
CANADA / JUDGMENT

Kanizaj v. Krcmar

2016 BCSC 375

COURT

Supreme Court of British Columbia

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2016 BCSC 375 Kanizaj v. Krcmar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kanizaj v. Krcmar,

2016 BCSC 375

Date: 20160303

Docket: E44565

Registry: New Westminster

Between:

Vera Kanizaj

Claimant

And

Ivan Krcmar

Respondent

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Claimant:

O.C. Lokken

The Respondent appearing in person on his own behalf and assisted by I. Krcmar, Jr.:

I. Krcmar

I. Krcmar, Jr.

Place and Dates of Trial:

New Westminster, B.C.

November 16-18 & 30, 2015

December 1 & 16, 2015

February 1-2, 2016

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2016

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Introduction

- [1] This family law action arises from the breakdown of both parties' second marriage. The facts that I set out in this introductory section reflect some of my findings of fact. The remainder of the findings of fact necessary to decide the issues are set out in other sections of these reasons for judgment.
- [2] The claimant, Ms. Vera Kanizaj, is 56 years old. She moved to Canada from Croatia in March 2004 to marry the respondent, Mr. Ivan Krcmar. She was previously married (for approximately 10 years) and divorced in 1988.
- [3] Mr. Krcmar is 65 years old. He immigrated to Canada from Croatia in 1972. He is a Canadian citizen. Mr. Krcmar was a widower before he met Ms. Kanizaj, having been married for nearly 24 years (his first wife passed away in 2001).
- [4] The parties met in Croatia in 2003 when Mr. Krcmar was visiting his dying mother and other members of his family. Ms. Kanizaj is the godmother to one of the children of Mr. Krcmar's sister. She and Mr. Krcmar hit it off and subsequently decided to get married. They agreed that Ms. Kanizaj would immigrate to Canada and marry Mr. Krcmar in this country, and that she would live with him in the Lower Mainland. Both have children from their previous marriages. Mr. Krcmar has two adult children, a son and daughter who are 37 and 35 years old, respectively. Ms. Kanizaj has a son who is currently 36 years old.
- [5] Ms. Kanizaj testified that she worked at a chocolate factory in Croatia before immigrating to Canada. She found the lengthy hours and irregular shift work to be so physically and emotionally demanding that she went on sick leave. She was on sick leave and living at home with her elderly parents at the time she met Mr. Krcmar. When Mr. Krcmar met Ms. Kanizaj in Croatia, he understood that she worked as a waitress at a hotel but was on sick

leave because she was unable to cope with the demands of her job. Regardless, when she came to Canada, she brought a few hundred dollars with her. She had no other assets or financial resources.

- [6] Ms. Kanizaj moved to Canada as planned on March 14, 2004, having been sponsored by Mr. Krcmar (he also paid for her travel expenses). They began cohabitation at that time. They married in Surrey, B.C. on March 28, 2004, and ultimately separated just over nine years later, in May 2013. Upon separation, both parties remained living in the matrimonial home for financial reasons, until June 1, 2014, when Mr. Krcmar moved out, leaving Ms. Kanizaj and her son to occupy it.
- [7] Ms. Kanizaj initially entered Canada on a visitor's visa. With Mr. Krcmar's help, her visa was upgraded to residency status. Her visa expired in June 2010. It has not been renewed. Ms. Kanizaj does not hold Canadian citizenship. She holds a valid passport issued by Croatia. I do not accept Ms. Kanizaj's attempt to hold Mr. Krcmar responsible for her failure to renew her visa. I am satisfied that he encouraged her to do so just as he encouraged her to learn to communicate in English. He gladly paid for her courses to attend English language classes, encouraged and tried to help her pass her driver's license test, and provided her with a vehicle for her own use. He also provided her with her own credit card and did not deny her access to funds. I do not accept Ms. Kanizaj's evidence that Mr. Krcmar was out to control her life and denied her access to funds and transportation. I find that they shared household duties, cooking, and work around the Surrey home (e.g., Mr. Krcmar did the heavy work and Ms. Kanizaj looked after the gardening).
- [8] Mr. Krcmar is fluent in English. Ms. Kanizaj asserts, however, that she is not capable of speaking English. One of the issues in this case is whether Ms. Kanizaj is, as a result of the English courses she has taken in the Lower Mainland, sufficiently able to understand and communicate in English so that she is able to obtain gainful employment.
- [9] Mr. Krcmar owned a townhouse in Surrey ("Townhouse") and a condominium ("Condo") in Langley before he and Ms. Kanizaj began cohabitation. When the parties began cohabitation, Mr. Krcmar owed approximately \$91,000 on a mortgage registered against the Condo; he held clear title to the Townhouse.
- [10] Ms. Kanizaj lived with Mr. Krcmar in the Townhouse until they moved into their new matrimonial home, which Mr. Krcmar purchased in Surrey ("Surrey Home"). Mr. Krcmar sold both the Townhouse and the Condo to help finance the purchase of the Surrey Home. He also used some of his own funds, which he held prior to their relationship to finance the purchase of the Surrey Home and to carry out some improvements to it. Mr. Krcmar does not dispute his obligation to share the increased value of the equity in the Surrey Home with Ms. Kanizaj even though title to the property is registered solely in his name. One of the issues concerning the division of family assets and debts is whether Mr. Krcmar's pre-marriage assets and his purchase of and contributions to the Surrey Home are, as he claims, excluded property.

- [11] Over time, and after Ms. Kanizaj moved to Canada, she became withdrawn and eventually depressed. Thus, another issue for determination in this trial is whether she is capable of working, and also the effect, if any, this has on Mr. Krcmar's obligation to pay spousal support. I must also determine what the effect is of Mr. Krcmar's impending retirement as a painter on his spousal support obligation.
- [12] During their marriage, Mr. Krcmar experienced extended periods of unemployment and also received disability payments for a workplace injury. During those periods of unemployment, Mr. Krcmar relied on his savings, credit, and withdrawal of funds from his RRSP to meet their living expenses. Their expenses usually exceeded Mr. Krcmar's income, whether it was employment income or disability benefits, by some \$20,000 per year. Ms. Kanizaj worked at a part time job for a period of time, until 2012, and earned approximately \$5,000, which she contributed to their household. Otherwise, Mr. Krcmar supported Ms. Kanizaj and all of their household expenses, as well as Ms. Kanizaj's son and his living expenses when he came to Canada to visit his mother.
- [13] Ms. Kanizaj's son, Dejan Habjan, came to Canada in 2012 to visit his mother. This was not his first visit. He first came to visit his mother and Mr. Krcmar in 2009. Each time, he entered the country on a visitor's permit. The visa he obtained in 2012 has since expired. He has, however, remained living in the Surrey Home with his mother (who admitted that she has made no effort to sponsor him). Mr. Krcmar paid for his travel costs.
- [14] Mr. Krcmar incurred considerable expenses on behalf of Mr. Habjan over the years. The list of things he paid for includes: courses so that he could learn a trade to assist him in obtaining a permanent residency status permit from the Canadian government; legal fees associated with securing that permit; and some of his rent for his apartment in Croatia. Mr. Krcmar claims that some of the funds advanced to or on behalf of Mr. Habjan were on account of a loan, but he does not seek reimbursement for the substantial sums that he paid for the courses and legal fees. He does, however, assert that all of these payments are to be considered in determining his obligations overall in this case.
- [15] The parties agreed to separate in May 2013. As noted, Mr. Krcmar remained living in the Surrey Home for financial reasons until June 1, 2014. Since their separation, and until April 2015, Mr. Krcmar has continued to pay for all of the expenses for the Surrey Home (including mortgage payments, taxes, insurance). He stopped paying for Ms. Kanizaj's telephone and cable bills and for the cost of her medical prescriptions in April 2015. He has also paid for some of Ms. Kanizaj's legal fees in this action because he was under the mistaken belief that he was required to do so.

- [16] Mr. Krcmar has also been paying spousal support to Ms. Kanizaj. In her evidence, she objected to the amount that he is paying her on the basis that it is insufficient to meet her needs and those of Mr. Habjan (which are exacerbated by his dietary requirements). According to Ms. Kanizaj, she needs her son to live with her to assist her with her daily living requirements due to her depression. Ms. Kanizaj's son is not able to work in Canada because he entered the country on a visitor's visa.
- [17] After her parents passed away, Ms. Kanizaj inherited the family home in Croatia. She sold it in 2014 and realized a profit of 32,000 EUR. She transferred those funds into Mr. Habjan's bank account in Croatia, even though at the time her finances in Canada were tight. Also at that time, Mr. Krcmar was withdrawing funds from his RRSP to meet their expenses because his disability benefits were insufficient. Ms. Kanizaj's position in this action is that the proceeds from the sale of her home in Croatia belong to her family and should not be considered as part of the family assets from her marriage to Mr. Krcmar, and therefore should not be considered when determining Mr. Krcmar's spousal support obligation. Ms. Kanizaj has made it clear that she does not intend to return to Croatia and intends to remain living in the Lower Mainland.
- [18] Mr. Krcmar received an inheritance of life insurance proceeds following the death of his first wife. He received the payment long before he met Ms. Kanizaj. Since his treatment of the inheritance was made an issue at trial, I will set out my findings concerning Mr. Krcmar's disposition of those funds. He gave \$20,000 each to his son and daughter in 2002 and 2003, respectively, but made no other gifts of cash to them. Mr. Krcmar also paid \$10,000 for the cost of his first wife's funeral and used some of those funds to purchase the Townhouse. He also used some of the funds to make a contribution to his RRSP, used \$10,000 of his inheritance to help fund the purchase of the Surrey Home, and used much of the remainder to pay for renovations.
- [19] As a result of the payments he has made to Ms. Kanizaj, payments to and for the benefit of Mr. Habjan, and ongoing payments to maintain the Surrey Home, Mr. Krcmar is in difficult financial circumstances. Indeed, he is so strapped at this juncture that he cannot afford to buy his children and grandchildren gifts for their birthdays and Christmas.

Issues

- [20] I have touched briefly thus far on a few of the issues that need to be determined. In this section, I will set out a complete list.
- [21] The first issue is to identify family property and debts. Within that analysis is determining whether there is excluded property, such as Mr. Krcmar's real property holdings and RRSPs that he owned prior to the parties' marriage.
- [22] Second, if excluded property was used to purchase family property, such as the Surrey Home, can it be ascertained?

- [23] Third, if it can, then what is the value of family assets and debts net of the excluded property?
- [24] Fourth, what is the allocation of family assets and debts that should be made between the parties of family assets and debts?
- [25] Fifth, what is Mr. Krcmar's spousal support obligation to Ms. Kanizaj? Included within the analysis of this issue is to determine whether Ms. Kanizaj is unable to work in Canada due to a medical disability or language difficulties, or both. Within this analysis I must also consider the effect of Mr. Krcmar's planned retirement in less than two years and Ms. Kanizaj's stated intention not to return to Croatia.
- [26] I do not need to determine whether Mr. Krcmar's spousal support obligation should include Mr. Habjan's living expenses because Ms. Kanizaj is not claiming that it must. Her claim is that his presence in Canada has been and continues to be of great benefit to her. I also do not need to determine whether the sale proceeds from Ms. Kanizaj's home in Croatia are excluded property because no such claim is being asserted. Instead, Mr. Krcmar says that it should be considered when assessing the credibility of Ms. Kanizaj's evidence. Finally, I do not need to determine whether Ms. Kanizaj is liable to account to Mr. Krcmar for the funds he has paid towards her legal fees because she has agreed that she should.

Mr. Krcmar's Present Circumstances

- [27] Mr. Krcmar is presently employed as a general painter by Simon Fraser University ("SFU"). He was recently able to change his employment status to full-time contract employee, which translated into a slightly lower annual income but provided him with significant medical and dental benefits. His Form 8 financial statement shows an annual income for Spousal Support Guidelines ("Guidelines") purposes to be \$51,779.36, based on an annual salary of \$52,469.76 less union dues of \$690.40 from when he worked in a different capacity for SFU in 2014. That amount does not reflect his current salary, which is lower. His current Guideline income is \$46,644.62, calculated as \$47,720.40 less union dues.
- [28] Prior to working for SFU, Mr. Krcmar worked as an industrial painter in the Lower Mainland and for a different company painting the interior of large steel pipes in a camp located in northern British Columbia, near Stewart. Before starting at SFU, Mr. Krcmar had been injured from a workplace fall and received disability benefits from the Workers Compensation Board ("WCB"). His employment was intermittent until he recovered from his workplace accident. His income tax documents show that his employment income was in the low to mid \$30,000 range between 2008 and 2010 and thereafter he relied on WCB benefits and withdrawals from his RRSP accounts to meet living expenses until he returned to work in 2013:

2008

\$32,738 (of which \$8,898 were earnings; the remainder included withdrawal of funds from his RRSP and employment insurance benefits)

2009

\$31,937

2010

\$32,477.69

2011

\$28,871 (\$5,000 from an RRSP withdrawal and the remainder derived from WCB benefits)

2012

\$33,959.94 (\$5,000 from an RRSP withdrawal and the remainder derived from WCB benefits)

2013

\$61,936 (\$9,933 from an RRSP withdrawal, \$10,527 derived from WCB benefits, and \$41,476 from employment income)

Those amounts do not represent his Guideline incomes because they do not take into account his union dues.

[29] Mr. Krcmar is finding it increasingly difficult to work due to health issues. His job involves intensive labour with a daily commute of two to three hours on public transportation. He tendered medical evidence to corroborate his evidence that he suffers from type 2 diabetes, ongoing pain from rotator cuff and ankle injuries, as well as depression arising from the breakdown of his marriage with Ms. Kanizaj (for which he takes medication when he has to because he dislikes the side effects). He hopes to be able to work until he is 67 in order to maintain his current level of income and in order to be able to make the spousal support payments to Ms. Kanizaj that are required of him.

[30] After separation, Mr. Krcmar paid Ms. Kanizaj \$250 per month for spousal support in addition to paying just under \$2,000 per month on account of the mortgage and all costs associated with maintaining the Surrey Home, including insurance, taxes, and heat.

[31] Mr. Krcmar eventually reduced his spousal support payment to \$205 because he could not afford more given that he was also paying for all of the expenses associated with the Surrey Home, which was also for Ms. Kanizaj's benefit. This arrangement is still in place. With the exception of cable and telephone costs, Ms. Kanizaj lives in the Surrey Home with her son expense free.

- [32] Mr. Krcmar has also paid for some of Ms. Kanizaj's other expenses since separation. He has paid for many of her prescription medications, and for the cost of the appraisal of the Surrey Home, which was \$945. In addition, he has paid \$4,500 to Ms. Kanizaj's former law firm under the misapprehension that he was obligated to do so.
- [33] Mr. Krcmar has lacked a permanent residence since he moved out of the Surrey Home. He slept on a couch in his daughter's home until the end of August 2014, moved to live in a basement suite in a coach house from September 1 to December 1, paying \$750 monthly, and then moved out when he could no longer afford it. He has since lived in a downstairs suite in his son's home. Mr. Krcmar agreed to pay his son \$750 per month to live in the suite, but has been unable to make that payment for months because he could not afford it. His son is letting his father live in the suite even though it could be rented out to others.
- [34] In summary, Mr. Krcmar is financially distressed due to the payments he has made and is continuing to make to Ms. Kanizaj, and to maintain the Surrey Home and to meet the mortgage obligation. He is continuing to incur debt that is unsustainable on his income.

Ms. Kanizaj's Present Circumstances

- [35] Ms. Kanizaj lives at the Surrey Home with her son. In addition to the spousal support payment that she receives from Mr. Krcmar, she receives a monthly disability pension and other assistance payments totalling \$462.42 plus a quarterly GST rebate. Her monthly expenses are in respect of food for herself and her son, transportation (bus), prescriptions, and the cost of telephone and cable. She does not contribute towards the cost of maintaining the Surrey Home and does not pay rent.
- [36] She has no savings or funds to draw upon. Her son is not able to work in Canada and is not earning any income to contribute towards their monthly expenses.
- [37] In addition to suffering from depression, Ms. Kanizaj has suffered from severe constipation, insomnia, and vitiligo (which is a whitening of the skin on her neck, and is not disabling, nor does it prevent her from working). Her ongoing problems with constipation were successfully treated in 2015 and she also received medication to assist with her insomnia. She also suffered from cancer to her thyroid nodules; she underwent successful surgery to deal with it in the latter part of 2015.

Credibility

- [38] I will start with my observation that I did not find Ms. Kanizaj to be accurate in her description of most events. I found that she overstated events when they were to her benefit and minimized anything that could harm her case. She was also not forthright and honest about a number of matters. For example, she was not honest about her ability to comprehend English, her description of Mr. Krcmar's conduct towards her, her relations with Mr. Krcmar's children, and the reasons she decided not to continue working nearby the Surrey Home.

- [39] As I noted, Ms. Kanizaj says that she could not speak English when she moved to Canada. Mr. Krcmar paid for her to attend an English language course after she arrived. She passed it. After she did, the Canadian government paid for Ms. Kanizaj to attend an English language course of some five months in duration. Ms. Kanizaj testified that she found it too difficult and stopped. Mr. Krcmar testified to the opposite, stating that she passed. This is an example of one of many conflicts in the evidence that involved credibility.
- [40] I will also add that Ms. Kanizaj testified that she studied German for eight years and Italian for three years while attending high school in Slovenia. She is capable of speaking several languages.
- [41] There is no question Ms. Kanizaj understands English sufficiently to be able to work. She understood English sufficiently well that she was able to detect what the interpreter was saying in English. I cite two examples.
- [42] The first one involves an instance where the interpreter stopped to tell me that the word "couple", which was contained in a question put to Ms. Kanizaj in English, had a different meaning in Croatian. The issue arose when Ms. Kanizaj was confronted with a question and answer from the transcript of her examination for discovery, where the word "couple" was used. The interpreter explained that in Croatian, the word couple does not necessarily mean two but is vague and often refers to more. After the interpreter provided that explanation to me, she read the question and answer to Ms. Kanizaj. The interpreter did not interpret what she told me to Ms. Kanizaj. Ms. Kanizaj then answered the question and when doing so, remarked on what the interpreter had just said to me in English, about the meaning of the word couple. It was clear that Ms. Kanizaj well understood the nuanced point that the interpreter was making, while speaking English, without the need for assistance.
- [43] On another occasion, Ms. Kanizaj corrected a question being translated to her by the interpreter to her, and was forced to admit that she understood the question as it was being asked in English.
- [44] I accept Mr. Krcmar's evidence that at a minimum, Ms. Kanizaj is currently able to comprehend English when she hears it. I accept his evidence that she has consistently refused to speak it for reasons that he is not able to understand.
- [45] Mr. Krcmar encouraged Ms. Kanizaj to work, as a way to improve her ability to communicate in English, to meet people, and to contribute financially to the household. When he was off work due to his workplace injuries, Mr. Krcmar drove Ms. Kanizaj to work. When he was back at work, Mr. Krcmar drove Ms. Kanizaj to work on the weekends.
- [46] Ms. Kanizaj worked at a part time job for a catering company located nearby the Surrey Home for several years from approximately 2007 to 2011. She claimed that she had to stop because it was too difficult for her to get there because she could not drive and did not have access to a car. I do not accept her explanation as credible. During times that she was not being driven to work by Mr. Krcmar, she was driven by a friend. Mr. Krcmar provided a

vehicle for her. He worked with her to study for the driver's test and helped her with her online studying. It is notable that Ms. Kanizaj passed the online tests, scoring some 90% every time she took them, but failed the actual test when she took it. I am satisfied that she failed the driving test intentionally. I am also satisfied that her job required her to be able to comprehend English and I am satisfied that she did well enough to carry out her job duties.

- [47] Ms. Kanizaj left that job in 2011 because she had to return to Croatia to look after her sick mother. She spent nearly the entire year in Croatia and returned only in response to Mr. Krcmar's requests for her to come home as soon as she could. He had not been well, had undergone surgery, and hoped that she would come home to be with him.
- [48] Ms. Kanizaj did not return to work when she returned to Canada in 2012. I do not accept that her decision was premised on depression because her purported symptoms did not become significant enough to require medical treatment until after separation.
- [49] When Ms. Kanizaj returned to Canada, she brought tension into the household and from there, arguments ensued. It was at that point, in 2012, that she asked Mr. Habjan to come to Canada to visit her. I reject her evidence that she asked him to come because, as she said, "I can't stand life any longer" in Canada. If that were the case, she could have easily returned to Croatia where she had lived for almost an entire year. Instead, her son came to visit and has since stayed, with Mr. Krcmar paying for his living expenses.
- [50] I also reject Ms. Kanizaj's attempts to lay the blame on Mr. Krcmar for her present status living in Canada with an expired residency permit. I do not accept as credible her evidence that Mr. Krcmar told her not to worry about renewing it. I not only reject her evidence generally because it was lacking in overall credibility, but also because it is in stark contrast to the efforts that Mr. Krcmar took to help Mr. Habjan qualify to get his residency permit. I find that Mr. Krcmar was acutely aware of the need to have valid residency documents and spent his own funds and followed leads to help Mr. Habjan obtain a permit. He was also concerned that Mr. Habjan continued to remain in Canada without a valid visa.
- [51] I also reject Ms. Kanizaj's evidence that she is not able to renew her permit because she is unable, owing to her purported language difficulties, to obtain secondary documents that are necessary for the renewal. Ms. Kanizaj has had the acumen and proficiency to apply for and obtain a government disability pension and GST credits. I am satisfied that her present status is part of an overall effort to paint an untruthful picture of Mr. Krcmar as an insensitive, uncaring individual who seeks to leave her penniless and subject to deportation.
- [52] I also accept that Mr. Krcmar's children made ongoing and sincere efforts to welcome Ms. Kanizaj into their family. I heard highly credible evidence from Mr. Krcmar and his daughter concerning the numerous efforts that he and his children made to integrate Ms. Kanizaj into their family. They encouraged her to learn and to speak English, invited her to family events (including birthday and holiday parties, family dinners), offered support to Ms. Kanizaj when her father died, and made every effort to treat her as a grandmother to their children. I accept Mr. Krcmar's daughter's account of her ongoing efforts to teach Ms. Kanizaj English

and of her ongoing discussions with her in English (because Mr. Krcmar's daughter does not speak Croatian). I find this to be further, credible evidence that Ms. Kanizaj is readily able to carry on conversations in English and to work at many jobs where English as a first language is not a prerequisite.

- [53] When Ms. Kanizaj came to Canada, she made the choice not to integrate with Mr. Krcmar's friends and family. She was reluctant to socialize with his friends and eventually refused to do so at all. She would not go out with her husband to events, and made his life unpleasant so that eventually he decided not to have friends over to the Surrey Home. Prior to his marriage with Ms. Kanizaj, Mr. Krcmar was an outgoing, engaging person who loved to socialize with his friends and family.
- [54] Faced with his wife's wishes not to socialize, Mr. Krcmar decided to stay home and do things with her there. They engaged in some online gambling together, made some wins, and lost money as well. Ms. Kanizaj initially testified that she was opposed to gambling but ultimately admitted that she gambled online on her own, even when her husband was at work.
- [55] I also reject Ms. Kanizaj's evidence that Mr. Krcmar engaged in excessive consumption of alcohol and when he did, he was verbally abusive towards her and on one occasion, assaulted her.
- [56] Mr. Krcmar did drink alcohol, mainly port, but his consumption was, generally speaking, modest, and not daily. He did admit to becoming inebriated on several occasions during their marriage, but I am satisfied that they were infrequent and of no consequence.
- [57] Mr. Krcmar was not verbally abusive towards Ms. Kanizaj and did not assault her. He was constantly worried about his wife's emotional and physical health and went to great efforts to adjust his lifestyle to accommodate her wishes. I have already mentioned that he limited and then stopped altogether visits from his friends. He also limited his visits with his daughter and her children because it became clear that Ms. Kanizaj was constantly (and unreasonably, I must add) offended at anything his daughter said or did. Eventually, Mr. Krcmar limited his contact with his daughter to times that he could see her and his grandchildren at their home when it did not pose an inconvenience for Ms. Kanizaj.
- [58] I do find, however, that Ms. Kanizaj verbally threatened Mr. Krcmar as a means of exerting control over what I am satisfied is his kind nature. Later in their relationship, she attempted to exert control by threatening to kill herself; at other times, she suggested to him that if he did a particular thing that she did not approve of, he might not "wake up the next morning", which Mr. Krcmar reasonably interpreted to mean that he would suffer physical harm. I accept Mr. Krcmar's evidence that Ms. Kanizaj's threats became sufficiently concerning that he moved out of the Surrey Home on June 1, 2014 at the suggestion of the police.

- [59] I also accept the evidence of Mr. Krcmar's daughter, whom I found to be highly credible and forthright, that Ms. Kanizaj threatened her as well, and at one point told her, without any provocation or other possible basis to do so, "You are going to be waking up in a pool of blood and someone's going to be without a mother and someone's going to be without a wife." Without any good reason, Ms. Kanizaj came to the opinion that Mr. Krcmar's daughter dislikes her, and Ms. Kanizaj is simply, and unreasonably, not prepared to believe or be persuaded otherwise.
- [60] I found that Ms. Kanizaj overstated an incident where she said she tried to commit suicide. She suggested that when she tried to hang herself with a rope in the garage of the Surrey Home, Mr. Krcmar acted out as a monster when he pushed her, and through unreasonable force, pulled her back into the house. Ms. Kanizaj's sensationalized description of that incident did not portray what actually occurred. Ms. Kanizaj found a rope and threatened to hang herself while standing on the garage floor. She was not in the midst of actually trying to commit suicide. She was holding the rope when Mr. Krcmar found her. When Mr. Krcmar found her in the garage, he not only tried to talk her out of it by reminding her that, if for nothing else, she had her son to live for, but when she appeared not to listen, he pulled away the rope and took her back into the house. He did not assault her. Instead, Mr. Krcmar acted out of genuine concern for Ms. Kanizaj's emotional and physical well-being.
- [61] Ms. Kanizaj's account of her hospitalization after this incident was inaccurate. She was not, as she claimed, hospitalized for depression and the suicide attempt, but was, instead, hospitalized for severe constipation, which as I pointed out was successfully treated. She admitted in cross examination that apart from this incident she did not make any attempts to threaten or commit suicide.
- [62] I also found Mr. Habjan's testimony, led in rebuttal following the close of Mr. Krcmar's case, about an incident involving Mr. Krcmar's son purportedly pushing Ms. Kanizaj was entirely devoid of credibility. Mr. Habjan tried to explain that he woke up in the evening when he heard an altercation taking place between his mother and Mr. Krcmar's son. Mr. Habjan claims that Mr. Krcmar was standing nearby and watching while his son was pushing Ms. Kanizaj, and that he had to intervene. Mr. Habjan's evidence was inconsistent and vague over the course of his cross examination about the subject. For example, Mr. Habjan denied having been asleep, could not identify the room in which the incident occurred, and conceded that he did not report the incident to the police, even though he said the incident involved multiple applications of physical force to his mother, because it was not, in his view, of any significance. He maintained that it was not significant, even though he claimed that he had previously reported alleged verbal abuse from Mr. Krcmar directed towards his mother to the police. Mr. Habjan's explanation that his language skills impacted his decision not to report the incident to the police was also lacking in credibility because he demonstrated a clear ability to speak and understand English well throughout his testimony, and also asserted that he contacted the police on prior occasions.

- [63] I found Mr. Habjan's overall testimony to have been contrived to have buttressed his mother's case. It was intentionally led first in Ms. Kanizaj's case before she testified, and over the objections of Mr. Krcmar. I do not accept that Mr. Habjan does not have access to the funds from the sale of his mother's home, which are said to have been deposited in his account with a bank in Croatia. There was no evidence, apart from his own, to demonstrate that he cannot access the funds electronically or through direct communication with his bank. Moreover, there is evidence demonstrating that Mr. Krcmar was able to communicate directly to the bank when he wired funds to Croatia to pay for Mr. Habjan's rent. Mr. Krcmar made three payments for Mr. Habjan's rent in 2013 totalling \$3,910, made by two payments of \$1,284 and \$1,461 in April and a payment of \$1,165 in October. I accept Mr. Krcmar's evidence that Mr. Habjan agreed to pay it back. Although I find that Mr. Krcmar loaned the money to Mr. Habjan out of his sense of obligation to Ms. Kanizaj, there is no evidence that Ms. Kanizaj agreed to be bound by the loan. As a result, there is no basis in this action in which to credit Mr. Krcmar with those funds.
- [64] Mr. Habjan left his job as a security guard in Croatia to visit his mother and has remained in Canada even though his visitor's permit expired over three years ago. His living expenses are being funded by his mother's disability payments from the government and the ongoing support provided by Mr. Krcmar. Mr. Habjan shows no intention to return to Croatia in the near future.
- [65] During the marriage, and prior to Mr. Krcmar moving out of the Surrey Home, he paid for all of Mr. Habjan's living expenses in Canada, in addition to paying for the cost for him to attend different courses in order to obtain trades certifications (e.g., welding, forklift operator) that would help facilitate his efforts to obtain permanent residency in Canada.
- [66] Neither Mr. Habjan nor his mother show any inclination to take any steps to improve Ms. Kanizaj's financial situation other than through this litigation. He complains that the spousal support payments to his mother are insufficient even though neither of them are not paying rent and Mr. Krcmar is looking after all of the household expenses, including the mortgage payment. Both mother and son complain that Mr. Krcmar will not pay for telephone and cable expenses even though Mr. Krcmar is incurring ongoing debt to meet the household expenses because they exceed his income. Ms. Kanizaj says that she has applied for government assisted housing but said that the wait list is approximately three years.
- [67] Mr. Krcmar is continuing to pay for all of the costs to maintain the Surrey Home including taxes, heat, and electricity, and the mortgage payments. This allows Ms. Kanizaj and Mr. Habjan to live at the Surrey Home with no other expenses except for the cost of cable and telephone (which only arose recently, in April 2015 when Mr. Krcmar stopped paying for them because he could no longer afford to). The amounts currently being paid monthly by Mr. Krcmar to maintain the Surrey Home total a minimum of \$1,997.71 as follows: mortgage payments in the amount of \$1,458.71; property taxes of \$246; insurance of \$96; \$140 for heat; and \$57 for utilities such as water and sewage. I agree with Ms. Kanizaj's submission that these payments benefit both parties because they maintain the Surrey Home which is

currently an appreciating asset.

- [68] In addition to the payment of \$205 per month in spousal support that she receives from Mr. Krcmar, Ms. Kanizaj receives on a monthly basis \$326.42 in social assistance payments and \$136 from the Homelessness Prevention Program, for a total of \$667.42, plus a GST rebate every quarter in the amount of \$96.87. When the GST payments are broken down on a per month basis, Ms. Kanizaj ends up receiving a total monthly income of \$699.71 (or \$8,396.52 annually) to cover her food, cable, and telephone costs. While the sum is likely insufficient to cover Mr. Habjan's living expenses, Mr. Krcmar is not obligated, I find, to pay for them, especially in circumstances where Mr. Habjan has made no contribution to the Surrey Home or his mother's living costs whatsoever.
- [69] I accept Mr. Krcmar's testimony that the presence of Mr. Habjan in the Surrey Home caused tension. On his return home in the evening from working at a physically demanding job, Mr. Krcmar would find Mr. Habjan up just in time to eat breakfast or lying on the couch in his pajamas. Mr. Habjan's only contribution to the household was to mow the lawn twice one summer when Mr. Krcmar was away working at the camp near Stewart, B.C. Yet, Mr. Habjan insisted on using the family computer to the exclusion of Mr. Krcmar, regardless of the latter's needs. Mr. Habjan insisted that Mr. Krcmar give up use of the computer when he wanted to use it. Mr. Krcmar would comply to avoid conflict. Mr. Krcmar finally challenged Mr. Habjan when, following their separation and while he was still living at the Surrey Home, Mr. Habjan insisted that Mr. Krcmar not speak to Ms. Kanizaj at all since they were separated.
- [70] Accordingly, I am satisfied that Mr. Habjan's continued presence in the Surrey Home has added and continues to add significant financial and emotional strain to an already troubled marriage.
- [71] I accept Mr. Krcmar's evidence that he continued to make payments to or for the benefit of Ms. Kanizaj and her son following separation because he continues to love his wife and feels sorry for her. At the same time, he realizes that they cannot live together and remain married. He continues to be concerned for her, has taken her to the hospital and to medical appointments after their separation, and stayed with her when she was hospitalized in 2015.
- [72] He did not, as Ms. Kanizaj claimed in her evidence, unilaterally terminate her cable and telephone utilities. Instead, Mr. Krcmar advised Ms. Kanizaj that he could no longer afford to pay those bills and that she should take them over. Those services were terminated because she did not pay the accounts. When Mr. Krcmar found out what had occurred, he paid the bills in order to get services reinstated, and then reiterated to Ms. Kanizaj that she must pay those accounts.
- [73] In conclusion, I reject Ms. Kanizaj's claims that she is financially impoverished, to the point that her ability to buy decent quality food is significantly impaired, that she must rely on a food bank for assistance, and is unable to enjoy life in Canada. I reject her claim that spousal support should be set at a level sufficient to pay for her and Mr. Habjan's food and other

living expenses. Ms. Kanizaj refuses to access any of the funds from the sale of her home in Croatia. She will not entertain the notion of returning to Croatia to live even though she has family there and she knows that her son will have to return home at some point because his visitor's visa has expired. Ms. Kanizaj insists on living what she says is an isolated life in Canada - one that she described at one point as "a prison" - that Mr. Krcmar should pay for.

Order for Divorce

[74] There is no possibility of reconciliation. The parties meet the requirements set out in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and an order for divorce is granted. It will take effect on the 31st day from the date of these reasons.

Division of Family Assets and Debts

Introductory Remarks

[75] Family property is all real and personal property that is owned or property where a beneficial interest is held by at least one spouse on the date of separation, unless it falls within the definition of excluded property in the Family Law Act, S.B.C. 2011, c. 25, ss. 84-85 [FLA]. Family property includes property acquired (either through ownership or a beneficial interest) after separation by at least one spouse if it is derived from property that is family property during the marriage: s. 84(b).

[76] Excluded property is defined in s. 85 of the FLA. The definitions applicable to this case are:

Excluded property

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
- (i) loss to both spouses, or
- (ii) lost income of a spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[77] The onus to prove property is excluded property falls on the person asserting it, which in this case is Mr. Krcmar: s. 85(2). For the reasons set out in this section, I find that Mr. Krcmar has readily satisfied that onus.

[78] Family debt is defined in s. 86 to include "all financial obligations incurred by a spouse" from the time the relationship between the spouses began until separation, and, in certain circumstances, afterwards:

Family debt

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate; and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

[79] Family property is valued based on its fair market value. The value of both family property and debt are, in the absence of an agreement (as is the case between the parties), to be determined as at the date of the hearing before the court regarding the division of property: s. 87.

[80] I will turn now to discuss the parties' assets and debts and to provide my determination of their value and allocation between the parties.

Family Assets

Surrey Home

[81] Mr. Krcmar purchased the Surrey Home in June 2004 for \$380,000. The total cost, however, once the statement of adjustments (to include his proportionate share of property taxes and to include fees) was finalized, was \$403,850.80.

[82] To buy the property, Mr. Krcmar signed two promissory notes with the lender, Envision Financial. One note, in the amount of \$165,000, was secured against the Townhouse pending its sale to a third party. Another note was signed in the amount of \$228,000 and registered against the Surrey Home. Mr. Krcmar has been paying down the balance of that debt. As I have noted, Mr. Krcmar also contributed \$10,000 from his own funds, which he obtained prior to their relationship from life insurance proceeds paid on the death of his first wife.

[83] The Townhouse was subsequently sold for \$222,953.64. He used \$164,236.30 of the proceeds to pay off the first promissory note and \$30,000 to pay down the amount owing on the other promissory note. The total of his contributions is \$204,236.30.

[84] I agree with Mr. Krcmar that the Surrey Home was purchased using excluded assets because the funds were secured by real property and cash he owned and inherited prior to meeting Ms. Kanizaj. I am able to find from the objective evidence (i.e., loan and documents from the lender and a law firm) that the funds were used to purchase the Surrey Home and further, that the current value of the mortgage is the result of further refinancing required to support the parties' living expenses (which included contributions to or for the benefit of Mr. Habjan, purchase of shares, and Ms. Kanizaj's travel costs to Croatia).

- [85] Thus, I am satisfied that Mr. Krcmar has met the onus on him per s. 85(2), sufficient to demonstrate that this is excluded property. The amounts are readily traceable and capable of mathematical certainty: *Asselin v. Roy*, 2013 BCSC 1681; *Cizmic v. Cizmic*, 2015 BCSC 1430.
- [86] The Condo was also sold for \$129,885.71, which resulted in a net payout to Mr. Krcmar of \$38,036.68. It was used to pay for some of the costs to renovate the Surrey Home; the remainder was put into savings, which in turn was used to meet the parties' ongoing living expenses. Mr. Krcmar does not seek to have any of that sum credited to him as an excluded asset.
- [87] The Surrey Home has been appraised at \$675,000 as at March 31, 2015. The parties accept that valuation. The amount of the mortgage debt at the time of their separation was \$310,177.41; at the start of trial, it was \$296,651.92. Mr. Krcmar is content to use the debt amount at separation for the valuation analysis, even though it is beneficial to Ms. Kanizaj to do so. Thus, the net equity in the Surrey Home, using the mortgage debt at time of separation was \$364,822.59. From that amount, the sum of \$204,236.30 should be deducted to account for the excluded asset value. Thus, the total available for allocation between the parties is \$160,586.29.
- [88] There was no claim made by Ms. Kanizaj at the outset of the trial that it would be significantly unfair to credit Mr. Krcmar for the value of his excluded assets used to purchase the Surrey Home, although there was some suggestion in closing argument that it should be considered. I see no basis for such a finding to be made. Nor do I see any basis to order anything but an equal division of the value of the Surrey Home that represents family property. Both parties contributed with their physical labour to care for the property. Mr. Krcmar carried out the heavy work to renovate and maintain the property, and Ms. Kanizaj tended to the gardening and some of the lighter renovation work. When he worked, she maintained the house. They both attended to the cooking.
- [89] Consequently, Ms. Kanizaj's share of the appraised value of the Surrey Home is \$80,293.15.
- [90] Ms. Kanizaj also agreed that if Mr. Krcmar can secure the funds, then he may buy out her interest. Clearly, that will benefit both parties because they will not have to account for real estate commission. Mr. Krcmar should have a limited time in which to do that so that the parties can move on with their lives with greater economic certainty. I agree with Ms. Kanizaj's submission that Mr. Krcmar should have 60 days from the date of the reasons in which to buy out Ms. Kanizaj's interest in the Surrey Home, failing which he shall forthwith list it for sale. I do not agree with Ms. Kanizaj that both parties should have joint conduct of sale because of the present difficulties in communication between the parties, which, I am satisfied, has been caused by the conduct of Ms. Kanizaj and Mr. Habjan. Therefore, Mr. Krcmar shall have conduct of sale and Ms. Kanizaj shall cooperate with his efforts to sell the Surrey Home in an amount at or above the appraised value that is in evidence. Until Mr. Krcmar sells the Surrey Home or purchases Ms. Kanizaj's interest in it, he shall pay the expenses to maintain it (e.g., utilities, taxes, property insurance, and mortgage), but he is

not required to pay for the cost of cable and telephone.

- [91] Accordingly, if Mr. Krcmar buys out Ms. Kanizaj's interest in the Surrey Home (of \$80,293.15) within the next 60 days, she will have 30 days following in which to vacate. Otherwise, he shall list it for sale and once sold, Ms. Kanizaj shall be entitled to one-half of the net sale proceeds after the mortgage, real estate commission, and other attendant costs are paid, and after Mr. Krcmar is given credit for the value of his excluded property. In the event of a sale to a third party, Ms. Kanizaj shall vacate the property in accordance with the terms of the sale.

Garmatex Shares

- [92] The parties purchased 30,000 shares in a publicly traded company known as Garmatex for \$15,000. There is little to no value in those shares at this time. The parties agree that each one may retain their 15,000 shares registered in their own names.

Bank Accounts

- [93] The parties agree that they may keep the amounts presently in their own bank accounts.

RRSPs

- [94] I agree with Ms. Kanizaj that she is entitled to one-half of the increase in value of the RRSPs owned by Mr. Krcmar prior to their marriage. I also agree with her that the onus is on Mr. Krcmar to demonstrate with mathematical certainty the value that is excluded property: Asselin; Cizmich.
- [95] There is no dispute that Mr. Krcmar owned RRSPs well before he began cohabitation with Ms. Kanizaj. Those funds were the result of a life time of prior employment and a contribution of \$50,000, which he made from his first wife's life insurance proceeds. The issue is determining the amount that is excluded. The valuation documents in evidence extend as far back as December 9, 2004. He owned RRSPs in the amount of \$114,266.66 as of that date. He does not, unfortunately, have any documents showing the amount of the account at an earlier time (e.g., to the date of cohabitation). Mr. Krcmar is unable to obtain documents from his financial institutions extending that far back in time. Nor can he remember the amount.
- [96] I do not accept that as a consequence the entire valuation of the RRSP must be divided between them, particularly when Ms. Kanizaj acknowledges that Mr. Krcmar owned his own RRSPs and because she does not challenge his evidence about his contribution from his wife's life insurance, nor the information in the RRSP documents produced. That would, in my respectful opinion, extend the notion of mathematical certainty to the point of unfairness.

- [97] It is possible to determine a minimum amount that was owned by Mr. Krcmar without any detriment to Ms. Kanizaj. The RRSP documents show that the earnings of each fund within his RRSP on a percentage basis for the year. The highest amount during this period was 4.15%. Mr. Krcmar has proposed that this rate of return be applied to the balance as at December 9, 2004, in order to determine its value as of January 1, 2004. When it is, the amount is \$109,714.58. From there, Mr. Krcmar proposed a value for a monthly increase of his RRSP, using a conservative approach based on rates of return for the various mutual funds in his account. When using that approach, Mr. Krcmar came up with a value as at April 1, 2004 of \$110,852, which he should be determinative. I agree with him that this approach is conservative because the return in the other funds ranges between .31% and 3.51%. Nevertheless, to avoid the prospect of any unfairness to Ms. Kanizaj, my preference is to determine the value of the RRSPs as at the start of the year, i.e., the highly conservative value of \$109,714.58, and then to reduce it to \$100,000 as proposed by Ms. Kanizaj to avoid the prospect of any detriment to her.
- [98] There was also some uncertainty as to the increase in value of the RRSP to the date of separation. By February 13, 2015, the value was \$153,632.74. Mr. Krcmar should contact his RRSP plan administrator to determine the amount as of the date of separation, and from there to allocate one-half of the increase from \$100,000 to Ms. Kanizaj.
- [99] Mr. Krcmar also owns a second RRSP that he acknowledges was obtained during the marriage and should be allocated equally with Ms. Kanizaj up to the date of separation. He shall contact his plan administrator to determine that amount and to arrange for the allocation.
- [100] Mr. Krcmar's contributions following separation are excluded property and should be deducted from the amount to be allocated.
- [101] Once, Mr. Krcmar obtains the value of the first RRSP from his plan administrator, the net amount in the increase in that RRSP shall be divided equally between the parties by a rollover pursuant to the applicable provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). In respect of the second RRSP acquired during the parties' relationship, it shall be divided equally per a similar rollover.
- [102] Ms. Kanizaj seeks more than the increase in value of the first RRSP since cohabitation. She takes issue with withdrawals that Mr. Krcmar made from his RRSPs during and then following the marriage and seeks a share of those withdrawals, claiming they were used for Mr. Krcmar's sole benefit. I am satisfied that he used those funds to pay for family expenses during the marriage (mostly at a time that he was without other regular full time employment income) and then following separation in order to pay for family debt. Both parties benefitted from those payments and there is no need for credits to be given by one party to the other.

Mr. Krcmar's Pensions

- [103] Mr. Krcmar owns two pensions. The first is a pension from the Machinists Union valued at \$17,808.82 as of December 13, 2013. There is no evidence of current value. All of Mr. Krcmar's contributions were made prior to 1992. He says that amount is an excluded asset. I agree that his contributions to the pension, which were prior to the marriage, are excluded, but the increase in value during their relationship is a family asset and should be divided equally between them. There is no formal valuation of that amount, although the evidence suggests it is in the range of \$7,600 to \$8,820. Mr. Krcmar shall notify the pension administrator to have the increase in value determined and the necessary allocation to Ms. Kanizaj effected.
- [104] He is also contributing to a pension at Simon Fraser University. His contributions began post-separation and are included within the ambit of family assets. It is not clear whether he will realize his pension. In any event, Ms. Kanizaj does not assert a claim to it.

Mr. Krcmar's Canada Pension

- [105] The parties agree to a division of Mr. Krcmar's Canada Pension in accordance with applicable legislation. Mr. Krcmar and Ms. Kanizaj will take all necessary steps to effect that division.

Ford Escape

- [106] The parties agree that one-half the value of the 2005 Ford Escape owned by Mr. Krcmar shall be paid to Ms. Kanizaj. The value of the vehicle is agreed at \$6,000. Her interest is \$3,000. To facilitate her ability to work in the future, Mr. Krcmar should transfer title to Ms. Kanizaj and in return, he is entitled to be credited \$3,000 from the amount that he owes to Ms. Kanizaj.

Life Insurance Policies

- [107] Mr. Krcmar cancelled two life insurance policies which he obtained during his marriage, one insuring his life in the amount of \$100,000 and the other insuring Ms. Kanizaj's life in the amount of \$250,000. The difference in policy limits is explained by the much higher cost in obtaining coverage for Mr. Krcmar given his age.
- [108] Mr. Krcmar cancelled the policies (in 2013) because he could not afford to pay the premiums. He received a payment for the cash surrender value of one of the policies in the amount of \$2,983.85. That amount is a family asset. The other policy did not have a surrender value and hence, no monies were paid to Mr. Krcmar.
- [109] I do not accept Ms. Kanizaj's contention that Mr. Krcmar acted inappropriately when he cancelled the policies and then used the payment of the surrender value. Neither party could afford the monthly premiums. He does not dispute that the surrender value should

be shared. This amount has effectively been shared because it was used to pay expenses while Mr. Krcmar was paying to maintain the Surrey Home without any contribution from Ms. Kanizaj or Mr. Habjan. Consequently, he is not obligated to provide any credit to Ms. Kanizaj for the surrender value.

Household Chattels

[110] With the exception of the curtains in the Surrey Home, Mr. Krcmar has agreed to let Ms. Kanizaj retain the household chattels she has requested without requiring her to account for their value. I do not agree with Mr. Krcmar's characterization of the drapes as fixtures. No value has been established for the used curtains apart from Mr. Krcmar's estimate of their original cost several years ago. In the absence of such evidence, I have determined that Mr. Krcmar should pay one-half of a nominal amount of \$1,500 to Ms. Kanizaj, which is \$750.

Visa Bonus Dollars

[111] The parties accumulated bonus dollars on the Desjardins Visa account issued in Mr. Krcmar's name during their marriage in the amount of \$1,530.72. The dollars can be used to offset purchases made on the Visa on a one point to purchase dollar basis. They are a family asset and both share equally in the value. Mr. Krcmar is content to give the bonus dollars to Ms. Kanizaj which she may use with the Visa. The question is whether Desjardins will transfer the name on the card into Ms. Kanizaj's name and release Mr. Krcmar from his obligations. If they will, then it will be to her benefit because she will have a credit card she can use, which is something she has made a point of needing in her evidence. In that event, Mr. Krcmar will be credited one-half the bonus dollars, which is \$765.36. Otherwise, he shall pay that amount to her and keep the card.

Summary of Payments and Distributions

[112] The distribution of credits on allocation of family property results in Mr. Krcmar being obliged to make the following payments and effect the following distributions to Ms. Kanizaj:

- Surrey Home - \$80,239.15 to be paid to Ms. Kanizaj by Mr. Krcmar within two months if he purchases her interest in the Surrey Home, or if he is unable to do so, then one-half of the proceeds (net of commission, debts, and value of excluded property) forthwith upon the completion of its sale.
- RRSPs - Ms. Kanizaj's allocation entitlement from the marriage shall be determined and be rolled over to her in accordance with applicable legislation.

- Mr. Krcmar's Machinists Pension - the increase in value between the time of the parties' cohabitation and separation shall be determined, and one-half of that amount shall be allocated to Ms. Kanizaj.
- Mr. Krcmar's Canada Pension - shall be allocated to Ms. Kanizaj in accordance with applicable legislation.
- Ford Escape - upon Mr. Krcmar's transfer of title to the vehicle to Ms. Kanizaj, he shall be credited \$3,000 in respect of his obligation to make the payments required by these reasons.
- Drapes - \$750 shall be paid by Mr. Krcmar to Ms. Kanizaj.
- Visa bonus dollars - \$765.36 shall be credited to Mr. Krcmar in respect of his payment obligations set out in these reasons if Desjardins will transfer the card into Ms. Kanizaj's name and release him from his obligations. Otherwise, he shall pay that amount to Ms. Kanizaj.

Family Debts

Mr. Krcmar

- [113] As at May 2013, Mr. Krcmar had credit card debt in the amount of approximately \$1,200. It increased to over \$11,000 as at February 15, 2015. By the start of trial, his credit card debt was near the maximum limits and totalled just under \$26,000.
- [114] His line of credit debt increased from \$950 as at May 30, 2013 to \$17,000 as at February 15, 2015, and then to just over \$16,583 at the start of trial. He owes his son rent in the amount of \$3,750 (his son is borrowing money to assist his father with his living expenses).
- [115] Ms. Kanizaj has agreed to pay Mr. Krcmar for one-half of those debts as they stood at the time of separation. She claims that the increase in debt was on account of Mr. Krcmar's legal fees and post separation living expenses. I agree with her submission that she should not have to pay for Mr. Krcmar's debt incurred after separation that he incurred to pay his living expenses and legal fees for this action. An allocation of those expenses is not reflected in the evidence. I will leave it to the parties to agree on the amount within 30 days, failing which they can have it determined on an assessment before the Registrar.

Ms. Kanizaj

- [116] Ms. Kanizaj has personal debt in the amount of \$2,800 plus ongoing interest. It is not family debt and Mr. Krcmar is therefore not obligated to pay for any part of it.

Reimbursement of Legal Fees

[117] Mr. Krcmar paid some of Ms. Kanizaj's legal fees in 2014 by mistake. He stopped upon receiving appropriate legal advice. I agree with his submission that the accounts were paid in error and that he is entitled to reimbursement from Ms. Kanizaj in the amount of \$4,500. She has agreed that she is obliged to reimburse him. Mr. Krcmar is entitled to an offsetting credit in that amount from the total amount he has to pay to Ms. Kanizaj.

Spousal Support

Introductory Remarks

[118] Ms. Kanizaj's claim for spousal support is said in her pleadings to be based on the federal and provincial legislation.

[119] Section 15.2 of the Divorce Act sets out the factors to be considered when making an award for spousal support:

Factors

15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall 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.

[120] The objectives for spousal support, as applicable to this case, are set out in sub-section (6):

Objectives of spousal support order

15.2 (6) An order made under subsection (1) or an interim order under subsection (2) 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;
- (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.

[121] The FLA sets out similar objectives regarding spousal support at ss. 160-162.

- [122] Ms. Kanizaj seeks an order, once the Surrey Home is sold, for monthly spousal support based on the high-point of the range of Mr. Krcmar's Guideline income. If it is \$51,780, she seeks \$752 monthly for the remainder of her life (so long as Mr. Krcmar is alive), owing to what she asserts is her permanent medical disability and inability to work. If it is \$46,644, then the amount is \$675. Until the Surrey Home is sold, she seeks to maintain the status quo, with Mr. Krcmar paying her \$205 per month plus all household expenses. Alternatively, Ms. Kanizaj contends that a lump sum payment is appropriate.
- [123] Ms. Kanizaj submits that she is entitled to indefinite spousal support based on the compensatory and non-compensatory support models. For the former, she submits that after she immigrated to Canada she cared for their home, worked to renovate the Surrey Home, and gave up her family home in Croatia to remain in Canada. She says that she has also given up her independence by remaining in Canada, cannot drive, is limited because she cannot communicate in English, and is dependent on Mr. Habjan to assist her with daily living. In respect of the non-compensatory support model, Ms. Kanizaj submits that her significant health problems prevent her from working, even part time.
- [124] Mr. Krcmar agrees that Ms. Kanizaj is entitled to spousal support. He says that his spousal support obligation should be based on what he submits is his Guideline income of \$46,644 for so long as he is working at SFU, with a review taking place immediately following his retirement. He submits that the mid-point of the range of \$506 to \$675 per month - \$590 - for 4.5 to 9 years as the spousal support award is fair and one that should be ordered. He is not seeking any reimbursement from Ms. Kanizaj for occupational rent, nor is Mr. Krcmar seeking reimbursement for the money he has paid to cover the expenses for the Surrey Home even though it benefits Ms. Kanizaj. Finally, and although he questions whether it was an inheritance, he does not claim any part of the proceeds from the sale of her home in Croatia as family property.
- [125] I agree with Mr. Krcmar that it is appropriate to use his present income to determine his support obligation. To do otherwise would engage an artificial income that he cannot earn prior to his retirement.
- [126] The provisions of the Divorce Act concerning spousal support are intended to deal with the economic consequences for both parties of the breakdown of the marriage and to relieve economic hardship. Spousal support is one of a number of means by which equitable distribution may be achieved upon the breakdown of the marriage: *Moge v. Moge*, [1992] 3 S.C.R. 813 at paras. 42, 43, 45.
- [127] The factors and objectives set out in s. 15.2(6) are not an exhaustive list; the Divorce Act does not exclude other considerations. Further, no one factor or objective is to be given more weight than the other: *Moge* at paras. 52, 77. For example, self-sufficiency is not paramount and as an objective is, according to *Moge*, "tempered by the caveat that it is to be made a goal only 'in so far as practicable'": paras. 53-54; *Tedham v. Tedham*, 2005 BCCA 502, para. 33. The court is also to consider each party's ability to support a reasonable standard

of living beyond the basic necessities of life in respect of their individual circumstances, including age, gender, skills, education, needs, and means (e.g., employment capacity and ability to retrain): The analysis is focused on those circumstances at the time the order is made: *Taylor v. Taylor* (1998), 38 R.F.L. (4th) 408 (B.C.C.A.) at paras. 72, 74; *Chutter v. Chutter*, 2008 BCCA 507 at paras. 52-61, leave to appeal ref'd [2009] SCCA No. 41; *Fisher v. Fisher*, 2008 ONCA 11 at para. 53.

- [128] But the "means and needs" test is no longer an exclusive criterion: *Moge* at para. 50. Neither party is guaranteed the standard of living they enjoyed during the marriage. There may be disparities in their respective standards of living upon the breakdown of the marriage. One key factor is the length of time of the parties' relationship since, as *Moge* states at para. 84, "As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution". The parties' standard of living during the marriage is considered even though spousal support does not guarantee to either party the same standard of living enjoyed during the marriage. The longer the marriage, "the greater will be the presumptive claim to equal standards of living upon its dissolution": *Moge* at para. 84; *W. v. W.*, 2005 BCSC 1010 at para. 10.
- [129] The case law speaks of entitlement on the basis of compensatory, non-compensatory, and contractual support: see, e.g., *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 35, 37, 43. The third category is not applicable because the parties did not enter into a separation agreement.
- [130] Compensatory support is seen in the case authorities as the primary basis to determine support. It addresses economic disadvantages arising from the marriage or economic advantages conferred on the other spouse. Compensatory support principles are "rooted" in the "independent" model of marriage where "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": *Chutter* at paras. 50-51; *Bracklow* at para. 39; *Moge* at 861-863. The compensatory support analysis focuses on the contributions made by each spouse to the family for which compensation may be appropriate on the breakdown of the marriage. This approach recognizes opportunities given up by a spouse to maintain the household and care for children, and considers the corresponding lower earning potential along with their means and needs: *Chutter* at para. 50.
- [131] The non-compensatory support model considers the fundamental nature of the marriage itself (as a joint endeavour or "socio-economic partnership"), moral obligations arising from it, and the economic consequences of the marriage and its breakdown, including economic hardship: *Bracklow*, paras. 39-41, 49. Need alone (beyond the basic necessities of life) may be sufficient to support a claim for spousal support. The primary burden to meet the needs of the disadvantaged spouse falls on the other in order to narrow the gap between the needs and means of the spouses on the breakdown of the marriage: *Chutter* at para. 54; *Bracklow*

at paras. 43; 55-60.

- [132] One of the issues I must consider is Ms. Kanizaj's claim that her need, consequent on her disability, cannot be met on a compensatory basis. When need is established that is not met on a compensatory basis, for example where a spouse is ill or disabled at the time of the marriage breakup, it may, in some circumstances, be appropriate to turn to what Bracklow described as the "fundamental marriage obligation" to provide "just support" "[a]bsent negating factors": paras. 48-49 (see also *Walburger v. Lindsay*, 2015 BCSC 341 at para. 134). At the same time, the Court in Bracklow, at para. 54, recognized that a spouse who becomes disabled towards the end of a very short marriage may be entitled to spousal support by virtue of need, but that it may be unfair to order support to be paid for an indefinite period.
- [133] I turn now to my determination. In this case, Ms. Kanizaj did not suffer any economic hardship or adverse consequences from the marriage. Her earnings in Croatia were \$200 per month, or \$2,400 per year. She was only able to save \$500 throughout the time she worked in that country. She did not leave or pass over higher paying job opportunities to move to Canada. She was being supported by her employer during her sick leave absence. Ms. Kanizaj claims that she was fit to return to work before she left for Canada and said that she simply failed to obtain her doctor's note that she could return to work before she moved here. I have significant reservations about her overall credibility, and as a result, I am concerned about placing weight on any of her uncorroborated testimony. Regardless, once she moved to this country, all of her expenses and her lifestyle, as well as Mr. Habjan's, were entirely paid for by Mr. Krcmar. Ms. Kanizaj retained the proceeds from the sale of her family home by having her son deposit them into his bank account at a time that Mr. Krcmar was withdrawing funds from his RRSP to meet expenses because he had been disabled from working. I reject her evidence that Mr. Krcmar insisted that she not work during their marriage, and as I have set out in a prior section, I am satisfied that he encouraged her to work to improve her English language skills to make it easier to assimilate.
- [134] I do not accept that by moving to Canada to marry Mr. Krcmar, she has suffered economic hardship. I agree with Mr. Krcmar's submission that had she remained in Croatia the last 10 years and saved all of her salary, it would be no more than \$25,000. In all, Ms. Kanizaj's financial circumstances are not worse off than had she not moved to Canada and married Mr. Krcmar.
- [135] There is also no basis to say that Ms. Kanizaj's involvement in the renovations of the Surrey Home equalled or exceeded Mr. Krcmar's.

- [136] Ms. Kanizaj has chosen to remain in Canada while at the same time claiming that her life here will be an impoverished one without lifetime support from Mr. Krcmar. She has chosen not to return to Croatia, where life would not pose the same hardships because living costs are lower, Ms. Kanizaj has family supports, is eligible to receive a pension, and can find work and drive. I agree with Mr. Krcmar's submission that he should not suffer the consequences of choices freely made by Ms. Kanizaj.
- [137] In my opinion, Ms. Kanizaj's current need is what entitles her to spousal support. She has been depressed and unable to work.
- [138] I will turn now, as the starting point in the determination of the amount and duration of spousal support, to consider whether Ms. Kanizaj is permanently disabled or whether she is capable of gainful employment.

Is Ms. Kanizaj Able to Work?

- [139] The thrust of Ms. Kanizaj's claim is that she is permanently disabled with no likelihood of self-sufficiency. She relies on the decisions of the Court of Appeal in *Sitwell v. Sitwell*, [1998] B.C.J. No. 1172 (C.A.), *Skoreyko v. Skoreyko*, 2003 BCCA 554, and *Shellito v. Bensimhon*, 2008 BCCA 68 in support of her submission that an indefinite spousal support award should be ordered for the remainder of Mr. Krcmar's lifetime because her disability prevents her from finding employment. In *Shellito*, the Court of Appeal said that disability may warrant a departure from the Guidelines: para. 24.
- [140] The cases cited by Ms. Kanizaj are, in my respectful opinion, inapplicable because, as I explain in this section, I am satisfied that she is capable of working and obtaining gainful employment.
- [141] I find that she is able to comprehend English sufficiently to work at a job paying minimum wage at the very least.
- [142] I have previously set out my findings concerning Ms. Kanizaj's English language abilities. She chose not to enhance her English language skills, chose not to take the driver's licence examination, and chose to stop working at a job that was approximately a 10 minute drive from her home. None of it is due to Mr. Krcmar. Her isolation is due to her own actions.
- [143] The only question is whether her present medical circumstances prevent her from working. Ms. Kanizaj's thyroid cancer has been successfully treated with surgery on October 15, 2015. Her skin condition, which she says is on her neck, was not readily visible when she was in the witness box. Regardless, it does not restrict her from working. Her issues with constipation have also been resolved and she received medication for her insomnia.
- [144] The issue as I see it is her depression. The only independent support for Ms. Kanizaj's case came from a medical-legal report provided by her psychiatrist, Dr. Martina Smit, which is dated September 22, 2015. Dr. Smit did not testify at trial.

- [145] Ms. Kanizaj was diagnosed with major depressive disorder by Dr. Smit following her consultation in September 2014. Ms. Kanizaj was seen by Dr. Smit at the Surrey Mental Health Clinic on September 8, 2014 after having been referred by the Surrey Memorial Hospital Emergency Department in August 2014, when the psychiatrist on duty assessed Ms. Kanizaj as requiring outpatient psychiatric follow up. Ms. Kanizaj continued in outpatient treatment with Dr. Smit until April 26, 2015, when she was admitted to Langley Memorial Hospital's inpatient psychiatric ward. She was later transferred to Surrey Memorial Hospital's inpatient psychiatric ward on May 19, 2015 and remained hospitalized until August 21, 2015. According to Dr. Smit's medical-legal report dated September 22, 2015, she treated Ms. Kanizaj during most of her stay at Surrey Memorial Hospital (with occasional coverage provided by Dr. Smit's colleagues). Following her release on August 21, Ms. Kanizaj resumed outpatient follow up care with Dr. Smit at the Surrey Mental Health Clinic.
- [146] None of Ms. Kanizaj's evidence concerning her prior problems with depression (e.g., 2006-2007), concentration, and consultations with other psychiatrists was supported by any direct evidence other than her own. I am not prepared to place any weight on its credibility. References in Dr. Smit's report to Ms. Kanizaj's consultations and treatments with other medical doctors are from 2014 and 2015 and come from Dr. Smit's review of medical records. Apart from Dr. Smit's report, which was only recently obtained, there is no other independent evidence to support Ms. Kanizaj's evidence concerning her disabilities and inability to work.
- [147] Thus, the only credible and reliable evidence to demonstrate the onset of a medical disability that prevents her from working shows that Ms. Kanizaj's disability arose in July 2014 after the marriage ended. And that evidence is hearsay in the sense that it comes from Dr. Smit's review of clinical records.
- [148] In the next several paragraphs, I review Dr. Smit's diagnosis and prognosis. Dr. Smit did not testify such that I must only rely on her report, which I conclude relies quite heavily on the veracity of Ms. Kanizaj's statements and complaints to her. Before I discuss Dr. Smit's diagnosis and prognosis, I wish to note my concern that they depend in part on inaccurate information provided to her by Ms. Kanizaj. Specifically, Dr. Smit was operating under the belief that Ms. Kanizaj is isolated because she cannot speak English and is unable to work outside the home. One key component of Dr. Smit's opinions concerns Ms. Kanizaj's reported sense of isolation. Dr. Smit was clearly not aware that Ms. Kanizaj:
- (a) passed her first English language course;
 - (b) communicated with Mr. Krcmar's daughter in English;
 - (c) is proficient in other languages;
 - (d) successfully completed the English language portion of the practice driving tests that she took; and

- (e) worked part-time outside the home for a catering company between 2004 and 2011, stopping when she left for Croatia.

[149] Nor could Dr. Smit be aware that Ms. Kanizaj demonstrated sufficient concentration and such an ability to understand English that when giving evidence in this trial she was able to correct the interpreter about her choice of words to describe a nuanced Croatian language issue arising from Ms. Kanizaj's examination for discovery evidence.

[150] Further, Ms. Kanizaj inaccurately reported to Dr. Smit that prior to moving to Canada she was able to function well, and she did not advise Dr. Smit that she was on sick leave from work due to emotional stress.

[151] Dr. Smit provided the following diagnosis concerning Ms. Kanizaj's depression :

Major Depressive Disorder: this developed after moving to Canada and has persisted for last several years. Based on information obtained in interviews with Ms. Kanizaj and her son Dejan Habjan, psychosocial stressors appear to have played a significant role in development of the depression (including difficult marriage, limited supports, acculturation and adjustment issues such as not being able to learn English, drive or work outside home; major financial strain after separation from husband Mr. Ivan Krcmar). There may be some biological predisposition (no one in her family was formally diagnosed or treated for depression but her father, who nevertheless worked in agriculture all his life, was described as an unhappy, socially withdrawn man and a paternal aunt was described as having extreme fatigue). Prior to moving to Canada, Ms. Kanizaj reports she was able to work, drive a car and generally function well.

[Emphasis added]

[152] According to Dr. Smit, Ms. Kanizaj's symptoms were treated with medication, including antidepressants and "psychosocial interventions" including "behavioural activation and attending ward group psychotherapy," and then electroconvulsive therapy ("ECT") because she was found to have only partial improvement. Dr. Smit opined that when Ms. Kanizaj was discharged from the hospital in 2015, the plan was for her to have further ECT treatments in order to "fully treat her depression"; unfortunately, she has not received those further treatments due to available but limited time slots at the hospital being taken up "due to acuity of other patients". In contrast, Ms. Kanizaj's depression was, on discharge, described by Dr. Smit as having "partly remitted into upper end of mild range".

[153] As for prognosis, the medical evidence speaks only as of last September 2015, when Dr. Smit's report was completed. Dr. Smit stated in her report that "at this time", Ms. Kanizaj was unable to work, even part time, "due to significant depressive symptoms (including poor concentration, low energy, insomnia, depressed mood, anxiety, pessimistic thoughts, becoming easily overwhelmed)." Dr. Smit's prognosis for recovery was guarded but she said that there is a possibility that Ms. Kanizaj may be able to work part time:

Prognosis is guarded with respect to depression given severity and chronicity of her symptoms as well as treatment resistance. I am hopeful that with resolution of some of her contributing psychosocial stressors (i.e. divorce, finances) her mental state may respond better to antidepressant treatment, and there is a possibility she may then be able to work part time. However, other psychosocial factors such as limited supports and language barrier would still make it difficult for her to achieve even part time gainful employment in the near future. A further complicating factor is that Ms. Kanizaj has been quite sensitive to side effects -- of most concern is that she had significant cognitive side effects with ECT which were slow to resolve and this may limit ability to use this otherwise highly effective treatment. I am unable to elaborate on prognosis of her other conditions beyond information already stated above as this is outside my scope of practice.

[Emphasis added]

[154] In her evidence, Ms. Kanizaj blamed her depression and psychiatric issues on Mr. Krcmar, claiming that he created an intolerable living situation in the house. I do not find her evidence to be credible and I find there to be no merit in the claim. As noted, I have significant reservations about her credibility and candour. Apart from my overall concerns about her credibility, her continued overstatement of all matters adverse to Mr. Krcmar, and my concerns arising from specific instances where I have found her to have provided untruthful testimony, I also find Ms. Kanizaj's evidence in this respect to be devoid of credibility because she admitted that after Mr. Krcmar moved out of the Surrey Home, she called him and begged him to return.

[155] I made mention of Ms. Kanizaj's efforts to blame her depression on Mr. Krcmar because they reflect poorly on her credibility. When considering spousal support, however, there is no requirement for Ms. Kanizaj to prove a causal connection between her disability and the marriage.

[156] As well, Dr. Smit's report does not place the cause of Ms. Kanizaj's depression on Mr. Krcmar.

[157] Nor has Ms. Kanizaj provided any corroborative evidence to demonstrate that she had to stop work in Canada due to medical issues. Indeed, the first document evidencing her depression concerns her hospitalization four days before this case was originally set for trial in April 2015, which she did not attend. The only document in evidence supporting depression prior to trial is Dr. Smit's report.

[158] Therefore, I have significant concerns about the reliability (although through no fault on her part) of Dr. Smit's opinions concerning Ms. Kanizaj's ability to work and the factors causing or contributing to her depression. Even if it were the case that Ms. Kanizaj was unable to work when Dr. Smit penned her report in September 2015, I am satisfied on the balance of probabilities that Ms. Kanizaj was, at the time of trial, able to work at least in part time jobs for minimum wage.

- [159] As a result, an order for indefinite spousal support is inappropriate since I have found that Ms. Kanizaj is capable of gainful employment: *Nataros v. Nataros*, 2000 BCCA 55; *Hudson v. Hudson* (1989), 19 R.F.L. (3d) 409 (B.C.C.A.); *Rayvals v. Rayvals*, 2004 BCCA 630.
- [160] Given the poor bus service near the Surrey Home, Ms. Kanizaj will either have to relocate to a residence with better service or learn to drive. I am therefore of the opinion that income should be imputed to Ms. Kanizaj based on at minimum wage of \$10.45 per hour as legislated in this province, and a 20-hour work week, which is one-half of a full time 40 hour week, commencing three months from the date of these reasons, and then onward for a further six months. Full time minimum wage is approximately \$21,700 per annum, and therefore, approximately \$10,850 per annum for half time.
- [161] The initial three month window of time will allow Ms. Kanizaj time to complete her driving course and obtain part time employment. During the second window of six months, Ms. Kanizaj should be able to look for and secure full time employment. Thereafter, income based on full time hours at minimum wage, which is an annual income of just over \$21,000, should be imputed to her.

Quantum and Duration of Mr. Krcmar's Obligation to Pay Spousal Support

- [162] The Guidelines apply and I do not see any reason to depart from their application in order to determine Mr. Krcmar's spousal support obligation.
- [163] Applying the DivorceMate program to Mr. Krcmar's current Guideline income (of \$46,644), and the present income received by Ms. Kanizaj from government assisted programs (\$5,549.04), based on the length of the marriage and the respective ages of the parties the result is a range of spousal support payments from a low of \$506 to a high of \$675 per month.
- [164] In determining Mr. Krcmar's spousal support obligations, which I discuss in the following paragraphs, I have been mindful of the principles and objectives underlying both the compensatory and non-compensatory models of support. I have considered the parties' relative ages, the length of their marriage, their needs, their means (including their ability to continue to be gainfully employed and at what income levels), and their health. I have determined that Ms. Kanizaj is capable of working and have determined that she should be allowed time to integrate into the minimum wage work force on a full time basis. I have also determined that Mr. Krcmar has a short time frame in which he can continue to work, and only so long as his health permits him to.
- [165] If I were to determine spousal support on a monthly basis, I would, based on Ms. Kanizaj's needs and the moral obligations of marriage arising within the non-compensatory model, order Mr. Krcmar to pay support at the high end of the range, which is \$675 per month, for three months given Ms. Kanizaj's need to obtain her driver's license and find work. Thereafter, I would impute income to Ms. Kanizaj at minimum wage for one-half of full time hours for six months, and from there, impute income based on minimum wage at full

time hours, which is approximately \$21,000. Mr. Krcmar would receive credit for the sums he is paying to maintain the Surrey Home, particularly since Ms. Kanizaj is receiving disability payments and a housing allowance from the provincial government. For the first three months of income, I would fix support at the mid-point of the range, and thereafter, at the low point. I agree with Mr. Krcmar that he should not be expected to work past age 67 solely for the purpose of paying spousal support given his own health issues. The range for the duration of spousal support is 4.5 to 9 years as described in the DivorceMate table. Given Mr. Krcmar's health problems, a review would be in order when he retires and it would not be limited to a material change in circumstances. Ms. Kanizaj is considerably younger than Mr. Krcmar and she should, with bona fide effort, have fully integrated into the workforce in Canada so as to be able to obtain work at an income level exceeding minimum wage.

[166] Alternatively, I could order a lump sum payment in favour of Ms. Kanizaj pursuant to s. 15.2 of the Divorce Act (which also provides authority to order periodic payments). The case authorities describe different circumstances where a lump sum payment may be more appropriate than periodic payments. Four examples found in the case law are apt for this case, i.e., where:

- (a) one of the parties has retired or is due to retire: *Rees v. Rees*, [1980] B.C.J. No. 1680 (S.C.); *K.D.R.A. v. Y.J.A.A.*, 2014 BCSC 2310;
- (b) the payment gives one party financial independence that cannot be achieved by modest periodic payments: *Pennington v. Pennington* (1985), 49 R.F.L. (2d) 113 (B.C.C.A.);
- (c) the payor spouse has insufficient income to pay on an ongoing basis but has capital assets with which to satisfy an award: *Robinson v. Robinson*, 2011 BCSC 1489 at para. 102, *aff'd* 2012 BCCA 497; *Davis v. Crawford*, 2011 ONCA 294 at para. 71; and
- (d) it provides for the parties to achieve finality without further contact and further conflict: *English v. English*, 2011 BCSC 90; *Carter v. Carter* (1978), 3 R.F.L. (2d) 355 (Nfld. T.D.); *Hayre v. Hayre* (1973), 11 R.F.L. 188 (B.C.S.C.), *aff'd* [1975] B.C.J. No. 1092 (C.A.).

[167] A lump sum payment should not be made in the guise of support for the purpose of redistributing assets: *Davis* at para. 60. Whether the payment is appropriate and if it is, the amount of it, are determined after the division of family assets is determined (which I have done).

[168] A lump sum payment in this case benefits both parties. It allows Ms. Kanizaj to achieve her stated goal to make her own financial choices and it allows Mr. Krcmar the opportunity to retire without the burden of ongoing spousal support. A lump sum payment brings financial certainty to the parties and allows them to move on with their lives without the burden of the other's circumstances and choices. It avoids them having to return to court in the near future for a further assessment once Mr. Krcmar retires. In short, it allows Mr. Krcmar to meet his obligation to Ms. Kanizaj at a time when he will have the capital to do so

and allows her to avoid the risk of significantly reduced (or possibly no) support from Mr. Krcmar once he retires.

- [169] Using the parties' current incomes and ages, the DivorceMate software program shows a lump sum payment for Mr. Krcmar (taking into account the tax implications for him) at the high end of the range to be \$39,393 for 6 years, 9 months following separation. When part time minimum wage income for Ms. Kanizaj is used (rounding down to \$10,500), the lump sum amount drops to \$32,801, and the amount drops further to \$22,933 when full time minimum wage income is used (at \$21,000). Those figures assume a current net discount rate and risk-free rates of return from the government of Canada, and take into account the tax consequences to Mr. Krcmar. Of course, the payment amounts are lower if the mid-point and low-points of the range are used (e.g., \$34,409 (mid)/\$29,344 (low) based on current incomes, \$28,540/\$24,359 based on part time earnings for Ms. Kanizaj, and \$20,018/\$17,044 based on full time earnings for Ms. Kanizaj).
- [170] In some cases, the lump sum payment is calculated by multiplying the periodic support obligation by the length of time determined to be appropriate, and then determining the present value of that amount taking into account tax consequences and contingencies: e.g., *K.D.R.A. v. Y.J.A.A.* In other cases, the DivorceMate software has been relied upon to provide the necessary evidence in which to determine an appropriate award: e.g., *Foster v. Foster*, 2007 BCCA 83; *J.S.P. v. J.H.S.*, 2015 BCSC 1239 at paras. 296-300.
- [171] In this case, I am satisfied that the DivorceMate software provides a sufficient, reliable basis upon which to determine the amount of the payment. In assessing a fair and appropriate amount, I have taken into consideration my findings concerning Ms. Kanizaj's ability to work, her financial need until she is capable of returning to full time employment, and the lack of any economic hardship that has been caused to her by the marriage.
- [172] Ms. Kanizaj submits that a lump sum payment of \$40,000 is appropriate. Although it was not entirely clear, I took her submission in closing argument to mean from this point forward, which is over 33 months post separation, without regard for the money paid by Mr. Krcmar to date. A payment in that amount, as new money, is, in my respectful opinion, not justified for the following reasons.
- [173] First, Ms. Kanizaj's submission is premised on the same point she made in respect of periodic spousal support, i.e., her ongoing disability that prevents her from earning as well as Mr. Krcmar's ongoing ability to earn income past the age of 67. The submission overlooks Mr. Krcmar's looming retirement resulting from his health problems. Nor does the submission account for my findings concerning Ms. Kanizaj's ability to work full time earning minimum wage in nine months' time.
- [174] Second, the submission assumes a Guideline income that is higher than Mr. Krcmar earns.
- [175] Third, the submission does not take into account any of the support payments and payments to maintain the Surrey Home that Mr. Krcmar has paid post-separation.

- [176] Fourth, a lump sum payment in that amount would extend the outside end of the range of the highest category of spousal support. The DivorceMate software calculations for lump sum awards are predicated on 6 years, 9 months, which is the mid-point of the range of 4.5 to 9 years. As I have noted, DivorceMate shows that the maximum payment that Mr. Krcmar would have to make as a lump sum payment, assuming he is obliged to pay the amount shown in the highest category, is \$39,393. Mr. Krcmar has made payments to and for the benefit of Ms. Kanizaj for the last 33 months since separation. If she were to receive a lump sum payment of \$40,000 in addition to the monies that Mr. Krcmar has paid to date, Mr. Krcmar will have paid more than he would ever be obliged to.
- [177] In the circumstances of this case, I have determined that there should be an order for both lump sum spousal support and periodic ongoing payments. The Divorce Act permits mutual orders of periodic spousal support payments and a lump sum payment in appropriate circumstances: *Crawford v. Rekus*, [1995] B.C.J. No. 1821 (S.C.). This is one of those cases.
- [178] I have determined that the appropriate amount of the lump sum support payment is \$28,540. It is the mid-point of the range in circumstances where Ms. Kanizaj earns part time minimum wage income and Mr. Krcmar earns his current income for 6 years, 9 months from the date of separation. Periodic ongoing payments shall be made for a brief period of time to permit Ms. Kanizaj to become self-sufficient. In my opinion, Mr. Krcmar should continue to provide some further contribution until Ms. Kanizaj reaches the point in time that I have found she should be able to work full time earning minimum wage. This will serve to promote the objective in the Divorce Act that calls for spousal support to promote financial self-sufficiency. Mr. Krcmar has acknowledged in closing submissions that he is willing to pay further support while Ms. Kanizaj returns to the workforce.
- [179] In reaching my decision, I have not lost sight of the payments Mr. Krcmar has been making for spousal support and to maintain the Surrey Home and the fact that Ms. Kanizaj has not paid rent. In *Schaefer v. Schaefer*, 2009 BCSC 169 (at paras. 64-67), payments made by the husband to the mortgage on the family home along with other household payments were held to be the equivalent of paying spousal support. In the present case, Ms. Kanizaj agrees that those payments benefited her, but says that there is no formal claim for occupational rent advanced by Mr. Krcmar. This argument confuses the concept of occupational rent with the payments to maintain the Surrey Home, which is the parties' core family asset. In most cases for occupational rent, the party remaining in the matrimonial home was still paying the mortgage payments and the rest of the expenses associated with the home. There often ends up being a set off between the occupational rent owed to the party residing outside the home and the reimbursement required as a result of the payment on account of the mortgage and those expenses. Here, Ms. Kanizaj was not only living rent-free but also was not making any payments towards the Surrey Home. Thus, she has received a double benefit following separation.

- [180] I agree with Mr. Krcmar that the funds he has paid on behalf of Ms. Kanizaj to maintain the Surrey Home (including the mortgage) is an important factor to be considered because his contributions of her half, \$998.85, for 33 months since separation in May 2013 have provided a significant benefit to Ms. Kanizaj (including her interest in the Surrey Home). The value of those payments to March 1, 2016 is \$32,962.05. Those payments have also put Ms. Kanizaj in a position where she has been able to use her disability, spousal support, and housing allowance payments for food and other living expenses (for herself and her son) without having to pay rent for alternate accommodation. I agree with Mr. Krcmar that I should consider these payments as a credit when assessing an appropriate lump sum payment. I also agree with his submission that I should take into account the spousal support payments he has made in excess of \$7,000. The total value of Mr. Krcmar's contributions to the benefit of Ms. Kanizaj to date exceeds \$40,000. That sum does not reflect payments that he made for food for the parties and Mr. Habjan while Mr. Krcmar lived in the Surrey Home following separation and until he moved out on June 1, 2014, or Mr. Krcmar's payments for Ms. Kanizaj's medical expenses (including prescriptions) following separation. This amount paid by Mr. Krcmar to date for the benefit of Ms. Kanizaj since separation is at least the amount of the \$40,000 lump sum payment that Ms. Kanizaj is seeking from Mr. Krcmar.
- [181] The lump sum support payment that I have determined Mr. Krcmar is obliged to pay falls well below the amounts paid by Mr. Krcmar to or for the benefit of Ms. Kanizaj to date. I will observe that even if I were to have assessed Mr. Krcmar's support obligation based on a periodic basis (as opposed to a lump sum payment) and given him credits for those amounts, I would have reached the same conclusion, i.e., the amounts he has paid to date exceeds his spousal support obligation. The result is that when the payments Mr. Krcmar has paid to the benefit of Ms. Kanizaj to date are offset against his lump sum spousal support obligation of \$28,540, Ms. Kanizaj would owe Mr. Krcmar over \$11,000. However, I will note that in oral argument, Mr. Krcmar said that he does not seek the return of monies he has paid for Ms. Kanizaj's benefit. His submission was that those payments should be a factor for consideration. Accordingly, I will consider Mr. Krcmar's lump sum payment obligation to have been already paid through the past expenses, including mortgage payments which he has paid, leaving only the periodic payments.
- [182] Therefore, Mr. Krcmar is to sell the Surrey Home or buy out Ms. Kanizaj's interest in it in the next three months. Until he does, he shall continue to pay her periodic support of \$205 per month and continue to pay the expenses related to the Surrey Home. Once Ms. Kanizaj moves out of the Surrey Home within that three month period, Mr. Krcmar shall pay spousal support in the amount of \$675 per month for a period not to exceed three months from the date of these reasons. Thereafter, he shall pay \$474 per month for a further six months, at which time his obligation to pay spousal support shall terminate altogether.

Costs

[183] Mr. Krcmar's position at the outset of trial prevailed, for the most part, in the result. Subject to any matters that I am unaware of or any further submissions that the parties may wish to make, my view is that he should have his costs at Scale C.

"Walker J."

The Honourable Mr. Justice Walker

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