of love with him, though she did nothing to end their marriage at that time.
- [37] At some point, Mr. Arcand received a gift of approximately \$25,000 or \$35,000 from his mother when his stepfather passed away. Mr. Arcand also received \$175,000 from his mother's estate when she passed away. These funds went into household general revenue and were spent on family expenses.
- [38] By 2011, the family coffers were again somewhat diminished. Fortuitously, Mr. Arcand was asked by some former business associates to transport cash to Australia on their behalf. He told Ms. Arcand that he had been offered a job in Australia by someone in the drug trade, and they wanted him to go there with his whole family to discuss it. Mr. Arcand had a cousin who lived in Australia, so Ms. Arcand was happy to take their three boys for a visit. Ms. Arcand became suspicious when three empty suitcases were dropped off at the Family Home a few days before the trip, but she did not find out that they were lined with cash until after Mr. Arcand handed them over to his contact in Australia. Mr. Arcand was paid \$100,000 (less the cost of travel to Australia) for his efforts. The profits went into family revenue, and the parties and their children enjoyed a three-week vacation in Australia.

- [39] Mr. Arcand was approached to do a second trip to Australia in the spring of 2012. Ms. Arcand was reluctant, but she agreed to go again. This time, when they went through security in Melbourne, police dogs sniffed the suitcases but found nothing suspicious. Ms. Arcand was concerned by this close call; Mr. Arcand, not as much. For this second trip, Mr. Arcand was again paid \$100,000 less travel expenses. Mr. Arcand had an opportunity to make a third trip to Australia, but neither he nor Ms. Arcand was willing to take the risk.
- [40] After returning from Australia in 2012, Mr. Arcand briefly grew marijuana outside, which he sold for profit.
- [41] In late 2014, Mr. Arcand was approached to transport drugs from Los Angeles to British Columbia. Mr. Arcand discussed the offer with his wife. She reluctantly agreed to the plan. Before his arrest in August 2016, Mr. Arcand had travelled to Los Angeles at least five and perhaps as many as 20 times to collect cocaine or methamphetamine for transport to Vancouver. The loads averaged between 30 and 40kg, and he would be paid \$2000 per kilo plus expenses. Again, neither Mr. Arcand nor Ms. Arcand kept records of these earnings.
- [42] Ms. Arcand was aware of Mr. Arcand's new business venture. Although she tried to minimize her involvement, she admitted that at least once she provided cover for Mr. Arcand's border crossing by bringing the children and going with him to Washington State for back-to-school shopping. She and the children returned home after shopping, and Mr. Arcand flew down to Los Angeles before renting a car to drive north with drugs in the trunk. Another time she went with him by train to Seattle before he flew to Los Angeles while she traveled home. Another time the parties travelled together to Washington State by taking the Anacortes ferry out of Sidney, BC; Mr. Arcand traveled from there to Los Angeles. I accept that it is likely that Ms. Arcand prepared the travel expense chart that would be submitted to Mr. Arcand's employer for reimbursement. When asked at trial why she did not object to Mr. Arcand's illegal activities, Ms. Arcand shrugged and said that she was in love.
- [43] On August 18, 2016, Mr. Arcand was driving from Los Angeles to Wyoming with 30kg of methamphetamine in his trunk when he was pulled over for a traffic violation in Utah. Police dogs found the drugs. Mr. Arcand was arrested. He had been followed from Los Angeles. U.S. Homeland Security gave Mr. Arcand an opportunity to disclose the identity of his employer, which he declined. Mr. Arcand was sent to an adult corrections centre in Salt Lake City for four days before appearing before a judge to plead not guilty. Mr. Arcand was moved to Tuella County jail in Utah, where he made his first phone call home to Ms. Arcand.
- [44] In his criminal proceedings, Mr. Arcand was represented by Ben Hamilton, a public defender. Mr. Arcand's only defence to the drug smuggling charges was to attempt to have the evidence obtained on the search of his vehicle excluded. When the judge dismissed the defence motion to suppress the evidence found pursuant to the search, Mr. Arcand pleaded guilty. He was sentenced in November 2017. The mandatory minimum was 10 years, which was the sentence advocated for by Mr. Hamilton. The prosecutor was seeking a 14-year sentence. The judge sentenced Mr. Arcand to a further 115 months in prison.

- [45] On October 30, 2017, Ms. Arcand sent Mr. Arcand's income tax return to Mr. Hamilton for signature. She also advised Mr. Hamilton that their lawyer would be sending transfer documents for Mr. Arcand to sign. I will return to this letter later in these reasons in connection with the alleged settlement agreement.
- [46] On November 30, 2017, Mr. Arcand signed a Form A Freehold transfer transferring the Family Home from himself and Ms. Arcand as joint tenants to Ms. Arcand alone for "\$1.00 and natural love and affection". Mr. Hamilton sent a notary public to meet with Mr. Arcand in custody and witness his signature on the Form A transfer. Ms. Arcand has not registered the signed Form A transfer with the Land Title and Survey Authority of BC. Both parties remain owners in joint tenancy of the Family Home.
- [47] After sentencing, Mr. Arcand was transferred to a federal correction institution in La Tuna, Texas in early January 2018. He remained there until his treaty transfer back to Canada was approved. Mr. Arcand was transferred in the summer of 2019 to a reception centre in Canada to be classified. After the classification process, Mr. Arcand was transferred to William Head Institution in Victoria in October 2019.
- [48] Mr. Arcand's first visit from Ms. Arcand and the children occurred on January 19, 2020, his birthday. Mr. Arcand and Ms. Arcand spoke privately on that occasion. Mr. Arcand asked if he could come back to the Family Home for approximately six months after his anticipated release from William Head so that he could avoid a halfway house. Ms. Arcand said no. Mr. Arcand asked whether they had to separate and whether he needed to get a lawyer. Mr. Arcand said he wanted half of their place. Ms. Arcand reminded him that he had signed a document. He told her that wasn't going to work because he didn't even know what he had signed. Mr. Arcand wondered aloud whether they would have to sell the Family Home. Ms. Arcand became quite upset and said that she guessed she could get a condo.
- [49] The day after that visit, Mr. Arcand sent Ms. Arcand a letter which I will describe later in these reasons.
- [50] Ms. Arcand started dating someone else in March 2020. Mr. Arcand learned of that fact in April 2020. Mr. Arcand says that's when he knew for sure that he and Ms. Arcand would not be getting back together.
- [51] Mr. Arcand was released from William Head to a Nanaimo halfway house at the end of October 2020. Over the next few months, Mr. Arcand used day passes to visit his sons at the Family Home four to five times per week for up to six hours at a time. He did not stay overnight.
- [52] In November 2020, Mr. Arcand reunited with the woman with whom he had had an affair in 2008. They are currently dating.

[53] On November 26, 2020, Ms. Arcand filed a notice of family claim seeking a divorce. Ms. Arcand asked Mr. Arcand to stop by her lawyer's office to pick up the document. The parties exchanged the following text messages on November 26, 2020:

Mr. Arcand: Hi there. What am I signing. Should I read it over? I trust you.

I mean is there any surprises that's all really.

Ms. Arcand: No [surprises]. It's the Divorce Papers.

You will need to bring ID with you.

[54] Mr. Arcand did not seek legal advice and did not read Ms. Arcand's notice of family claim carefully. At paragraph 3, her notice of family claim said this with respect to "prior court proceedings and agreements":

There was an oral agreement made between [Ms. Arcand] and [Mr. Arcand] wherein [Mr. Arcand] would agree to allow [Ms. Arcand] to keep any family assets, including the matrimonial home.

Mr. Arcand did not notice this paragraph when he was served with Ms. Arcand's notice of family claim.

[55] From October 2020 until at least August 2021, Mr. Arcand continued to visit the Family Home property. The parties have different perspectives on how respectful Mr. Arcand was of limits and how accommodating Ms. Arcand was with respect to those visits. It is not necessary for me to resolve that conflict in the evidence to decide the issues in this case, and their differences in perspective do not make one party more credible than the other.

[56] In August 2021, Mr. Arcand approached Ms. Arcand and said that he wanted half of the Family Home. On August 5, 2021, he filed the notice of family claim to initiate this action, and Ms. Arcand was served in September 2021.

[57] Mr. Arcand was afforded day parole on April 12, 2022.

Credibility and Reliability

[58] I find that both parties were generally credible, and, for the most part, they attempted to testify based on their best recollection. Much of the parties' evidence regarding the history of their relationship was consistent, with small differences likely attributable to the passage of time and a difference in perspectives.

[59] There were some inconsistencies in Mr. Arcand's evidence regarding his earnings from his drug activities. I am satisfied that his evidence on this point is not entirely reliable in part because neither he nor Ms. Arcand kept any records to keep track of these earnings, and the funds (for the most part) were spent on living expenses rather than acquiring tangible assets. I accept Mr. Arcand's evidence that he was not anticipating extensive questioning on discovery about his drug-related earnings, which explains why he gave some different answers at trial after he had turned his mind to those details. Overall, I am satisfied that the

unreliability of his evidence regarding the details of his drug activities does not undermine Mr. Arcand's overall credibility.

[60] One key conflict in the parties' evidence relates to the timing of a conversation in which Ms. Arcand told Mr. Arcand, "I can't do this any more". The parties agree that the conversation occurred, but Ms. Arcand testified in answer to a leading question from her counsel that this conversation happened before Mr. Arcand signed the Form A transfer. Mr. Arcand says this conversation happened a few weeks later. I find Mr. Arcand's evidence regarding the timing of that conversation to be more reliable because he had a clear recollection of speaking to Ms. Arcand about the absence of expressions of affection only after he was in the more private phone area in the Texas prison, where he arrived in La Tuna in early January 2018. Ms. Arcand was less clear on the timing of that conversation. Further, a letter written by Ms. Arcand in the fall of 2017 and a letter written by Mr. Arcand in January 2020 are more consistent with this conversation happening in early January 2018. This correspondence is reviewed in more detail later in these reasons.

[61] It came to light during Ms. Arcand's cross-examination that she had failed to disclose bank statements for the business account used by her limousine business to pay bills. A bank statement for the limousine business's chequing account for the month of September 2022 showed an opening balance of \$56,373.13, a closing balance of \$8695.13, and a total of \$50,000.00 transferred to the business account for which bank statements were not disclosed. Those bank statements were eventually produced to Mr. Arcand's lawyer close to the end of her cross-examination. Her counsel sought to have the business bank account statements admitted into evidence during her re-examination; however, I declined to admit the documents, as they were disclosed late without reasonable explanation. Ms. Arcand insisted that she did not know that Mr. Arcand was interested in the business account statements. I find her evidence on this point to be disingenuous. The other business bank account statements were disclosed, and the late-disclosed business bank account statements were clearly relevant to the issues of the parties' respective claims for spousal support and his division of property claim. I find it is more likely that Ms. Arcand was reluctant to share how successful the limousine business performed in 2022, given Mr. Arcand was seeking to divide the proceeds from the sale of the Suburban (which was used in the limousine business) and was making a claim for spousal support (which he abandoned at the opening of trial).

[62] Ms. Arcand was also challenged on her failure to produce any emails between her and Mr. Arcand while he was in prison. These emails might have illuminated the nature of the parties' relationship between January 2018 and January 2020. I accept Ms. Arcand's evidence that these emails were not producible because they were exchanged through a prison portal to which she no longer has access. Her failure to produce these emails does not have a negative impact on her credibility.

1. Did the parties separate and enter into an enforceable settlement agreement in November 2017?
- [63] A pivotal issue at trial was whether Mr. Arcand agreed to give Ms. Arcand the Family Home when he signed the Form A Transfer on November 30, 2017. In her counterclaim, Ms. Arcand seeks an order enforcing the parties' agreement that she "would retain for her own use absolutely any interest [Mr. Arcand] had in [the Family Home] as a result of leaving [Ms. Arcand] to solely care for the children and her own spousal support needs". However, Ms. Arcand has failed to prove that it is more likely than not that the parties agreed to divide family property as she alleges. Significantly, Ms. Arcand did not testify that the parties reached the agreement that she pleaded, and the Form A transfer in and of itself does not confirm or constitute such an agreement. I am satisfied that Mr. Arcand signed the Form A transfer so that Ms. Arcand could mortgage or sell the Family Home if she needed to do so while he was incarcerated, not because he was waiving any claim to an interest in the Family Home.
- [64] Leading up to Mr. Arcand's sentencing in November 2017, both parties were aware that he was facing a long jail term. Understandably, Ms. Arcand was quite anxious about how she was going to financially support three children on her own. She was worried about her increasing debt load. She was worried Mr. Arcand's former associates would come after her for money. She didn't know for how long Mr. Arcand would be in prison and whether she would have to sell the Family Home to support herself and the children. From her discussions with the bank in April 2017, Ms. Arcand knew that she would not be able to increase the mortgage on the Family Home or sell it without Mr. Arcand's signature, which would be more difficult to secure after he was sentenced and no longer had a lawyer.
- [65] Ms. Arcand spoke to Mr. Arcand regarding her concern about finances. According to Ms. Arcand's testimony, Mr. Arcand told her, "You do whatever you want. You can sell the house if you need to. You can do whatever you want and whatever you need to do." Mr. Arcand acknowledged that he agreed she could sell the Family Home if she needed to do so in order to help out their family. However, his agreement that she could sell the Family Home in order to provide financial support for their family does not, without more, establish that he agreed to give up his interest in the Family Home. Ms. Arcand's own evidence failed to prove the settlement agreement alleged in her counterclaim.
- [66] Ms. Arcand's lawyer submitted in final argument that the parties agreed in November 2017 that Mr. Arcand would transfer the Family Home to Ms. Arcand in exchange for "not seeking any relief for spousal or child support". These are the terms she alleged in her response to family claim. However, the evidence does not establish that the parties agreed to those terms. Ms. Arcand did not testify that the parties discussed waiver of her potential claims for child support and spousal support. This alleged agreement was not put to Mr. Arcand in cross-examination. A settlement agreement requires certainty as to terms; the evidence at trial did not prove the terms argued by Ms. Arcand's counsel.

- [67] The respondent failed to prove that the parties reached an enforceable settlement agreement that she would keep the Family Home for her sole benefit. Instead, based on both parties' evidence of what they actually discussed, I find that Mr. Arcand agreed to sign the Family Home over to Ms. Arcand so that she could mortgage or sell the house if she needed to do so to support their family. Neither party argued that the failure to register the Form A transfer had any significance, and it is not a factor in my findings.
- [68] I also reject the respondent's theory that Mr. Arcand signed the Form A transfer after he knew that Ms. Arcand wanted to separate. For the reasons that follow, I am satisfied that Ms. Arcand did not raise the possibility of separation until early January 2018, a few weeks after Mr. Arcand signed the Form A transfer.
- [69] Firstly, Ms. Arcand's contemporaneous correspondence to Mr. Arcand's lawyer lacks any suggestion that she wanted to separate. Instead, her letter dated October 30, 2017 to Mr. Hamilton is consistent with Mr. Arcand's signing the Family Home into her name for financial reasons:

As we recently spoke about, I have enclosed Blake's income tax return for him to sign.

Also you will receive transfer documents from our lawyer for Blake to sign our home into my name. This needs to be done in order for me to take care of our financial situation. I will explain more to him after he has been sentenced but do not want to talk about it over the phone at this time. I'm sure he will understand.

- [70] Ms. Arcand acknowledged in cross-examination that she led Mr. Hamilton and Mr. Arcand to believe that she needed the Form A transfer signed because she might need money while Mr. Arcand was in prison. Ms. Arcand did not tell Mr. Hamilton the parties were separating and that they had agreed that she would get the Family Home. Ms. Arcand described Mr. Bartlett as "our" lawyer, not "my" lawyer. She talked about "our home" and "our financial situation".
- [71] I am satisfied that Ms. Arcand did not tell Mr. Arcand that she wanted to separate before he signed the Form A Transfer. As noted earlier, the parties agree that Ms. Arcand said, "I can't do this anymore" to Mr. Arcand, but the parties disagree on the timing of her statement. I accept that Ms. Arcand made this statement to Mr. Arcand while he was in Texas in early January 2018, i.e., after he signed the Form A Transfer. Mr. Arcand had noticed that Ms. Arcand stopped putting "x's and o's" at the end of her emails and no longer professed her love at the end of telephone conversations while he was still in prison in Utah. However, Mr. Arcand's evidence was clear that they did not discuss the status of their relationship while he was at the Utah jail because the telephone area in Texas lacked privacy. It is understandable that Mr. Arcand would be reluctant to ask his wife why she was no longer affectionate while he was in a place where his conversation would be easily overheard by fellow inmates.

- [72] Ms. Arcand was less clear in terms of when she announced that she could not "do this anymore". She could not recall a specific date nor did she offer any details of the conversation or context. In answer to a leading question from her counsel (which was not objected to), Ms. Arcand asserted that she made the statement before Mr. Arcand signed the Form A transfer. However, her letter to Mr. Hamilton said that she would "explain more" after Mr. Arcand was sentenced and that she did not want to discuss it over the telephone "at this time": these statements are more consistent with deferring an announcement that she could not "do this anymore" until after the Form A transfer was signed.
- [73] Further, Ms. Arcand said that Mr. Arcand was in Utah when she told him that she could not "do this anymore". However, she gave this evidence after her lawyer wrongfully summarized Mr. Arcand's evidence by saying he "settled on Utah" as his location when the conversation occurred; however, Mr. Arcand testified that he noticed the lack of affection while he was in Utah, but he was consistent in saying that she made the statement during their first conversation after he moved to the Texas prison.
- [74] The notice of family claim filed by Ms. Arcand seeking a divorce provides another small bit of evidence in favour of finding that her announcement that she could not "do this anymore" occurred in January 2018. In her notice of family claim filed November 26, 2020, Ms. Arcand indicated under "spousal relationship history" that the parties separated on August 18, 2016 - the day Mr. Arcand was arrested. However, in Schedule 1 of her notice of family claim, she said that the parties had been living separate and apart since January 1, 2018. Under cross-examination, she claimed that the date was simply an error, but that explanation seems unlikely. Despite consulting with her counsel after cross-examination and before re-examination, Ms. Arcand could not clarify when asked by her counsel on re-examination why she pleaded that the parties had separated in January 2018. There was no evidence regarding the significance of that date for their relationship other than Mr. Arcand's evidence that she told him she could not "do this anymore" shortly after he moved to the Texas institution in early January 2018. In my view, it is more likely that Ms. Arcand believed the parties had separated as of January 1, 2018 because that was the approximate date when she told Mr. Arcand that she could not "do this anymore".
- [75] In closing submissions, counsel for Ms. Arcand argued in the alternative that if the parties did not enter into an enforceable agreement in November 2017 to give the Family Home to her, then they entered into an enforceable settlement agreement in April 2020. I reject this submission, both on the pleadings and the facts. In her original counterclaim filed October 1, 2021, Ms. Arcand sought an order confirming the settlement agreement the parties allegedly made in April 2020. Her examination for discovery in May 2022 was adjourned midway through to allow her to amend her counterclaim. On June 27, 2022, Ms. Arcand amended her counterclaim to seek an order confirming the agreement the parties allegedly made on November 30, 2017, without pleading in the alternative that the alleged agreement was made in April 2020. It appears that the pleading amendment was deliberate. I am not prepared to find an agreement that was not pleaded.

- [76] In any event, I find that the parties did not enter into an enforceable settlement agreement in April 2020.
- [77] By way of context, Mr. Arcand wrote to Ms. Arcand on January 20, 2020, the day after she brought the children to visit him at William Head institution. He asked Ms. Arcand if he could stay in the guest suite over the garage or in the garage for six months, "[a]nd then like I said I'll sign everything over to you no problem". Ms. Arcand declined this offer. She allowed Mr. Arcand to visit their children at the Family Home property, but she did not let him stay there, which would have allowed him to avoid staying at the halfway house. Interestingly, his offer in January 2020 to sign over everything to Ms. Arcand supports the conclusion that he had not agreed or intended to do so when he signed the Form A transfer in November 2017. Significantly, there is no evidence that Ms. Arcand responded to this offer by asserting that he had already signed over everything to her, which suggests that she did not believe as of January 2020 that he had already done so.
- [78] As of April 30, 2020, Mr. Arcand had learned that he might be eligible for day parole. He again wrote to Ms. Arcand to ask if he could stay at the Family Home, this time for three or four months at the most. He went on to say, "Of course I'll gladly sign over (give) you my half of the house and you can have everything" other than some couch pillows that he wanted. Mr. Arcand was desperate to avoid staying at the halfway house once he received day parole. Ms. Arcand did not accept his offer, and the parties did not reach an enforceable settlement agreement in April 2020. Again, there is no evidence that she told him after receiving the April 2020 letter that he had already signed over his half of the house.
- [79] To be clear, I do not accept all of Mr. Arcand's evidence about the circumstances of signing the Form A transfer. It is not credible that Mr. Arcand would not recognize that the Form A transfer he signed had the effect of transferring ownership of the Family Home into his wife's name: the document was clear on its face, and Mr. Arcand had bought and sold a number of properties by November 2017. That said, I accept his evidence that he did not discuss the Form A transfer or whether it was related to the dissolution of his marriage with Mr. Hamilton (his criminal lawyer) or the notary public who witnessed his signature. There was no evidence that the notary public who witnessed Mr. Arcand's signature (self-described as "Federal Defender, Investigator & Notary") or Mr. Hamilton would be in a position to advise Mr. Arcand regarding BC family law. Mr. Arcand did not speak to Sanford Bartlett, the parties' conveyancing lawyer in BC, before signing the Form A transfer. I accept Mr. Arcand's evidence that he would have signed anything for his wife at that point in time and that he trusted her.
- [80] In summary, I find that there is no enforceable settlement agreement between the parties.
- [81] Before addressing the division of family property and debts in accordance with the Family Law Act and the respondent's claims for child and spousal support, I will determine the date of separation.

2. If the parties did not separate in November 2017, what is the date of separation?

[82] The parties have alleged different dates of separation. Despite pleading the parties separated in August 2016, Mr. Arcand submitted that the parties separated in early 2020 after he returned to Canada and met with Ms. Arcand in person for the first time since he was incarcerated. Ms. Arcand says that the parties separated either on August 18, 2016 when Mr. Arcand was arrested or when she told him that she could not "do this any more" (which I have determined was in January 2018). For the reasons that follow, I find that the parties separated on January 19, 2020.

[83] Both parties seek orders for division of family property and debt pursuant to the Family Law Act. For that reason, I will consider separation under the Family Law Act.

[84] Section 3 of the Family Law Act provides guidance for determining the date of separation:

3 (4) For the purposes of this Act,

- (a) spouses may be separated despite continuing to live in the same residence, and
- (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

[85] Generally, separation for the purposes of the Family Law Act will be established where

- i. parties have physically separated, and
- ii. at least one of the parties has stated their intention to separate and taken steps consistent with that intention: *Dhillon v. Dhillon*, [1998] B.C.J. No. 823, 1998 CanLII 4192 (C.A.).

[86] In *Nearing v. Sauer*, 2015 BCSC 58, Justice Fleming reviewed the relevant factors to consider when determining the date of separation:

[56] Typically when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: [*Sachdeva v. Sachdeva*, 2013 BCSC 313] at para. 87. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive: *Newth v. Booth*, 2011 BCSC 317 at para. 17.

- [87] Many of the generally accepted characteristics that would otherwise be associated with a married couple may be absent when the parties do not physically reside together at the relevant time: *Quirion v. Lovett*, 2022 BCSC 1693 at para. 73. In such circumstances, the Court may consider the overall context in which the parties conducted themselves, including their interactions with each other and with third parties.
- [88] Although both parties pleaded that they separated on August 18, 2016, I find that the parties did not separate at that time. Between Mr. Arcand's arrest in August 2016 and sentencing in November 2017, the parties continued to communicate, initially by telephone and then primarily once a week by email because it was less expensive. There is no evidence that Ms. Arcand told Mr. Arcand that she intended to separate in August 2016. In September and October 2017, Ms. Arcand wrote letters of support on behalf of Mr. Arcand to be presented to the sentencing judge. Ms. Arcand acknowledged in cross-examination that she wanted the judge at his criminal trial to think Mr. Arcand was a family man. The letters give no hint that the parties had separated or that Ms. Arcand intended to separate from her husband.
- [89] Ms. Arcand contacted "a divorce lawyer" in the spring of 2017, but she did not retain that lawyer. There is no evidence that she told Mr. Arcand that she consulted a lawyer. Ms. Arcand "just inquired" and said that it was very difficult with her husband in jail. There is insufficient evidence to conclude that the parties separated in the spring of 2017.
- [90] Ms. Arcand represented to Canada Revenue Agency in September 2017 and again in June 2019 that she and Mr. Arcand were married. In her 2016 income tax return (which was prepared in September 2017), Ms. Arcand is identified as "married", not separated. Similarly, in her 2017 income tax return (which was prepared in June 2019), Ms. Arcand is identified as "married", not separated. Ms. Arcand claimed a spousal tax credit for Mr. Arcand on both her 2016 and 2017 income tax returns. The marital status that a party identified on their income tax return may be relevant to the question of when the parties separated: *Cole v. Cole*, 2016 BCSC 716 at para. 43.
- [91] As I found earlier in these reasons, Ms. Arcand said to Mr. Arcand in early January 2018, "I can't do this any more". I accept that such a statement is some evidence of an intention to separate. The question remains whether Ms. Arcand took steps consistent with that intention.
- [92] After the discussion in January 2018 and continuing until their first in-person post-incarceration meeting on January 19, 2020 at William Head, the following factors suggest the parties were not separated:
- i. Ms. Arcand continued to send money to Mr. Arcand in prison until at least 2019;
 - ii. Ms. Arcand continued to speak to Mr. Arcand by telephone and exchange emails with him;
 - iii. Ms. Arcand filed her 2017 income tax return in June 2019 and described herself as "married"; and

iv. there is no evidence that Ms. Arcand notified third parties that the parties had separated.

[93] There was little evidence regarding the frequency and content of the communication between Ms. Arcand and Mr. Arcand between January 2018 and January 2020. Ms. Arcand acknowledged that she emailed him "quite often", but the emails themselves were unavailable as they were exchanged through a portal administered by the prison and not captured in Ms. Arcand's email account. In re-examination, Ms. Arcand explained that the emails were primarily updates about the children and the dog, to let him know that everything was okay. Mr. Arcand acknowledged that the frequency of communication was somewhat reduced after January 2018, and that the terms of endearment were missing by the fall of 2017.

[94] When Ms. Arcand visited Mr. Arcand on January 19, 2020, she made it clear that he was not welcome to return to the Family Home when he was released from prison.

[95] Ms. Arcand wrote a letter to Mr. Arcand that he received on January 19, 2020, right after his visit with Ms. Arcand and the children. The letter written by Ms. Arcand was not in evidence, but I infer from his response written the following day that her letter related to their relationship. Mr. Arcand signed his January 20, 2020 letter, "soon to be your ex but always to be a friend". Mr. Arcand was not asked at trial to explain whether he was referring to separation or divorce.

[96] Ms. Arcand started dating her current partner in or about March 2020. The fact that she only started dating after January 2020 despite Mr. Arcand's incarceration for more than three years prior to that date is more consistent with the parties' separation occurring in January 2020 rather than in January 2018.

[97] There is little evidence to establish when Ms. Arcand told third parties that the parties had separated. She did not testify about when she shared this news with others. Based on a letter Mr. Arcand wrote to Ms. Arcand on April 28, 2020 (in response to a letter she wrote to him, which was not in evidence), I infer that he understood that she had not started telling friends about their separation. In his letter, after referring to Ms. Arcand's telling him about her new partner, Mr. Arcand wrote as follows:

let me know when you start telling people about us so I can tell a few friends via mail. Just remember how fast word and gossip will travel. You know everyone likes that sort of thing so of [course] I'll follow your lead.

[98] I infer from Mr. Arcand's evidence that,

i. as far as he knew, as of April 28, 2020, Ms. Arcand had not told friends about their separation; and

ii. he became aware sometime after April 28, 2020 that the friends he wanted to notify had learned of their separation from someone other than him.

- [99] Ms. Arcand filed her notice of family claim seeking a divorce on November 26, 2020. Under "spousal relationship history", she indicated that the parties separated on August 18, 2016. Under Schedule 1, the claimant asked for a divorce on the basis that she and Mr. Arcand had lived separate and apart since January 1, 2018. In the affidavit she made on January 4, 2021 in support of her desk order divorce application, Ms. Arcand deposed that she and Mr. Arcand had been living separate and apart since August 18, 2016.
- [100] In this case, the date of separation is not obvious because many of the usual indicia of marriage did not exist after Mr. Arcand was incarcerated on August 18, 2016. However, the physical separation occasioned by his incarceration does not equate to separation pursuant to the Family Law Act. I accept that Ms. Arcand expressed an intention to separate in January 2018; however, there is a lack of evidence to establish that she took steps consistent with that intention prior to January 19, 2020 when she declined Mr. Arcand's request to return to the Family Home. Ms. Arcand failed to prove on a balance of probabilities that her conduct between January 2018 and January 2020 was more consistent with her intention to separate than it was with being married to Mr. Arcand. Before January 19, 2020, she continued to communicate with Mr. Arcand, to send him money, and to file her tax returns as a married person. Sometime after January 19, 2020, Ms. Arcand started dating her current partner, and she told the parties' friends that she and Mr. Arcand had separated. I conclude that the parties separated for the purposes of the Family Law Act as of January 19, 2020.
3. Is retroactive child support payable?
- [101] There is no retroactive child support payable because the Court lacks jurisdiction to make such an order. The parties' three children were all over the age of majority when the respondent first advanced a claim for child support.
- [102] The Supreme Court of Canada has found that courts lack jurisdiction to order retroactive child support pursuant to the Divorce Act, R.S.C., 1985 (2nd Supp.), c. 3 on an original application if, at the time of the application, the child was no longer a "child of the marriage": *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 86-90. *D.B.S.* continues to apply where there is no existing child support order for an adult child, despite comments made by Chief Justice Wagner and Justice Martin (concurring) at paras. 105-106 in *Michel v. Graydon*, 2020 SCC 24 suggesting that it may be time to revisit the "procedural bar preventing courts from hearing original applications for historical child support": *L.L.M. v. D.R.M.*, 2022 BCSC 143 at para. 66. For the time being at least, the procedural bar from *D.B.S.* remains in place and governs the outcome of Ms. Arcand's claim for retroactive child support.
- [103] This Court has no jurisdiction to order retroactive child support in this case because the parties' three children were no longer eligible for child support when Ms. Arcand first applied. Ms. Arcand first advanced a claim for child support in her amended counterclaim filed October 1, 2021, more than a year after the youngest of the parties' children reached the age of majority and ceased to be a "child of the marriage". Ms. Arcand deposed that

there were no children of the marriage in an affidavit made January 4, 2021, in support of her desk order divorce application. There was no child support order in place while any of the parties' children fit the definition of "child of the marriage". As a result, this Court lacks jurisdiction to make a retroactive child support order.

4. Is spousal support payable?

[104] Ms. Arcand claims spousal support, retroactive to September 1, 2016 and for an indefinite period into the future, based on an estimate of Mr. Arcand's tax-free earnings of \$150,000 per year from his illegal drug activities, grossed up for taxes to \$230,000 per year. Ms. Arcand's claim for spousal support is dismissed, as she has not established her entitlement to spousal support.

[105] Entitlement to spousal support is a threshold issue to any award for spousal support.

[106] Ms. Arcand's claim for spousal support is made pursuant to both the Divorce Act and the Family Law Act.

[107] Section 15.2(6) of the Divorce Act sets out the objectives for a spousal support order, and s. 15.2(4) sets out the factors to consider when assessing the spouses' condition, means, needs and other circumstances.

[108] Sections 160-162 and 165 of the Family Law Act provide the legislative framework for ordering spousal support. If a spouse is entitled to spousal support after considering the objectives listed in s. 161 of the Family Law Act, then the amount and duration of spousal support must be determined based on the conditions, means, needs, and other circumstances of each spouse: Family Law Act, ss. 160, 162. Section 165 of the Family Law Act authorizes the courts to order spousal support in the amount it considers appropriate once entitlement is established.

[109] The Supreme Court of Canada has identified that the purpose of spousal support "is to relieve economic hardship that results from 'marriage or its breakdown'" (emphasis in original): *Moge v. Moge*, [1992] 3 S.C.R. 813 at 848, 1992 CanLII 25. Marital partners "should expect and are entitled to share [the] financial benefits" that are generated from the marriage: *Moge* at 849. Those financial benefits can be equally distributed in many ways, including through spousal support and through division of assets: *Moge* at 849. The Court must consider "the respective advantages and disadvantages of the spouses as a result of their roles in the marriage": *Moge* at 849.

[110] The Supreme Court of Canada has identified three grounds for entitlement to spousal support:

1. compensatory support, which relates primarily to the first two objectives set out in s. 15.2(6) of the Divorce Act;

2. non-compensatory support, which relates primarily to the final two objectives set out in s. 15.2(6) of the Divorce Act; and
3. contractual support.

[111] Ms. Arcand did not specifically identify she was claiming spousal support on compensatory grounds, but I am satisfied that this is the only basis which may apply. It is clear on the evidence that Mr. Arcand has been left in a weaker economic position as a result of the marriage breakdown than has Ms. Arcand, and there is no contract between the parties by which Mr. Arcand agreed to pay spousal support.

[112] Justice Rowles summarized the purpose of compensatory spousal support as follows in *Chutter v. Chutter*, 2008 BCCA 507:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (citations omitted)

[113] The question of possible economic disadvantage requires consideration of missed career opportunities as a result of primary childcare and household responsibilities. I am not satisfied on the evidence that Ms. Arcand's career was adversely affected by her family responsibilities. Both parties actively participated in child-rearing, although in different ways and with different strengths. Even if Ms. Arcand was the "primary caregiver" for the children, which I am not satisfied has been proven, her family responsibilities did not impede her economic opportunities in the long term. Both parties worked at home, and Mr. Arcand actively encouraged and financially supported Ms. Arcand's career. Ms. Arcand has not established that assuming childcare and household responsibilities resulted "in a lower earning potential and fewer future prospects of financial success": *Chutter* at para. 50.

[114] Ms. Arcand has not identified any educational or employment opportunities she sacrificed as a result of her relationship with Mr. Arcand or her family responsibilities. Ms. Arcand was working part-time as a medical office assistant when the parties first co-habitated; she gave up that career when she was not getting sufficient hours to move up the seniority list. Mr. Arcand supported Ms. Arcand financially when she trained to become a realtor, and he encouraged her to pursue that career. Ms. Arcand stayed home full-time to have children and care for them from early 1998 until 2003, while Mr. Arcand worked at home growing marijuana and caring for the children. Mr. Arcand supported Ms. Arcand financially when she started the limousine business, and he encouraged her to do so.

- [115] I am not satisfied that Ms. Arcand suffered an economic disadvantage arising from the marriage or the breakup of the marriage that would not have been suffered otherwise. To the contrary, I find that Ms. Arcand benefitted from the economic advantage afforded by the parties' marriage by taking the opportunity to establish three businesses. Based on her financial disclosure, Ms. Arcand's limousine business appears to be successful (despite some challenges caused by the COVID-19 pandemic). From her work in the limousine business, Ms. Arcand recognized an opportunity and launched a prom dress consignment store in her garage in 2019. Finally, she has been able to generate income by renting the room over the garage through Airbnb. According to her most recent F8 Financial Statement, Ms. Arcand had net earnings of \$27,470.55 on gross earnings of \$85,138.66 from her three businesses in 2021. Bank statements indicate that the limousine business was financially successful in 2022. A summary of revenue and expenses for the limousine business for the first nine months of 2022 prepared by Ms. Arcand suggests net earnings of approximately \$35,000 for that period. A spreadsheet for the Airbnb indicates revenue of approximately \$14,000 for the first nine months of 2022. I am not satisfied that Ms. Arcand has proven on a balance of probabilities that her earning potential would have been higher if she had not married Mr. Arcand or if their marriage had continued.
- [116] At the same time, I am also not able to conclude that Ms. Arcand conferred an economic advantage on Mr. Arcand because she assumed a disproportionate share of family responsibilities. Mr. Arcand's career and future prospects of financial success were not enhanced by Ms. Arcand's role within the marriage. Mr. Arcand chose to devote many of his prime working years to the illicit drug trade. He takes responsibility for his decision. For many years, Mr. Arcand's illegal activities were the main source of income for their family. I am satisfied that Ms. Arcand was aware of and benefitted from Mr. Arcand's ill-gotten gains over the course of their long relationship. However, Mr. Arcand's current income earning prospects are quite grim. He is 62 years old with a criminal record, physical ailments that preclude a return to the logging industry and perhaps any employment, and no legitimate work experience since 1997. I am unable to conclude that Mr. Arcand received an economic advantage from the marriage in the sense that he advanced his own career at the expense of Ms. Arcand.
- [117] In summary, Ms. Arcand has failed to establish entitlement to spousal support on a compensatory or other basis.
5. Would it be significantly unfair to divide family assets equally?
- [118] The claimant seeks an equal division of family assets and debts including the proceeds of the Suburban sold by Ms. Arcand after his incarceration. He also seeks an order that he receive various chattels listed in his financial statement, which Ms. Arcand does not oppose.
- [119] The respondent argues that it would be significantly unfair to divide family assets equally given that she has been responsible for maintaining those family assets since Mr. Arcand's incarceration in August 2016.

- [120] For the reasons that follow, I am satisfied that family assets and family debts should be divided equally, subject to crediting Ms. Arcand for post-separation made to preserve the Family Home.
- [121] Section 81 of the Family Law Act provides that, on separation, spouses are entitled to an undivided half interest in all family property and are equally responsible for debt, "regardless of their respective use or contribution", except as otherwise provided in Part 5.
- [122] Section 84 of the Family Law Act defines family property. In this case, the main family asset is the Family Home. The parties owned various vehicles and chattels, but Mr. Arcand has not advanced a claim for anything other than a few chattels, an equal share of the Family Home and the proceeds of a vehicle formerly owned by the limousine business.
- [123] Family property includes an interest in a business owned by at least one spouse on the date of separation: Family Law Act, s. 84(1)(a) and 84(2)(b). Mr. Arcand did not seek an equal share in any of the three businesses operated by Ms. Arcand. He sought only a share of the proceeds of the sale of a Suburban used for the limousine business that was purchased in January 2016 and sold for \$41,500 in February 2021. The financing loan used to purchase the Suburban had been paid off by early 2020.
- [124] In her counterclaim, Ms. Arcand sought an equal share in Mr. Arcand's pension from his time as a logger. There is apparently no such pension available to divide.
- [125] As noted earlier in these reasons for judgment, neither party seeks to exclude property from family property pursuant to s. 85 of the Family Law Act.
- [126] Section 86 of the Family Law Act provides that family debt includes all financial obligations incurred during the relationship and up to the date of separation and after separation if incurred for the purpose of maintaining family property. As of the date of separation (January 19, 2020), the parties had the following debts:
- i. a mortgage on the Family Home in the amount of \$249,965.17; and
 - ii. a loan from Mr. and Ms. Easthom in the amount of \$50,000.
- [127] The loan related to the parties' tree farm business had been paid off by January 19, 2020. Ms. Arcand led evidence regarding the parties' credit card debt as of August 2016; however, there was no evidence at trial to establish the amount of credit card debt, if any, as of January 19, 2020.
- [128] Section 87 of the Family Law Act provides that the value of family property must be based on its fair market value as of the date of the hearing date, unless otherwise ordered, where there is no agreement dividing family property and debt. As stated in *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 39, "because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property".

- [129] As a starting point, the best evidence of the fair market value of the Family Home as of the trial date is the joint appraisal report, which determined that the value of the Family Home as of May 20, 2022 was \$1,725,000. Both parties were asked about real estate market conditions as of the trial date as compared to May 2022. Such evidence is likely inadmissible. Neither party was able to provide any clear evidence regarding market trends in any event. I find that the fair market value of the Family Home as of the trial date is \$1,725,000.
- [130] In terms of other family assets, I am satisfied that the Suburban fit within the definition of family property in s. 84(1)(a) of the Family Law Act. Further, I am satisfied that the \$41,500 received for the sale of the Suburban fits within the definition of family property in s. 84(1)(b)(i). I recognize that Ms. Arcand used \$10,000 from the proceeds of the sale of the Suburban to pay down the principal owing on the Easthom debt. As set out below, I have included this payment as part of the family debt to be divided. It would be unfair to allow Ms. Arcand to retain the entire proceeds of the sale of the Suburban and also to recover half of the debt payment from Mr. Arcand. I am satisfied that the Family Law Act suggests that the sale proceeds should be recognized as family property. I find that the debt payment made by Ms. Arcand should be included in family debt as it was a financial obligation incurred for the purpose of maintaining the Family Home: Family Law Act, s. 86(b); C.K.M. v. H.R.M., 2021 BCSC 1297 at para. 34.
- [131] In final submissions, Ms. Arcand asked the Court to account for mortgage interest payments and other expenses that she paid between August 18, 2016 (the date Mr. Arcand was incarcerated) and the date of trial. However, I have determined that the parties separated on January 19, 2020. Expenditures she made between August 18, 2016 and January 19, 2020 are not subject to division. As noted by Justice Choi in *Yousefian v. Jafarmadar*, 2018 BCSC 855 at para. 13, generally, the Family Law Act "does not contemplate a forensic accounting of expenditures during the relationship". It is true that Ms. Arcand was the sole breadwinner for the family from August 18, 2016 to January 19, 2020; however, there were other times during the parties' relationship when Mr. Arcand's financial contribution to the relationship exceeded that of Ms. Arcand. The expenditures made by Ms. Arcand between August 18, 2016 and January 19, 2020 were payments from family resources for family obligations.
- [132] Post-separation on January 19, 2020, Ms. Arcand paid municipal taxes, home insurance, mortgage and loan interest payments, and home maintenance costs. Mr. Arcand should have to account for those expenditures that were "necessary in order to preserve the parties' equity in the property": *Ostere v. Harding*, 2017 BCCA 157 at para. 22. The amount of family debt includes the loan interest amounts that became due post-separation, which Ms. Arcand paid: C.K.M. at para. 28.
- [133] I am satisfied that the following are family debts (valued as of the date of trial) and post-separation expenditures that should be shared by the parties:

- i. mortgage balance owing on the Family Home in the amount of \$249,965.17;
- ii. interest payments on the mortgage from January 2020 to March 2023 in the amount of \$25,424.41;
- iii. Easthom loan balance owing in the amount of \$35,000;
- iv. Easthom loan principal (\$15,000.00) and interest payments from January 2020 to March 2023 (\$4290.00), totalling \$19,290.00;
- v. municipal property taxes paid from July 2020 to July 2022 in the amount of \$11,479.40;
- vi. house insurance from January 2020 to March 2023, totalling \$7038.06; and
- vii. other house-related expenses from January 2020 to March 2023, totalling \$3251.40.

[134] With respect to the house-related expenses, I accept Mr. Arcand's evidence that the dishwasher purchased in January 2021 was a gift from the children to Ms. Arcand. The invoice shows it was purchased by one of the children, not Ms. Arcand.

[135] In final submissions, Ms. Arcand relied on *Slavenova v. Ranguelov*, 2015 BCSC 79, a case in which the Court ordered that the parties' real property be valued at the date of separation rather than the date of trial pursuant to s. 87 of the Family Law Act. In the case at bar, Ms. Arcand did not plead s. 87 of the Family Law Act. In any event, I am not satisfied that there is compelling evidence in this case to depart from the statutorily mandated valuation date: *Rudyak v. Bekturova*, 2018 BCCA 414. Mr. Arcand did not contribute financially to the preservation and maintenance of the Family Home since the parties' separation in January 2020; however, that inequality can be redressed by accounting for those expenditures. The relatively short post-separation non-contributing period must be considered in the context of a long relationship and marriage. Further, although Mr. Arcand did not make a claim for occupational rent, it remains a fact that Ms. Arcand has had the benefit of residing in the Family Home since separation and earning rental income through Airbnb. I recognize that Mr. Arcand's incarceration and probation status precluded the possibility of his living at the Family Home prior to his release on parole in October 2020, but that does not diminish the financial benefits Ms. Arcand received post-separation by running her three businesses from the Family Home.

[136] Ms. Arcand sought unequal division of family property and debt pursuant to s. 95 of the Family Law Act. Section 95(1) allows the Court to order unequal division of family property or family debt or both if it would be significantly unfair to divide equally family property or family debt or both. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson summarized the legislative intent of s. 95(1) and the meaning of "significantly unfair" as follows:

[134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where

courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

- [137] Section 95(2) sets out various factors the Court may consider for the purposes of s. 95(1). I will review the subsections pleaded and relied upon by Ms. Arcand in turn.
- [138] Section 95(2)(b) allows the Court to consider the terms of any agreement between the parties. I have found that the parties did not agree that Ms. Arcand could retain the Family Home for her own use absolutely. There was no other agreement alleged or established on the evidence.
- [139] Section 95(2)(c) allows the Court to consider a spouse's contribution to the career or career potential of the other spouse. As discussed in the section pertaining to spousal support, I am not satisfied that Ms. Arcand should be compensated for her contribution to Mr. Arcand's career or career potential.
- [140] Section 95(2)(d) allows the Court to consider whether family debt was incurred in the normal course of the relationship between the spouses. Section 95(2)(d) may be relied upon where one spouse seeks to challenge whether a certain family debt (as defined in s. 86 of the Family Law Act) should be paid by only one of the parties because it was not incurred for a family purpose: *Jean Louis v. Jean Louis*, 2020 BCCA 220 at paras. 71-72, leave to appeal to SCC ref'd, 40008 (12 May 2022). Mr. Arcand has not incurred any family debts that were not incurred for a family purpose. He concedes that the loan from Mr. Easthom is a family debt incurred for family purposes. Section 95(2)(d) does not apply in this case.
- [141] Section 95(2)(f) allows the Court to consider whether a spouse, after the date of separation, caused a significant decrease or increase in the value of the family property or family debt beyond market trends. Post-separation, Ms. Arcand paid down the Easthom loan principal and paid interest, which effectively reduced the family debt. As a result, family debt should be divided unequally to account for Ms. Arcand's payments: *C.K.M.* at para. 78.
- [142] Section 95(2)(i) allows the Court to consider any other factor that may lead to significant unfairness, limited to factors that relate to the "economic characteristics of a spousal relationship": *Singh* at paras. 138-140. I am satisfied there are no other factors that relate to the economic characteristics of the spousal relationship that would lead to a finding of significant unfairness in this case. Although Mr. Arcand did not advance a claim for excluded property, it is fair to recognize that the capital for the original purchase of the Family Home came from the equity Mr. Arcand had built up from his ownership and sale of other properties. Much of the increase in the value of the Family Home is due to market conditions, and I am satisfied that it is fair that both parties share equally in that increase. I recognize that Ms. Arcand is bitter that Mr. Arcand's incarceration caused her emotional and financial stress. However, incarceration was a risk of his career choices, of which she was aware and from which she benefitted for many years. I was not provided with any legal

authority to suggest that his years of earning income from illegal activity, used to fund the family's lifestyle, would make it significantly unfair for him to receive half of the value of family property.

[143] To summarize, the value of family property to be divided is the value of the Family Home and the sale proceeds from the Suburban, for a total of \$1,766,500. The total amount of family debt and post-separation expenses to be divided is \$346,448.44. Ms. Arcand has paid \$66,438.27 post-separation toward family debt and expenses to preserve the parties' equity in the Family Home (see para. 133 ii, iv-vii above), which requires an adjustment in her favour.

Other issues

[144] In her amended counterclaim, Ms. Arcand seeks an order dividing Canada Pension Plan credits. Within 60 days, Ms. Arcand may make the necessary application to equally divide the parties' Canada Pension Plan credits pursuant to the Canada Pension Plan, R.S.C. 1985, c. C-8.

Conclusion

[145] For the reasons set out above, the issues as set out at para. 5 above are resolved as follows:

1. Ms. Arcand has failed to prove that the parties entered into an enforceable settlement agreement in November 2017 or at any time;
2. The parties separated on January 19, 2020;
3. There is no retroactive child support payable because the Court lacks jurisdiction to order child support in this case;
4. There is no spousal support payable because Ms. Arcand has not established entitlement; and
5. It would not be significantly unfair to divide family assets and debts equally, subject to an adjustment in Ms. Arcand's favour in recognition of post-separation payments described in para. 133 ii, iv-vii.

[146] As a consequence, family property worth \$1,766,500.00 shall be divided equally, and outstanding family debt of \$280,010.17 shall be divided equally. From his share of family property, Mr. Arcand shall pay Ms. Arcand \$33,241.64 to adjust for the post-separation payments she made.

[147] Mr. Arcand shall have the chattels listed in his financial statement.

[148] The claimant is entitled to costs, subject to any offers or other matters that may affect costs. The parties may arrange with court scheduling in the next 30 days to make submissions before me on any costs issues arising from these orders.

"Lamb J."

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