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COURT OF APPEAL FOR ONTARIO

GILLESE, JURIANSZ and LAFORME JJ.A.

B E T W E E N :	)	
	)	
CHRISTINE LOUISE STROBELE	)	**Stanley P. Jaskot and D. A. Willer**
Applicant (Respondent/ Appellant by way of Cross-Appeal)	)	**for the respondent/ appellant by way of cross-appeal**
	)	
- and -	)	
	)	
JOHANN GEORG STROBELE	)	**Patrick D. Schmidt and George Karahotzitis for the appellant/**
Respondent (Appellant/ Respondent by way of Cross-Appeal)	)	**respondent by way of cross-appeal**
	)	
	)	
	)	**Heard: September 20, 2006**

On appeal from the final order of Justice David L. Corbett of the Superior Court of Justice dated June 1, 2005.

GILLESE J.A.:

OVERVIEW

[1] During their marriage, the parties built their dream home (the "new matrimonial home"). The new matrimonial home was constructed on property in Milton, Ontario that Dr. Strobele, the appellant, owned prior to the marriage. Unfortunately, the cost of construction of the new matrimonial home more than exhausted the parties' financial resources. At the date of separation, the property was subject to significant debt.

[2] When their marriage ended, Dr. Strobele stayed in the new matrimonial home. Ms. Strobele sought, among other things, compensation for the money that she had contributed towards its construction.

[3] After an eight-day trial in which both parties were self-represented, Corbett J. found that as at June 18, 2002, the date of separation, the "as-built"

value of the new matrimonial home was $1.8 million and the market value of the property was $1.1 million. Debts of $1.4 million were owed in respect of the property.

[4] The trial judge issued a final order dated June 1, 2005, (the "Order") in which he declared Ms. Strobele to be a fifty percent equitable owner of the matrimonial home, on the basis of resulting trust principles. He gave Dr. Strobele the option of remaining in the property or selling it. If the property were sold, the process prescribed by the *Family Law Act*, R.S.O. 1990, c. F.3, for the equalization of net family property would be followed. If, however, Dr. Strobele chose to remain in the matrimonial home, he was ordered to pay to Ms. Strobele the sum of $160,000, a figure arrived at by departing from a "strict application" of the equalization principles.

[5] Dr. Strobele appeals. The primary relief he seeks on appeal is an order setting aside all parts of the Order below that relate to the property and dismissing Ms. Strobele's claims, other than her claim for divorce.

[6] Ms. Strobele cross-appeals. She asks for an order:

1. declaring the value of the property to be $1.8 million for equalization purposes;
2. requiring Dr. Strobele to pay her $240,000 as compensation for her contribution to the cost of construction of the new matrimonial home; and,
3. that Dr. Strobele's net family property statement include a figure of $66,901 for the value of household contents.

[7] Through inadvertence, the trial judge neglected to grant a divorce dissolving the parties' marriage. The parties joined in asking this court to grant the divorce. At the oral hearing of the appeal and cross-appeal on September 20, 2006, this court made the necessary findings and granted the divorce.

[8] For the reasons that follow, I would grant the appeal and dismiss the cross-appeal.

BACKGROUND

[9] Dr. Strobele bought the property in 1987. Ms. Strobele moved onto the property in 1994 when she and Dr. Strobele began living together. They continued to reside on the property after their marriage on September 13, 1995.

[10] Before their marriage, the parties entered into a marriage contract. The contract is dated September 1, 1995. It establishes the values of the parties' pre-marriage property and provides that, in the event of marriage breakdown, each party is entitled to deduct the value of that property when calculating their

respective net family property values, even if the property had become the matrimonial home.

[11] The trial judge found the marriage contract to be valid. He noted that the parties were well-educated and each had the assistance of legal counsel in negotiating the terms of the marriage contract. He also found there was nothing unusual in the circumstances surrounding its negotiation and execution. He found the value of Dr. Strobele's pre-marriage property to be $430,000 and the value of Ms. Strobele's pre-marriage property to be $16,000. He also found that the property was the only material asset taken into account in establishing the value of Dr. Strobele's pre-marriage property.

[12] Dr. Strobele's evidence was that at the time the marriage contract was negotiated in the summer of 1995, the value of the home was approximately $490,000, with debts of $60,000 registered against it. An appraisal report dated December 4, 2002 prepared by Mr. John F. Vivian and filed as an exhibit at trial, estimated the market value of the home to be $475,000 in July 1995.

[13] Title to the property was, at all times, registered in Dr. Strobele's name alone.

[14] During the summer of 2000, the house on the property in which the parties lived was demolished. Construction on the new matrimonial home was undertaken and completed in June of 2002.

[15] The initial estimate of the construction cost of the new matrimonial home was between $500,000 and $600,000. The ultimate cost of construction, as found by the trial judge, was $1.8 million.

[16] The trial judge found the market value of the property to be $1.1 million in June 2002 and $1.2 million in April 2004. He found the date of separation to be June 18, 2002. At that time, the property was subject to debt of $1.4 million.

[17] Ms. Strobele was found to have contributed $240,000 to the cost of construction of the new matrimonial home. The trial judge found that Dr. Strobele had contributed "substantially" more to the cost of construction than did Ms. Strobele.

[18] The trial judge gave Dr. Strobele the option of selling the property or continuing to live in it. He attached a different formula for the division of property depending on which option Dr. Strobele chose. If he chose to remain in the property, he was required to pay Ms. Strobele $160,000. This, the trial judge said, was the amount Ms. Strobele was owed due to having acquired a fifty per cent interest in the property, based on resulting trust principles, after allowance was made for the fact that the property was worth substantially less than it cost to build. In setting the figure of $160,000, the trial judge expressly departed from the rules prescribed by the *Family Law Act* for equalization of net family property. He stated that the appropriate way to resolve the parties' dispute was "to depart from

the strict application of the equalization [rules]" and to "acknowledge the value of the home in Dr. Strobele's hands".

[19] If, on the other hand, Dr. Strobele chose to sell the property, the sale proceeds and the debt would be divided equally between the parties. Each party's net family property would then be calculated in accordance with the various findings of fact that had been made and the party with the greater net family property would pay the other an equalization payment of half the difference. In other words, the equalization provisions would be followed.

THE ISSUES

[20] While the parties raise a number of issues on appeal and cross-appeal, the essence of their dispute is this. They built the new matrimonial home at a cost that greatly exceeded the price that a third party would pay for the property. The debt against the property exceeded its market value at the date of separation. Dr. Strobele continues to live on the property and Ms. Strobele wants $240,000 as compensation for the money that she contributed to the construction of the new matrimonial home.

[21] To resolve this dispute, it must be determined whether the trial judge erred in:

1. finding the value of the new matrimonial home to be $1.1 million at the date of separation;
2. declaring Ms. Strobele to be an equitable owner of fifty per cent of the property, based on resulting trust principles; and,
3. failing to find that Dr. Strobele owes Ms. Strobele $240,000 based on unjust enrichment principles.

The cross-appeal raises the additional issue of whether the trial judge erred in:

4. finding that the household contents had been divided equally between the parties and in failing to include $66,901, the alleged value of household contents retained by Dr. Strobele, in Dr. Strobele's net family property.

1. VALUE OF THE PROPERTY

[22] Ms. Strobele urges the court to take a "cost to build" approach to the value of the property, rather than a market value approach. Accordingly, instead of the market value of $1.1 million, as found by the trial judge, she says that $1.8 million ought to be used as the value of the property for purposes of calculating Dr. Strobele's net family property. She contends that the "cost to build" approach is warranted in the circumstances of this case because the parties agreed together to spend large sums on the construction of the new matrimonial home, believing they would reside on the property for the remainder of their lives. She says it is unfair

to allow Dr. Strobele to stay on the property and enjoy the benefit of the new matrimonial home without compensating her for the money that she contributed to its construction and that using a "cost to build" approach assists in resolving that unfairness.

[23] The trial judge rejected this argument, saying at pages 36 to 37 of the reasons:

> [W]e cannot embark on a process of attributing subjective value to property in matrimonial disputes and the reason for that is this: it would arise in every case in respect to a broad range of assets, everything ranging from sentimental assets of no market value whatsoever but of great personal sentimental value to very large ticket items such as houses and cottages and the like. It is a measure that will conflate the matrimonial property process and ultimately lead to results that cannot be borne by the parties because they will be asked to pay amounts of money they cannot afford. It will also lead to distortions in the allocation of property because, if the market value is considerably less than the sentimental value, it will encourage people to force sales of the property in order to buy the property in a roundabout fashion. There are all sorts of reasons for not adopting it. I would not exclude the prospect of adopting that kind of an analysis for a unique object in a unique set of circumstances, but I cannot accept it as general proposition for valuation in matrimonial cases.

[24] I agree with the trial judge's determination and reasoning on this issue. In my view, he made no error in finding the value of the property to be $1.1 million as at the date of separation. The trial judge was entitled to accept the evidence of Mr. Bruce Rae, the expert called by Ms. Strobele, as to the market value of the property at the date of separation. In my view, he was correct in holding that the market value of the property, rather than the "cost to build", was the proper approach to follow when valuing the property. Although the value of the property to the parties is doubtless in excess of that which a third party would pay in an open market, for the reasons given by the trial judge, the property was properly assigned its fair market value.

2. ENTITLEMENT TO A FIFTY PER CENT INTEREST IN THE PROPERTY

[25] The trial judge ordered that the parties were entitled to an equalization of their respective net family properties, pursuant to the *Family Law Act*, if the property were sold. However, if Dr. Strobele chose to remain in the property, he was to pay Ms. Strobele $160,000. The trial judge explicitly acknowledged that he arrived at that figure by not applying the equalization provisions in the *Family Law Act*.

[26] In my view, the trial judge erred in failing to follow the procedure prescribed by the *Family Law Act*. He had no authority to determine ownership of the new matrimonial home as a discrete matter, rather than as part of calculating each party's net family property. Ms. Strobele's entitlement is to an equalization of the parties' net family property in accordance with Part 1 of the *Family Law Act*. That is so whether Dr. Strobele remains in the property or it is sold. See *Hamilton v. Hamilton*, 1996 CanLII 599 (ON CA), [1996] O. J. No. 2634 at paras. 23 – 26 (C.A.).

[27] Based on a value of the property of $1.1 million, Dr. Strobele's net family property statement reveals that, after allowing for the value of property owned on the date of marriage as per the finding of the trial judge, his debts exceed his assets. His net family property is, accordingly, deemed to be zero and he owes Ms. Strobele no equalization payment.

[28] Further and in any event, in my view, the trial judge erred in quantifying Ms. Strobele's interest in the property at fifty per cent. In *Hamilton, supra*, at para. 34, this court held that the extent of the beneficial interest is "proportionate to the financial contribution made to acquire the property". The trial judge found that Ms. Strobele contributed $240,000 towards the cost of construction of the new matrimonial home. He found that the cost of construction was $1.8 million. Based on those findings, Ms. Strobele is entitled to a 13% interest in the property. However, it must be noted that Ms. Strobele's 13% interest is in the full asset, that is, in both the value of the property and the debts associated with it. As the debts exceed the value of the property, her 13% interest has a negative value.

[29] I see no need to deal with the speculation that the trial judge may have been intending to act pursuant to s. 5(6) of the *Family Law Act* when he granted Ms. Strobele a fifty per cent interest in the property. No claim was made under that section and the trial judge did not purport to act pursuant to it. Further, he did not make the findings necessary to empower him to make such an award.

3. COMPENSATION FOR UNJUST ENRICHMENT

[30] Rather than a proprietary interest in the property, Ms. Strobele argues that she is entitled to a monetary claim, based on unjust enrichment, for the $240,000 that she contributed towards the construction of the new matrimonial home. For the reasons already given, in my view, treating her claim in this manner is not a permissible approach to deciding the parties' respective entitlements. The proper approach to determining each party's entitlement is by means of equalization of net family property values in accordance with the *Family Law Act*.

[31] Even if it were open to Ms. Strobele to advance such a claim, it would fail on the merits.

[32] It is well-established law that to succeed in a claim based on unjust enrichment, Ms. Strobele must prove that:

a. Dr. Strobele was enriched,

b. she suffered a corresponding deprivation, and

c. there was no juristic reason for the enrichment.

See *Peter v. Beblow*, 1993 CanLII 126 (SCC), [1993] 1 S.C.R. 980.

[33] In my view, Ms. Strobele's claim fails because Dr. Strobele has not been enriched as a result of her contributions towards the construction of the new matrimonial home. Moreover, as will be evident on reading the following analysis, Ms. Strobele has suffered no deprivation.

[34] As found by the trial judge, Dr. Strobele entered the marriage with property having a net value of $430,000. At the end of the marriage, after allowance is made for his pre-marriage property, his debts exceed his assets. Consequently, despite Ms. Strobele's contributions, it cannot be said that Dr. Strobele has been enriched. On the contrary, he is worse off financially than he was when he entered the marriage.

[35] Ms. Strobele, on the other hand, is better off financially since the marriage. As found by the trial judge, Ms. Strobele entered the marriage with property having a net value of $16,000. Based on the trial judge's findings, which include that Ms. Strobele has a pension valued at $49,000 (after allowing for taxes) and RRSPs valued at $33,489, again after allowing for taxes, Ms Strobele's net family property is greater than $16,000.

[36] Ms. Strobele then argues that Dr. Strobele has been enriched to the extent of $240,000 because the debt against the property would be that much greater, absent her contributions. Even on that assumption, Dr. Strobele has still not been enriched. This argument ignores the fact that the parties jointly incurred the debts in relation to the new matrimonial home and are jointly liable for them. If the debts were greater, both would share in the consequences of an even worse investment made during their marriage. That does not amount to an enrichment on Dr. Strobele's part. His net family property value would be a larger negative number but, for equalization purposes, it would still be presumed to be zero.

4. HOUSEHOLD CONTENTS

[37] In my view, there is no basis for interfering with the finding of the trial judge that the household contents had been divided equally between the parties. That said, for the purposes of the cross-appeal, I will assume that the value of the household contents of $66,901 ought to be included in Dr. Strobele's net family property statement for purposes of the equalization calculation. Even including such a figure, Dr. Strobele would still owe nothing to Ms. Strobele because the value of Dr. Strobele's net family property would remain at a negative figure and is, therefore, deemed to be zero for purposes of equalization.

DISPOSITION

[38] Accordingly, I would allow the appeal. Dr. Strobele may very well be entitled to an equalization payment from Ms. Strobele. However, he does not seek that relief. The primary relief that he seeks is to have paras. 4 through 10 of the Order set aside and Ms. Strobele's claims below, other than her claim for a divorce, dismissed. I would so order.

[39] As previously noted, this court granted the parties' divorce on September 20, 2006.

[40] For the reasons given, I would dismiss the cross-appeal.

[41] If the parties are unable to agree on costs of the appeal and below, they may make brief written submissions on the same. In such an event, I would ask that the appellant and the respondent file their written submissions within 14 and 21 days, respectively, of the release of these reasons.

RELEASED: October 24, 2006 "EEG"

"E.E. Gillese J.A."

"I agree R. Juriansz J.A."

"I agree H.S. LaForme J.A."