
CANADA / JUDGMENT

M. (M.E.) v. L. (P.)

[1992] 1 SCR 183

COURT

Supreme Court of Canada

DECIDED

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M. (M.E.) v. L. (P.)

Collection

Supreme Court Judgments

Date

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Report

[1992] 1 SCR 183

Case number

21387

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty;
McLachlin, Beverley

On appeal from

Quebec

Subjects

Family law

Notes

SCC Case Information: 21387

Decision Content

M. (M.E.) v. L. (P.), [1992] 1 S.C.R. 183

M.E.M.Appellant

v.

P.L.Respondent

Indexed as: M. (M.E.) v. L. (P.)

File No.: 21387.

1991: October 2; 1992: January 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.

on appeal from the court of appeal for quebec

Family law -- Compensatory allowance -- Discretion -- Divorce -- Family residence owned by wife -- Hypothecary loan repaid by husband -- Claim for compensatory allowance dismissed -- No reason to vary trial judge's findings -- Court of Appeal's intervention unwarranted -- Civil Code of Quebec, art. 559.

Family law -- Compensatory allowance -- Approach to be taken in considering facts -- Additional criteria for obtaining compensatory allowance -- Nature of contributions to enrichment of spouse's patrimony -- Effects of contracts concluded between parties -- Civil Code of Quebec, art. 559.

The parties were married in 1965 under the separation of property regime. During the marriage the appellant was primarily responsible for raising the couple's two children and doing the household chores. She also worked part-time and her income was deposited into the family account. The respondent for his part had a steady job and earned a modest income. The family residence was bought by the appellant two months before the marriage for \$13,000. She paid \$2,000 and the respondent \$1,000 as a deposit, and the appellant's father made his daughter a loan of \$10,000, secured by a hypothec and bearing interest at 4 percent. From 1965 to 1970, the respondent paid his father-in-law \$10,030 in repayment of capital and interest. He also paid the taxes and insurance on the house and did some renovation work. The house was sold in 1971 for \$14,000. The appellant used this amount to buy a new house for \$19,000. Once again, she was the sole owner of the house. The balance of the sale price was again lent by the appellant's father to his daughter. When the lender died in 1975, the respondent had repaid \$2,200 in capital and the appellant's mother made her daughter and son-in-law a present of the balance. From 1971 until early 1981, when the parties separated, the taxes, insurance and other expenses relating to the house were paid by the respondent. He also did renovation work. At the time of the divorce in 1984, the house was valued at \$54,000.

The Superior Court granted the divorce petition but dismissed the respondent's claim for a \$40,000 compensatory allowance. The court found the spouses' contributions virtually equivalent and concluded that there was no real, significant contribution which it could take into account in order to grant the claim. The repayment of the hypothecary loan and the payment of taxes and insurance could be regarded as equivalent to the payment of rent and considered as corresponding to a choice of quality of life. The various maintenance jobs were part of the duties

regularly performed by a spouse. The Court of Appeal, in a majority decision, reversed the decision on the compensatory allowance and ordered the payment of an allowance of \$40,000, holding that the repayment of the hypothec by the respondent was a contribution which had enriched the appellant's patrimony. This appeal is to determine whether the trial judge, in refusing to grant the respondent a compensatory allowance, exceeded the discretion conferred on him under the old art. 559 C.C.Q.

Held: The appeal should be allowed.

In order to be awarded a compensatory allowance, the claimant must establish: his or her contribution; the enrichment of the other spouse's patrimony; the causal link between the two (which must be "adequate" but does not have to be absolute), and the proportion in which the contribution made possible the enrichment. The claimant must also establish a concomitant impoverishment and the absence of justification for the enrichment. It is the overall, flexible and generous approach which must prevail in assessing all these elements.

In examining the facts under art. 559 C.C.Q., the trial judge should not give priority to contributions which are readily quantifiable. He should first weigh all contributions of the spouses, without making any distinction between contributions to the marriage and contributions to the patrimony. So-called "domestic" or "conjugal" contributions are part of the overall assessment of the matrimonial situation of the parties and must not be excluded a priori because of their nature. The distinction between contributions to the marriage and contributions to the patrimony is only used in determining justification.

The contracts concluded between the parties may be a "justification" for the enrichment of one of the spouses. Although in a compensatory allowance context marriage contracts and the matrimonial regime are not binding on the trial judge, they are relevant factors in assessing the parties' circumstances and their intentions. Article 559 C.C.Q. provides that the trial judge must take into account the advantages of the matrimonial regime and marriage contract. However, the weight and effect to be given to them are left to his discretion. In the case of a contract of sale or gift between spouses, the trial judge must decide what the parties intended at the time the contract in question was entered into. To do this, he must examine the lifestyle chosen and arrangements made by the parties during their marriage.

Article 559 C.C.Q. is an equitable provision which gives the trial judge a very large measure of discretion in granting a compensatory allowance. There are many factors which may be legitimately considered. For an appellate court to intervene, the trial judge's error must be obvious. In the present case, the Court of Appeal should not have intervened. The record contained evidence which justified the trial judge in exercising his discretion to deny the claim for a compensatory allowance. The respondent could never have benefited from the quality of life connected with living in a single-family house without the appellant's father's loan. This practically interest-free loan and the appellant's extra income helped the respondent to make his payments. The repayment of the hypothecary loan did not really impoverish the respondent, since he would in any case have had to house his family and he benefited from the use of a house

at very moderate cost. The appellant's enrichment is justified by her prudent management and by the respondent's contributions to the marriage. It is also justified by the fact that she gave up her career and worked only part-time for a number of years. During this time the respondent was paying into a pension fund. In this situation, it is reasonable to think that the house was intended as a patrimony for the appellant to compensate for her withdrawal from the labour market. The respondent never asked that the property also be put in his name. The trial judge viewed the parties' matrimonial situation from an overall perspective, without being caught up in figures and without attaching undue importance to the question of the house alone. There was no reason to vary his findings.

Cases Cited

Considered: *Lacroix v. Valois*, [1990] 2 S.C.R. 1259; referred to: *Lebrun v. Rodier*, [1978] C.A. 380; *Droit de la famille -- 67*, [1985] C.A. 135; *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67; *Droit de la famille -- 873*, [1990] R.D.F. 616; *Droit de la famille -- 866*, [1990] R.J.Q. 1833; *Droit de la famille -- 144*, [1987] R.J.Q. 253; *Droit de la famille -- 519*, [1988] R.D.F. 349; *Droit de la famille -- 391*, [1987] R.J.Q. 1988; *Sabourin v. Charlebois*, [1982] C.A. 361; *Droit de la famille -- 698*, [1989] R.J.Q. 2261.

Statutes and Regulations Cited

Civil Code of Quebec, arts. 462.14 [ad. 1989, c. 55, s. 8], 462.17 [idem], 559 [ad. 1980, c. 39, s. 1; rep. 1989, c. 55, s. 23].

Authors Cited

Caparros, Ernest. *Les régimes matrimoniaux au Québec*, 3e éd. Wilson & Lafleur, 1985.

APPEAL from a judgment of the Quebec Court of Appeal, [1989] R.J.Q. 271, 21 R.F.L. (3d) 265, 20 Q.A.C. 111, reversing a judgment of the Superior Court dismissing the respondent's claim for a compensatory allowance. Appeal allowed.

Nathalie Croteau and Carole De Lagrave, for the appellant.

Micheline Parizeau, for the respondent.

//Gonthier J.//

English version of the judgment of the Court delivered by

Gonthier J. -- The issue in this case is whether the trial judge, in refusing to grant the respondent P.L. a compensatory allowance, exceeded the discretion conferred on him under the old art. 559 of the Civil Code of Quebec ("C.C.Q."). Article 559 has since been replaced by art. 462.14 C.C.Q.

I -- Facts

The parties were married on September 4, 1965 under the separation of property regime. Two sons were born of this union, the first in 1966 and the second in 1972. During the marriage the appellant M.E.M. was primarily responsible for raising her children and looking after the family home. However, she worked part-time. The income she earned in this way was deposited into the family account. The respondent worked for Canada Post and earned only a modest income.

On June 30, 1965, two months before the marriage, the appellant bought a house in Pointe-aux-Trembles for \$13,000. At that time the respondent paid \$1,000 and the appellant \$2,000 as a deposit. The balance of the sale price was financed by the appellant's father, who made his daughter a loan of \$10,000 secured by a hypothec and bearing interest at 4 percent per annum. From 1965 to 1970, the respondent paid his father-in-law \$10,030 in repayment of capital and interest. During that period he also paid the taxes and insurance on this first house and did some renovation work.

The house was resold in July 1971 for \$14,000. The appellant used this amount to buy a new house for \$19,000. Once again, the appellant was the sole owner of the house. The balance of the sale price, namely \$5,000, was again lent by the appellant's father to his daughter, this time as a personal loan. When the lender died in 1975, the respondent had repaid \$2,200 in capital. The appellant's mother, as her husband's sole heir, made her daughter and son-in-law a present of the balance of \$2,800. From 1971 until early 1981, when the parties separated, the taxes, insurance and other expenses relating to the house were paid by the respondent. The respondent also did renovation work.

The decree nisi was granted by Paul Reeves J. on December 21, 1984. At the time of the divorce the evidence placed the value of the house at \$54,000. Reeves J. dismissed the claim for a \$40,000 compensatory allowance made by the respondent. He gave the appellant custody of the minor child and ordered the respondent to pay an alimentary pension of \$40 a week for that child. The respondent appealed.

On January 9, 1989 the Court of Appeal, per Vallerand and Rothman JJ.A and Fortin J. (ad hoc), affirmed the trial judgment as to the alimentary pension. However, Vallerand J.A. and Fortin J. ordered the appellant to pay the respondent a compensatory allowance of \$40,000 within one year. Rothman J.A. dissented on this point. It is this aspect of the decision which is now the subject of this appeal.

II -- Applicable Legislation

Civil Code of Quebec

559. The court, in granting a divorce, may order either spouse to pay to the other, as consideration for the latter's contribution, in goods or services, to the enrichment of the patrimony of the former, an allowance payable immediately or by instalments, taking into account, in particular, the advantages of the matrimonial regime and marriage contract.

The compensatory allowance may be paid, wholly or in part, by the granting of a right of ownership, use or habitation in accordance with articles 458 to 462.

III -- Judgments Below

Superior Court

Reeves J. began by stating that art. 559 C.C.Q. is an exceptional provision which must be applied in light of the other provisions of the Civil Code and the contractual agreements between the parties:

[translation] Article 559, which is an exceptional provision, must not override the provisions of the Code governing the conduct of the parties at the time of their marriage, when they have determined their contractual regime and concluded their marriage contract, when they have later each acquired reserved property, when during the marriage the parties have contributed time and energy to increasing the comfort and amenities of their married life.

He defined the contribution referred to in art. 559 as follows:

[translation] The contribution to increasing the other's patrimony is something in the nature of a surplus, something beyond the everyday, normal and even generous contributions made by each party, in the ordinary course of family life.

In this case, where the house belongs to the wife but it is the husband who has been responsible for repaying the hypothecary loan and for paying the taxes and insurance premiums, Reeves J. concluded that the husband's contributions may be regarded as equivalent to the payment of rent and may also be considered as corresponding to a choice of quality of life. He described the situation of the parties here as follows:

[translation] In the case at bar, this was not a house "bought" by the husband in his wife's name. The applicant's father lent the money necessary to purchase the house. Had it not been for that contribution, the parties would have lived modestly in rented premises, without being able to create any patrimonial asset.... The argument that the hypothec payments made by the respondent were neither more nor less than he would have had to pay in rent is a valid one. In return, he undoubtedly enjoyed a special measure of satisfaction from the quality of life inherent in the ownership and occupancy of a single-family home. . . . It is true that the respondent was responsible for maintaining, painting and doing some repair work on the house. Is this an extraordinary contribution? The answer has to be no. It is a common and virtually universal sharing of duties regularly performed by every spouse.

As to the fact that the wife was sole owner of the house, the judge added:

[translation] Throughout these years, the applicant agreed to his wife being the owner. He did not make any attempt to become co-owner.

He examined the contributions made by each party and found them virtually equivalent:

[translation] . . . the consideration for the respondent's contribution in time, energy and work consisted over the weeks, months and years in the prudent, and perhaps in the eyes of the respondent-applicant, too economical, management of the household affairs by his wife.

The judge accordingly concluded that there was no real, significant contribution which the court could take into account in order to grant P.L.'s claim for a compensatory allowance, even in part.

Court of Appeal, [1989] R.J.Q. 271 (sub nom. Droit de la famille -- 594)

Vallerand J.A.

Vallerand J.A. allowed P.L.'s appeal on the question of the compensatory allowance and ordered M.E.M. to pay him a compensatory allowance of \$40,000.

He began by setting out certain principles applicable to compensatory allowances which in his opinion are well established. First, he noted that it is the contribution to the patrimony which is the basis of the allowance, and observed that the payment by one spouse of the price of property owned by the other is an "obvious" contribution to the patrimony.

The judge went on to say that contributions to patrimony and contributions to the marriage should not be confused (at pp. 273-74):

[translation] The fact that one spouse provides the other and their children with free accommodation in a house owned by him or her seems to me to be more a matter of a contribution to the marriage than a contribution to the patrimony of the spouse who is thus provided with free shelter. In my opinion, with all due respect, holding the contrary would be to return to the position that everything done by one for the other must be accounted for

The equation made by the trial judge and our colleague Rothman J.A. between payment of the capital cost of the house on the one hand and on the other the free accommodation seems to me to lead to the set-off between a contribution to the patrimony and a contribution to the marriage. [Emphasis in original.]

He accordingly chose not to consider the payments by P.L. for interest on the capital, insurance or heating since, in the case at bar, these were [translation] "contributions to the marriage, to the family which should not be credited to the recipient of the compensatory allowance" (p. 274).

Vallerand J.A. considered it was not necessary to take the work done by the husband into account, since in his opinion the latter was entitled to the compensatory allowance he was claiming solely on the basis of the hypothecary payments. He set P.L.'s monetary contribution at 73 1/3 percent of the \$18,000 [sic] which the second house cost. Since the house was worth \$54,000 at the time of the divorce, therefore, the husband was entitled to \$39,600, an amount which the judge rounded off to \$40,000, the amount claimed as a compensatory allowance.

Fortin J. (ad hoc) -- Concurring

Fortin J. set the compensatory allowance at \$40,000. He rejected the conclusions of the trial judge, who regarded the repayment of the hypothecary loan as equivalent to the payment of rent and emphasized the contribution made by M.E.M.'s father (at p. 282):

[translation] The respondent's father did not make her a gift, but an interest-bearing loan just as any financial institution would have done, except that the latter probably would not have been satisfied with the guarantees provided by the borrower. The father's contribution consisted of the credit granted to his daughter, and indirectly to his son-in-law. I find it hard to accept that the hypothecary payments made by the appellant are nothing more or less than those he would have paid as rent, if one adds the interest, taxes and property insurance, to mention only those items. If in 1971, after having the benefit of adequate accommodation, the parties ended up with a property paid for in full, all things being equal, the positions of tenant and owner certainly are not equivalent to each other. The same is true for the second property.

Fortin J. considered that P.L.'s repayment of the loan was a contribution and that this contribution had enriched his wife's patrimony. He characterized the improvements and repairs to the two properties in the same way. He then made certain detailed calculations of the salaries, amounts deposited in the bank accounts, investments and so on, finally concluding that the allowance claimed was justified.

Rothman J.A. -- Dissenting

According to Rothman J.A., the main problem raised by this case was to determine whether the trial judge erred in denying the compensatory allowance to P.L. despite the latter's contribution to the purchase and maintenance of the house owned by his wife.

Rothman J.A. saw nothing in the renovation work done by P.L. to justify compensation under art. 559 C.C.Q. Additionally, he characterized the payment of the insurance premiums and taxes as "alimentary" just as the payment of rent would be; those contributions therefore did not provide a basis for a compensatory allowance either.

Rothman J.A. then considered the repayment of the loan by the husband. He noted that throughout these years P.L. had paid his father-in-law only \$30 in interest. He pointed out that the purchase of the two houses would never have taken place without the help of M.E.M.'s father, who lent his daughter almost the whole price on very favourable terms. He also considered that the equation made by Reeves J. between these hypothecary payments and rent was correct in the circumstances (at pp. 276-77):

Seen in this context, appellant's payments did no more than help provide housing for himself and his family at a cost that was not excessive or exaggerated. If respondent's patrimony was enriched by these payments, there was nothing unjustified about the enrichment. Appellant benefitted personally in having a place to live for himself and his family. He had a legal obligation to contribute towards the expenses of the marriage in accordance with his means (Article 445

C.C.Q.) and this certainly included the obligation to contribute to adequate housing, whether by way of rent or otherwise.

He accordingly concluded (at p. 277):

With respect for the contrary opinion, I would therefore not disturb the conclusion of the trial judge that the payments made by appellant do not justify a compensatory allowance. These payments did not, in my view, unjustifiably enrich respondent's patrimony.

...

The claim for a compensatory allowance under Article 559 C.C.Q. is a claim founded on the equitable principle of unjustified enrichment or "enrichissement sans cause". It is not every contribution made by one spouse to the other that will give rise to a compensatory allowance on divorce. To support a claim under Article 559 C.C.Q., there must, of course, be a contribution by one spouse which has enriched the patrimony of the other spouse and caused a corresponding impoverishment to the patrimony of the contributing spouse. But it is essential, as well, that the enrichment be unjustified or without cause.

Rothman J.A. summarized as follows the points in favour of upholding the trial judge's decision (at p. 279):

With respect, I do not think that, in allocating to appellant the lion's share of the capital appreciation of these properties, we would be reflecting respondent's undisputed ownership rights in the houses, the loans by her father, or the fact that appellant contributed no more to the capital cost of the properties than \$13,200, apparently without even paying the interest due on the loans to respondent's father.

Rothman J.A. would accordingly not have granted the allowance to P.L.

IV -- Issues

The appellant submitted the following issues to the Court:

[translation]

--What approach should be taken in considering the facts on a claim for a compensatory allowance under art. 559 C.C.Q.?

--What types of contribution, in goods or services, may contribute to the enrichment of the patrimony of a spouse?

V -- Analysis

Unlike the facts in *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, the particular circumstances of this appeal now give the Court an opportunity to express its opinion on a number of questions concerning the rules for awarding a compensatory allowance.

Before going further, however, it is important to look at the historical background of art. 559 C.C.Q. so as to gain a better understanding of the problem which this provision was intended to rectify.

Article 559 C.C.Q. and the "Mischief" Rule

Article 559 C.C.Q. was adopted to remedy the lack of legislation providing for other than alimentary claims in the event of a separation or divorce. Until 1982 the Quebec courts found that the legislation in effect did not provide for a redistribution of the patrimony between spouses. Mayrand J.A. wrote that:

[translation] In the present state of the law, the labour of both spouses can only enrich one of them without proportional recompense for the other. This is the foreseeable risk which spouses married under separation of property take and which only a legislative amendment or an agreement between the spouses could eliminate.

(Lebrun v. Rodier, [1978] C.A. 380, at p. 381.)

This situation was especially intolerable as the great majority of couples divorcing at that time were married under the separation of property regime, and in these more "traditional" couples, the wife generally had to forgo working outside the home in order to look after the family and had no assets in her patrimony. The "mischief" which the Quebec legislature clearly intended to correct was therefore this situation of spouses, usually wives, married under the regime of separation of property who found themselves destitute upon divorce. This Court indeed wrote in *Lacroix v. Valois*, supra, at p. 1276, that the compensatory allowance

is clearly intended to mitigate the injustices produced by the implementation of a freely adopted matrimonial regime . . .

The mechanism adopted by the legislature to correct these injustices between spouses was limited in nature, affecting only situations in which the patrimony of one spouse was enriched as the result of a contribution in goods and services by the other. As a result of the wording of art. 559, the courts established a connection between the action for a compensatory allowance and the action for unjust enrichment. They thereby set out a number of elements to be considered by the trial judge in examining the situation of the parties. Certain of these elements were adopted by the Court in *Lacroix v. Valois*.

The wording of art. 559 does not allow for a true redistribution of assets: this was noted by the Court in *Lacroix v. Valois*. This situation has in fact since been altered with the adoption of measures creating the family patrimony. The wording of art. 559 C.C.Q. left no doubt, however, as to the remedial and truly equitable nature of this provision. Article 559 C.C.Q. thus gives the trial judge a very large measure of discretion in granting a compensatory allowance: "The court . . . may order . . .". (Emphasis added.) I shall return to this notion of the essentially discretionary nature of the remedy provided by art. 559 C.C.Q.

Judicial Debate

The wording of art. 559 C.C.Q. has given rise to considerable judicial and academic debate as to the rules that should govern the granting of an allowance. One of these controversies concerned the nature of the causal connection that must exist between the contribution and the enrichment: this point was dealt with in *Lacroix v. Valois*.

Other disagreements still exist on the following points:

- (1) the nature of the contributions which may be a basis for the application of art. 559;
- (2) the existence of constituent elements other than those set out by the Court in *Lacroix v. Valois*, at p. 1277;
- (3) the weight that should be given to contracts (sales, gifts) between the parties: this question arises especially in cases where the family residence is in the name of one spouse (generally the wife) but was paid for by the other spouse.

These points partly overlap those submitted to the Court by the appellant in the case at bar. I shall therefore deal first with the appellant's arguments and then dispose of the three matters I have just mentioned.

Approach to be Taken in Considering the Facts on an Application for a Compensatory Allowance

The Court has already answered this question in the judgment rendered in *Lacroix v. Valois*. It is worth reproducing the relevant passage of that judgment, which is found at pp. 1277-78:

The elements which a party must establish in order to be awarded an allowance are stated by the Court of Appeal as follows . . .

- (1) his or her contribution;
- (2) the enrichment of his or her spouse's patrimony;
- (3) the causal link between the two;
- (4) the proportion in which the contribution made possible the enrichment.

This statement results from the wording of art. 559 and the natural incorporation of the remedy introduced by it into the general principles of civil law. I do not think there is any need to alter this statement, except to note that there must be great flexibility in evaluating the items it contains.

... The Court of Appeal has quite properly pointed out many times in subsequent cases that these items must be viewed as a whole, by an assessment free of calculations made to the nearest dollar The matrimonial context is special in that the keeping of precise, penny-pinching accounts which could eventually be used as evidence in a court is hard to reconcile with the idea generally held of marriage as being a peaceful union

In general, therefore, analysis of the factual and legal aspects of a compensatory allowance situation calls for special flexibility. [Emphasis added.]

Accordingly, it is the overall, flexible and generous approach described in *Lacroix v. Valois*, which must prevail in assessing all the constituent elements of art. 559 C.C.Q., and not only in examining the causal connection between the contribution and the enrichment.

Examining the Facts Under art. 559 C.C.Q. -- Nature of the Contributions

In this Court the appellant argued that in interpreting art. 559 C.C.Q. the judge should not give priority to contributions which are readily quantifiable, but on the contrary should consider all contributions, whatever their form or nature. The appellant is clearly referring to the distinction between "contributions to the marriage" and "contributions to the patrimony" on which Vallerand J.A. based part of his analysis in the case at bar. This distinction entails a two-stage analysis: first, it must be determined what contributions are not normal contributions to the expenses of the marriage, and second, having excluded these ordinary contributions, it must be decided whether the patrimony of one spouse has been unjustly enriched by the contribution of the other.

The flexibility rule set out in *Lacroix v. Valois* must guide such an analysis. Applying this principle, all contributions must first be weighed, without any distinction being made between contributions to the marriage and contributions to the patrimony. So-called "domestic" or "conjugal" contributions must not be excluded a priori because of their nature, but should be part of the overall assessment of the matrimonial situation. This approach was indeed recommended by Beauregard J.A. (dissenting in part) in *Droit de la famille -- 67*, [1985] C.A. 135, at p. 142:

[translation] In doing so, does the judge require a direct contribution, rarely found between spouses, or a contribution of the type found in households every day, "diffuse, vague and general, though real"? The Code does not say. Why should a distinction be made where the legislature has not made one, especially when the provision is remedial in nature? It is hard to imagine that the legislature could have intended to remunerate a spouse whose salary has paid the hypothec but not one whose salary pays the heating. I would not be any less liberal than the Supreme Court was in *Leatherdale v. Leatherdale*.

In my opinion this approach, in so far as it involves an initial overall assessment of the contributions, is more likely to lead to an understanding of the arrangement agreed on by the parties and the patrimonial results which followed. If we exclude the so-called "contributions towards the expenses of the marriage" from the analysis at the outset, we are overlooking without any particular reason (since the wording of art. 559 C.C.Q. does not require it) an overall view which may be very significant.

Further, failure to look at the "contributions towards the expenses of the marriage" and assess them may lead to unfair results in a compensatory allowance situation. Since the wife's contribution to the home is more fluid, less capable of being strictly proved, it is easy to regard it in its entirety as a contribution to the marriage and exclude it from the analysis. It is less easy to exclude the husband's contribution, as it is often monetary and lends itself to allocation depending on his employment. Thus, in the case at bar the majority reasons include the hypothecary payments as a contribution but exclude the payments for heating or taxes. The wife's contribution in services does not really lend itself to such allocation, because that contribution is not quantifiable and can only be assessed in terms of its quality and the often indirect benefit received by the husband.

Additionally, the distinction between "contributions to the marriage" and "contributions to the patrimony" appears in the very way in which it is stated to suggest that the normal contribution to the expenses of the marriage by a spouse can never give rise to enrichment of the patrimony of the other spouse. However, even normal contributions to the expenses of the marriage certainly may enrich the other spouse's patrimony.

This having been said, however, there is some logic in this distinction: a spouse who makes a normal contribution to family life certainly cannot expect to receive reimbursement equivalent to the value of that contribution upon a divorce. In relying on this concept of "contribution to the marriage", the Court of Appeal avoids such results by limiting the scope of art. 559 C.C.Q. However, it seems to me that the proper way of approaching the problem, and of taking this concept of normal contribution into consideration, should not depend on analysis of the contributions. Rather, it involves assessing the "cause" or "justification" for the enrichment. The question of whether the contribution is normal will be relevant to this assessment and to the exercise of judicial discretion under art. 559, taking the circumstances as a whole into account.

Additional Points to be Included in Considering the Facts

In *Lacroix v. Valois*, supra, the Court noted the close relationship between the action for a compensatory allowance and the action de in rem verso. The conditions for applying the doctrine of unjust enrichment were stated in *Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 77:

1. an enrichment;
2. an impoverishment;

3. a correlation between the enrichment and the impoverishment;
4. the absence of justification;
5. the absence of evasion of the law;
6. the absence of any other remedy.

Some of these elements overlap those already set out in *Lacroix v. Valois*:

- 1.a spouse's contribution;
- 2.the enrichment of the other spouse's patrimony;
- 3.the causal link between the two;
- 4.the proportion in which the contribution made possible the enrichment.

Additionally, several decisions of the Court of Appeal (see, for example, *Droit de la famille* -- 873, [1990] R.D.F. 616; *Droit de la famille* -- 866, [1990] R.J.Q. 1833) have also included the criteria of the concomitant impoverishment and the absence of justification for the enrichment. This approach seems logical to me since these are additional elements which the plaintiff must establish when he wants to take advantage of the action de in rem verso. The importance of determining the parties' true situation, together with the wording of art. 559 C.C.Q., seem to me to favour the inclusion of these two elements in the analysis.

Accordingly, if one of the parties has contributed to enriching his or her spouse's patrimony without suffering a corresponding impoverishment, for what reason should he or she be granted an allowance? Article 559 C.C.Q. does mention that the allowance serves as "consideration" -- this suggests that there is a genuine patrimonial imbalance, an injustice to be corrected. Similarly, if the parties have freely agreed to transfer property to the spouse who remains at home in order to provide him or her with a patrimony, how can it be said that this enrichment is unjustified? Since I think it is necessary in awarding the allowance to analyze the situation in a spirit of equity and justice, these two criteria of impoverishment and absence of justification seem to me to be essential to the analysis of the specific situation of the parties. The flexibility recommended by the Court in *Lacroix v. Valois* then becomes of the greatest importance.

I adopt this passage from the text by Professor Caparros, cited by Rothman J.A. in the case at bar:

[translation] Accordingly, to succeed in a claim for a compensatory allowance it is necessary to establish an impoverishment of the claimant which has resulted in an enrichment of the defendant, and an absence of cause for that enrichment. If the absence of cause is not taken into account, arbitrary action may result. Once there is an impoverishment, enrichment and causal link, even if the enrichment is justified, there may be a tendency to take away property from someone who is validly enriched. Let us not forget that the great underlying principle is that each person should be given his due, not have it taken away.

(Ernest Caparros, *Les régimes matrimoniaux au Québec* (3rd ed. 1985), at p. 61.)

The contracts concluded between the parties are in fact an excellent example of what may be a "justification" for the enrichment of a spouse.

Effects of Contracts Concluded Between the Parties

The "absence of justification" factor is the appropriate channel for dealing with contracts that may have been concluded by the parties before or during the marriage. It can thus be considered that certain contracts concluded between the parties may be a justification for the enrichment of one of the spouses.

Let us deal first with the particular case of marriage contracts and matrimonial regimes. I hasten to point out that marriage contracts and the choice of a matrimonial regime are not binding on the trial judge in the granting of a compensatory allowance. In this connection, the Court of Appeal has in a number of decisions adopted a very proper position in refusing to consider traditional marriage contract clauses concerning expenses of the marriage as bars to a compensatory allowance claim (see *Droit de la famille* -- 144, [1987] R.J.Q. 253 (McCarthy and Monet JJ.A.); *Droit de la famille* -- 519, [1988] R.D.F. 349 (Tyndale and Tourigny JJ.A. and Meyer J. (ad hoc)); and the dissent by Tyndale J.A. in *Droit de la famille* -- 391, [1987] R.J.Q. 1988). We must avoid falling again into the trap of the matrimonial "cause" of the enrichment, which was regarded as justification for the impoverishment of spouses married under separation of property before art. 559 C.C.Q. came into effect (see *Sabourin v. Charlebois*, [1982] C.A. 361).

This does not mean that they cannot be relevant factors in assessing the parties' circumstances and their intentions. That is how I understand Reeves J.'s comments on the exceptional nature of art. 559 C.C.Q. and the fact that it should not take precedence over the provisions of the Civil Code governing the choice of matrimonial regime and the conclusion of the marriage contract. Article 559 C.C.Q. provides that the judge must take into account the advantages of the matrimonial regime and marriage contract. However, the weight and effect to be given to them are left to the discretion of the trial judge.

The spouses may also have concluded contracts of sale or gift by which certain property was transferred from one spouse's patrimony to the other's. A husband may thus have transferred ownership of the family residence to his wife to provide her with a patrimony. This decision to benefit the wife may constitute a "justification" or cause for the enrichment of the latter's patrimony, in which case the husband could not subsequently claim what he had freely given or sold.

Whether expressly or by implication, transferring property to the patrimony of the disadvantaged spouse may ultimately amount to recognizing and discharging the latter's claim for a compensatory allowance. The new art. 462.17 C.C.Q. does in fact recognize this possibility of paying the compensatory allowance during the marriage and by means of a contract:

462.17 One of the spouses may, during the marriage, agree with the other spouse to make partial payment of the compensatory allowance. The payment received must be deducted when the time comes to fix the value of the compensatory allowance.

Once again, it is for the trial judge to decide what the parties intended at the time the contract in question was entered into. To do this, therefore, he must examine the lifestyle chosen and arrangements made by the parties during their marriage. It may be that the only purpose of the gift was to place property beyond the reach of creditors (see *Droit de la famille* -- 698), [1989] R.J.Q. 2261 (C.A.)), in which case the donor may be awarded a compensatory allowance; but it may have served both as protection against creditors and as compensation. A good example of this kind of situation is *Droit de la famille* -- 866, *supra*. The following is the relevant extract from the reasons of Rothman J.A., at pp. 1838-39:

It is perfectly plausible that the parties would have intended to benefit the wife and the family by having the house purchased in her name while, at the same time, protecting this important family asset from possible future claims of business creditors. Many couples purchasing a home do so with both of these purposes in mind. There is no contradiction here and no incompatibility between the two purposes.

The contradiction arises only when respondent attempts to recover, by way of compensatory allowance, the payments he willingly made for a house that he and his wife decided would be purchased by her. At no time until the divorce proceedings were taken was there any question that the payments were not being made for her benefit or that they would be subject to reimbursement or compensation.

In short, while the payments made by respondent did enrich appellant's patrimony, this was obviously what the parties intended. It is difficult to imagine that respondent could have made the payments that he did on the house that his wife had purchased without intending to benefit her, albeit, at the same time, protecting the house from his creditors.

Nor is there anything unusual in the path the parties followed. They did what many generations of Quebec couples have done. They married under a regime of separation as to property, providing in their marriage contract for various gifts of future property. They purchased their family home in the wife's name while the husband made the payments on the house because he was the wage-earner. The parties were obviously aware that the wife could not herself make these payments, having agreed to remain at home to look after the children. Unless the entire arrangement was a subterfuge designed to hide the true ownership of the property from respondent's creditors, what purpose, other than a benefit to the wife, could possibly have been intended by the parties?

The claim for a compensatory payment under article 559 C.C.Q. is a claim founded on the equitable principle of unjustified enrichment or enrichissement sans cause. It is not every contribution made by one spouse to another that will give rise to a compensatory allowance. There must, of course, be an enrichment and an impoverishment. But it is essential, as well, that the enrichment be without cause.

Far from being without cause in this case, the enrichment of appellant's patrimony by respondent's contributions seems to me exactly what the parties intended in the arrangements they made.

Nor does this result seem unjustified or inequitable. Appellant gave up her own teaching career and salary for some 20 years to look after the house and children. This left respondent free to pursue his business career. It does not seem to me unjustified or unfair that during this period respondent was contributing to appellant's equity in the house while he was building up his own equity in the business. [Emphasis added in final paragraph.]

Principles for Applying the Compensatory Allowance and Discretionary Power

The elements of the compensatory allowance which I have identified are thus the following:

- (1) the contribution, whatever its nature and form;
- (2) the enrichment;
- (3) the causal link, which must be "adequate", but does not have to be absolute;
- (4) the proportion in which the contribution has made possible the enrichment;
- (5) the concomitant impoverishment of the person making the contribution;
- (6) the absence of justification for the enrichment. The distinction between contributions to the marriage and contributions to the patrimony is only used in determining justification.

Before going on to analyze the circumstances of this case, I feel it is worth emphasizing the deference that must be accorded to the discretionary power of the trial judge under art. 559 C.C.Q. Clearly this principle is general in application, but it assumes even greater importance in family law for two reasons. The situation arising where a family is in the process of dissolving is unique. First, financial matters must be dealt with quickly so as to avoid exhausting the parties' resources and allow them to start their lives anew. Second, this is an area where the parties have generally not kept documents that would provide evidence of each one's contribution. Oral evidence is thus of first importance, and assessing the credibility of witnesses is very much the function of the trial judge. In a proceeding involving a compensatory allowance, a trial judge's error must be obvious for an appellate court to intervene.

This principle was set out in *Lacroix v. Valois*, supra, at p. 1275:

The awarding of a compensatory allowance or lump sum rests upon a decision that depends to a large extent on the trial judge's ability to assess the facts. In performing this difficult judicial exercise, there are many factors which the trial judge may legitimately consider as, in relation to both compensatory allowances and lump sums, the legislator has recognized the need for broad discretion by adopting enabling provisions which have an essentially open texture. In such a context, the function of an appellate court is to correct errors of law made at trial in exercising the discretion conferred by law. It goes without saying that assessing the facts is the prerogative of the trial judge and that, unless it can identify such an egregious error in this regard that it indicates an error of legal principle, the Court of Appeal is not justified in intervening.

This latitude in assessing "factors which the trial judge may legitimately consider" will occur in particular in the examining of the reasons justifying the enrichment, which may well be done from an overall perspective and will often underlie the judge's decision whether or not to use his discretionary power to alter the parties' patrimonial situation resulting from their agreements or from the circumstances.

The fact of giving greater deference to the trial judge's decision may, at least *prima facie*, lead to "contradictory decisions". This difficulty is inherent in the subject-matter, but it is the result of a flexible system in which the judge exercises an equitable power. Article 559 C.C.Q. (and its successor, art. 462.14 C.C.Q.) is just such an equitable provision, which clearly confers a remedial and discretionary power on the trial judge.

Application to the Case at Bar

In the case at bar, the record contained evidence which justified the trial judge in exercising his discretion to deny the compensatory allowance to the respondent. The Court does not have to decide whether it would have exercised its discretion in the same way. Questioning a trial judge's findings of fact where there has been no error of law can only encourage appeals, a particularly unfortunate development in family matters. The Court must instead inquire whether the trial judge exercised his discretion judicially. With all due respect for the contrary opinion, I believe that the judge exercised his discretion reasonably.

Let us consider what was before the judge in making his decision. In the case at bar we can identify, as a contribution, the appellant's work at home, as well as her work outside the home (extra income used to support the family), and the fact that she was able to get her father to lend her the money to finance the purchase of the house. The respondent, for his part, paid the expenses connected with the house (hypothec, taxes, heating, insurance and so on) and supporting the family. He did maintenance and renovation work on the house. However, he paid only \$30 in interest to his father-in-law over all those years. There was accordingly indirect assistance by the father to his daughter which the respondent cannot now lay any claim to.

At the time of the break-up, the appellant has the benefit of a furnished house. The respondent has his car, some savings and his career (job security at the post office, a pension fund equivalent to 80 percent of his salary on retirement).

The appellant's enrichment may be ascribed in part to the respondent's contribution. However, it should not be forgotten that without this practically interest-free loan from the appellant's father, the respondent could never have "bought" this house. I am of the view that the trial judge's observations to the effect that the respondent benefited from the quality of life connected with living in a single-family house are very apt. The trial judge also noted that the appellant's thrift and sense of organization had a positive impact on the couple's finances. Judging from the amount which the appellant has been able to save since the break-up (nearly \$30,000), it may well be concluded that without his wife the respondent might not even have been able to repay the capital on the loan. The appellant's extra income also helped the respondent to make the hypothecary payments.

The impoverishment of the respondent is not truly obvious, since he would in any case have had to house himself and his family somewhere. On the contrary, he benefited from the use of a house at very moderate cost.

Is there a justification for this "enrichment" of the appellant? The judge essentially concluded that her enrichment was justified as a contribution by the respondent to the marriage and by the appellant's prudent management. I am also of the view that the fact she gave up her career and worked only part-time for a number of years is another justification. It should be noted that during this time the respondent was paying into a pension fund. In this situation, it is reasonable to think that the house was intended as a patrimony for the appellant to compensate for her withdrawal from the labour market. It is important in this regard to fully understand and respect the arrangements intended by the parties, so long as they are not a cause of injustice. Moreover, the respondent could at any time have asked that the property also be put in his name. He never did this, and until the divorce proceedings were brought never claimed to have any right of any kind to the house on which he had assumed the hypothecary payments.

The appellant has since made savings and is now in a relatively good financial position: she should not be penalized for this. She will not have as good a pension as the respondent. Furthermore, in equity, some allowance must be made for the very low alimentary pension paid by the respondent for the minor child in the appellant's custody (\$2,000 a year, whereas the trial judge himself found that the financial burden of caring for the child is at least \$5,000 a year). The trial judge no doubt took this fact into account in his decision to deny the allowance. This seems quite logical to me.

Accordingly, I see no reason to vary the trial judge's findings. He used his discretion reasonably in light of the facts as a whole. He viewed the situation from an overall perspective, without being caught up in figures and without attaching undue importance to the question of the house alone. Did he have before him a situation so inequitable that he should have exercised his discretion to grant the respondent a compensatory allowance? I do not believe so. The evidence in the record allowed the judge to deny the respondent a compensatory allowance. With respect, I consider that he acted within the discretion conferred on him by art. 559 C.C.Q. and that there was accordingly no basis for reversing his decision.

The Court cited in *Lacroix v. Valois*, supra, at p. 1285, the decision of the Court of Appeal in the case at bar in the following passage:

In the case of a compensatory allowance, the classic example is that of a spouse who helps pay for the family residence of which the other spouse is the sole owner: the courts have recognized that the spouse making the contribution will have an action for the additional value of the residence to the extent of the contribution made (see, for example, . . . *Droit de la famille* -- 594, [1989] R.J.Q. 271 (C.A.)).

This obiter remark was inserted to illustrate the classic situation in which one of the spouses pays for a house belonging to the other. That does not mean that, once the contribution, enrichment and concomitant impoverishment have been proven, the trial judge has no discretion to determine whether there is a justification for that enrichment.

VI -- Disposition

For these reasons, I must conclude that the Superior Court judge acted within the discretion conferred on him by art. 559 C.C.Q. His judgment contains no error that could affect the validity of his disposition. In the case at bar, therefore, the Court of Appeal's intervention was not justified.

I would allow the appeal. The respondent will not be awarded any compensatory allowance. There will be no award as to costs.

Appeal allowed.

Solicitors for the appellant: Parizeau, De Lagrave & Croteau, Outremont.

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