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LOUISIANA CONSTITUTIONAL LAW: HUSBAND'S BURDEN OF
PROVIDING ALIMONY AND CHILD SUPPORT

Louisiana's statutory scheme regulating alimony has been increasingly attacked as a violation of the equal protection guarantee of Article 1, Section 3 of the 1974 Louisiana Constitution due to the male-female distinction employed in Louisiana's statutes.¹ While its prohibition against sex discrimination is not absolute, the Louisiana Constitution does require that a legitimate state interest be served by the sex distinction and that the differentiation bear a reasonable relationship to the objective of the legislation.² Although Louisiana's alimony provisions may be prompted by the state's interest in protecting a spouse who is left in a disadvantaged financial position due to the breakup of a marriage, the state's decision to impose on the husband the burden of support is unreasonable when one considers that the state's interest could be better facilitated by determining the parties' needs and ability to provide alimony, based on actual circumstances rather than arbitrary sexual presumptions.

Louisiana courts have been reluctant to sustain equal protection attacks on Civil Code articles 148 and 160 which provide alimony only for

1. See *Welsh v. Welsh*, 332 So. 2d 352 (La. App. 4th Cir.), *aff'd sub nom. Johnson v. Welsh*, 334 So. 2d 395 (La. 1976) (separate domicile of wife); *Williams v. Williams*, 331 So. 2d 438 (La. 1976) (alimony pendente lite); *State v. Barton*, 315 So. 2d 289 (La. 1975) (criminal neglect of family); *State v. Robertson*, (24th Judicial District), *cert. denied*, 294 So. 2d 839 (La. 1974) (criminal neglect of family); *Broussard v. Broussard*, 320 So. 2d 236 (La. App. 3d Cir. 1975) (maternal preference rule); *Whitt v. Vauthier*, 316 So. 2d 202 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 558 (La. 1975), *cert. denied*, 424 U.S. 955 (1976) (alimony after divorce).

2. LA. CONST. art. 1, § 3 provides *inter alia*: "No person shall be denied the equal protection of the laws. . . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations." See Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6 (1975). The Louisiana Constitutional Convention fashioned the amendment from federal equal protection jurisprudence, STATE OF LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VERBATIM TRANSCRIPTS August 30, 1973 at 3. Although the United States Supreme Court has not yet held that sex classifications are "suspect" and subject to strict scrutiny, even the lesser standard is now more demanding. See *Matthews v. Lucas*, 96 S. Ct. 2755, 2762 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). See Barham, *Introduction: Equal Rights for Women Versus the Civil Code*, 48 TUL. L. REV. 560 (1974); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 536 (1976).

the wife. Alimony pendente lite, as provided by article 148,³ is a legislative recognition of the husband's obligation to support his wife during the existence of the marriage.⁴ The wife's needs are determined from her actual income,⁵ whereas some courts consider the husband's potential as well as actual economic resources in determining his ability to pay.⁶ Article 148 survived "on face" equal protection scrutiny in *Williams v. Williams*,⁷ in which the Louisiana Supreme Court upheld alimony pendente lite for women only and based its decision on the belief that due to the wife's lack of control over her earnings and revenues, it is reasonable for the legislature to afford her special protection during the final stages of the community's existence.⁸

The husband not only has a duty to support his wife during the marriage but also once the marriage has been dissolved. Alimony after divorce, governed by article 160,⁹ is a pension given to the ex-wife who does not have sufficient means for her support.¹⁰ The burden is placed on the wife to prove that she is unable to supply her needs from not only her income but from all her available actual resources.¹¹ The Fourth Circuit Court of Appeal in *Whitt v. Vauthier*¹² upheld the constitutional validity of alimony for wives only based partly on its recognition that divorced women are in a disadvantaged position and need protection and that in

3. LA. CIV. CODE art. 148: "If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband."

4. See *Murphy v. Murphy*, 229 La. 849, 87 So. 2d 4 (1956); *Eals v. Swann*, 221 La. 329, 59 So. 2d 409 (1952).

5. See, e.g., *Bilello v. Bilello*, 240 La. 158, 121 So. 2d 728 (1960).

6. A determination is made concerning the husband's capacity to earn. To avoid liability, he is required to prove that he is absolutely unemployable. See *Zaccaria v. Beoubay*, 213 La. 782, 35 So. 2d 659 (1948); *Sykes v. Sykes*, 308 So. 2d 816 (La. App. 4th Cir. 1975); *Viser v. Viser*, 179 So. 2d 672 (La. App. 2d Cir. 1965).

7. 331 So. 2d 438 (La. 1976).

8. *Id.* at 440.

9. LA. CIV. CODE art. 160 provides *inter alia*: "When the wife . . . has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income. . . ."

10. See *Frederic v. Frederic*, 302 So. 2d 903 (La. 1974); *Hays v. Hays*, 240 La. 708, 124 So. 2d 917 (1961).

11. See *Smith v. Smith*, 217 La. 646, 47 So. 2d 32 (1950). *But see* *Chaisson v. Domingue*, 175 So. 2d 902 (La. App. 3d Cir. 1965).

12. 316 So. 2d 202 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 558 (La. 1975), *cert. denied*, 424 U.S. 955 (1976).

accordance with “[c]ivilian principles” the *husband* may receive alimony after divorce.¹³

Although Civil Code article 227 imposes an obligation on *both* the husband and the wife to provide support for their children,¹⁴ courts have been hesitant to enforce the mother’s duty of support and have almost apologetically applied article 227 to females.¹⁵ As in establishing an award of alimony for a wife or a divorced wife, the woman’s *potential* earning capacity has not been a factor used by the courts in determining an award of child support. The jurisprudence is to the effect that it is only the working mother who has a duty to support her children¹⁶ or that the obligation is fulfilled when the mother performs day-to-day services for the children.¹⁷ Thus, the mother’s duty of support has been treated more as a contribution to aid the father rather than as a mutual obligation to support her children.¹⁸ However, the courts have been willing to enforce fully the father’s burden of financial support, and no distinction has been drawn between employed and unemployed fathers.¹⁹

13. *Id.* at 205. The basis for the Fourth Circuit’s statement was an assumption that the Code Napoléon of 1804 was in effect in Louisiana. Code Napoléon article 301 (1804) provided alimony after divorce for *either* spouse. Although the Louisiana Digest of 1808 did not contain any alimony provisions, only those prior laws which were contrary to the Digest were repealed. When the legislature provided alimony for divorced wives in 1827, the court held that there was no intention to “foreclose against needy husbands. . . .” Since alimony for the divorced husband “was once available by virtue of a positive statute in the Code Napoléon . . .” and there has been no “positive legislative statement” to the contrary, a needy divorced husband can receive alimony. *Id.* at 205, 206. The court’s position is untenable since the Code Napoléon was never in force in Louisiana. See A. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM pt. 1, 54, 55 (1971).

14. LA. CIV. CODE art. 227: “Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining and educating their children.”

15. See *Moreland v. Moreland*, 279 So. 2d 266, 268 (La. App. 2d Cir.), *cert. denied*, 281 So. 2d 749 (La. 1973); *Fellows v. Fellows*, 267 So. 2d 572, 575 (La. App. 3d Cir. 1973); *Zara v. Zara*, 204 So. 2d 76, 79 (La. App. 4th Cir. 1967).

16. *Grishman v. Grishman*, 332 So. 2d 840 (La. App. 4th Cir. 1975); *Moreland v. Moreland*, 279 So. 2d 266 (La. App. 2d Cir.), *cert. denied*, 281 So. 2d 749 (La. 1973); *Price v. Price*, 272 So. 2d 392 (La. App. 1st Cir. 1972).

17. See *Nelson v. Nelson*, 335 So. 2d 787 (La. App. 1st Cir. 1976); *Fall v. Fontenot*, 307 So. 2d 779 (La. App. 3d Cir. 1975).

18. See *Black v. Black*, 205 La. 861, 18 So. 2d 321 (1944); *Zara v. Zara*, 204 So. 2d 76 (La. App. 4th Cir. 1967); *Poydras v. Poydras*, 155 So. 2d 221 (La. App. 1st Cir. 1963); *Qvistgaard-Petersen v. Qvistgaard-Petersen*, 135 So. 2d 669 (La. App. 2d Cir. 1961).

19. The father must prove he is absolutely unemployable to avoid liability. See *Sykes v. Sykes*, 308 So. 2d 816 (La. App. 4th Cir. 1975). Compare *Hampson v. Hampson*, 271 So. 2d 898 (La. App. 2d Cir. 1972) (the determination of the

Departing from the prior jurisprudence, recent appellate court decisions have used equal protection arguments to lessen the financial burden placed on husbands to provide alimony and child support by requiring wives to secure employment. In *Ward v. Ward*²⁰ and *Favrot v Barnes*²¹ the Fourth Circuit re-examined the traditional technique of awarding alimony after divorce and the factors used to determine the amount the husband must pay. In both cases the husband appealed, arguing that his wife was capable of working and therefore not entitled to alimony.²² Sitting en banc, the Fourth Circuit held in *Ward* that a divorced wife must support herself when she is capable unless there is a valid and compelling reason preventing her from doing so.²³ To reach this result, *Ward* concluded that the same elements that are used to determine the husband's means to provide alimony pendente lite, which include earning potential, should become a factor in establishing the sufficiency of the wife's means.²⁴ This expanded definition of the wife's means was based on the lack of a valid reason for distinguishing between the economic capabilities of the sexes.²⁵ In *Favrot* the court emphasized the unreasonableness of refusing to weigh the wife's earning potential and noted that it was repugnant to "constitutional principles of justice administered without

husband's ability to pay) with *Tjaden v. Tjaden*, 294 So. 2d 846 (La. App. 2d Cir.), cert. denied, 296 So. 2d 838 (La. 1974) (the treatment of the wife's ability to find employment).

20. 332 So. 2d 868 (La. App. 4th Cir.), rev'd, 339 So. 2d 839 (La. 1976).

21. 332 So. 2d 873 (La. App. 4th Cir.), rev'd, 339 So. 2d 843 (La. 1976).

22. The wife in *Ward* had thirteen and one-half years experience as a school teacher and also had an extensive educational background. She had last worked in 1971 for the public schools of Orleans Parish at an annual salary of \$10,400. In *Favrot* the wife had taught school before the marriage.

23. The case was remanded to the trial court for the purpose of giving Mrs. Ward an opportunity to show that work was unavailable. In denying a rehearing the court stated that the availability of work is not the only factor involved as there may be "many valid and compelling reasons why a divorced wife could not accept available work she is capable of performing." In *Mendoza v. Mendoza*, 310 So. 2d 154, 158 (La. App. 4th Cir. 1975), Judge Redmann, in dissent, stated that the wife should be allowed alimony for one month during which she must seek fulltime employment, with leave to apply for an additional month or months of support on her showing of a good faith attempt to secure employment.

24. 332 So. 2d at 872: "The same word, 'means', is used in the same manner in both articles, the only difference being that in Article 148 the reference is to the husband's 'means', while in Article 160 the reference is to the wife's means."

25. *Id.* "If the word (means) as used in Article 148 includes the ability to work and earn an income, and we are satisfied our jurisprudence is to that effect, it should received (sic) the same interpretation in Article 160." Although the court in *Ward* spoke in terms of reasonableness (the basic equal protection test) no specific mention was made of equal protection.

impartiality. . . .²⁶ The court treated Article 1, Section 3²⁷ as potent and revolutionary, yet the minimal discussion concerning equal protection may have represented an attempt to refrain from language that could be interpreted as supportive of wholesale equal protection attacks.

Likewise, the Third Circuit in *Ducote v Ducote*²⁸ utilized the new constitution to temper the parental obligation to provide child support. *Ducote* involved a father's appeal of a judgment increasing child support payments. Although the court affirmed the increase in favor of the mother,²⁹ it recognized in dicta that in some circumstances a wife should be compelled to seek employment in order to contribute to the support of her children.³⁰ The basis for the decision was a combination of a concern for equal protection and a belief that the court should take cognizance of all the pertinent circumstances of both the husband and wife.³¹ Due to the presence of three young children in the mother's custody, the court decided that she was justified in remaining at home.³² Since it was necessary for her to care for and supervise the children and to provide transportation to and from school, she was not compelled to seek employment.³³

The appellate courts' lessening of the husband's burden to provide alimony received a mixed reaction by the Louisiana Supreme Court which granted writs on *Ward*, *Favrot* and *Ducote*. The court reaffirmed the prior jurisprudence concerning alimony after divorce but in dicta possibly approved a new method of awarding child support.³⁴

A divided supreme court³⁵ reversed *Ward* and *Favrot* and held that an unemployed wife's potential earning capacity is *not* a proper factor in

26. 332 So. 2d at 876 (La. App. 4th Cir.), *rev'd*, 339 So. 2d 843 (La. 1976).

27. See note 2, *supra*.

28. 331 So. 2d 133 (La. App. 3d Cir.), *aff'd*, 339 So. 2d 835 (La. 1976).

29. *Id.* at 137. An increase was granted in order to allow the divorced wife to purchase a new automobile and because the children were entitled to be maintained in the same standard of living as would be their custom if living with the father.

30. *Id.* at 138.

31. The Third Circuit did not elaborate on its reasons for expanding the obligation of the mother. The court merely cited LA. CONST. art. I, § 3 and *Marcus v. Burnett*, 282 So. 2d 122 (La. 1973), in which the supreme court allowed the expense of the father's second marriage to be considered in ascertaining the amount of child support. The basis for that decision was LA. CIV. CODE art. 231 which provides that alimony shall be granted according to "the circumstances of those who are to pay it."

32. The three daughters were ages 14, 10, and 9. 339 So. 2d at 838 (La. 1976).

33. 331 So. 2d at 138.

34. 339 So. 2d 835 (La. 1976). See note 43, *infra*.

35. Justices Summers, Calogero and Dennis dissented.

determining her means.³⁶ The court also held there was no difference between the interpretation of "means" as found in articles 148 and 160 but the court's treatment of the term in the two articles indicates the inaccuracy of that statement. Affirming prior jurisprudence,³⁷ the court stated that a wife's "means" refers only to actual resources, such as property or money and not potential resources,³⁸ even though such potential resources as employability are considered to form part of the husband's "means" in article 148. While the court acknowledged that the husband cannot escape having to provide alimony pendente lite by refusing to work, it reasoned that this difference was based on the husband's onerous obligation to support his wife under Civil Code article 120,³⁹ and not a different definition of "means" in article 160.

Generally, Louisiana courts place undue emphasis on article 120 as the source of the husband's additional duty of support. Article 120 imposes a duty on the husband to furnish his wife with the conveniences of life but the wife has a reciprocal obligation to live with the husband wherever he chooses to reside.⁴⁰ The obligation should cease to exist when she refuses to reside with her husband without having lawful cause.⁴¹ Yet

36. The Third Circuit in *Gravel v. Gravel*, 331 So. 2d 580 (La. App. 3d Cir. 1976), stated in dicta that alimony pendente lite would be denied to a wife capable of earning sufficient income for her support. The court relied on Article 1, Section 3 but the wife was not forced to seek employment because she was attending school and had custody of two minor children. Although *Gravel* was not appealed to the Louisiana Supreme Court, the supreme court's discussion of article 148 in *Ward* tends to reaffirm the pre-*Gravel* jurisprudence that a wife is entitled to alimony pendente lite and is not required to obtain employment to support herself. *Cooper v. Cooper*, 336 So. 2d 928 (La. App. 3d Cir. 1976), followed the same rationale as *Gravel*. However, *Best v. Best*, 337 So. 2d 672 (La. App. 3d Cir. 1976), states that a wife is not required to work and support herself during the pendancy of a suit for separation or divorce, and represents a divergence of opinion on *Gravel* within the Third Circuit.

37. See note 11, *supra*.

38. 339 So. 2d at 842.

39. *Id.*

40. LA. CIV. CODE art. 120: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and furnish her with whatever is required for the convenience of life, in proportion to his means and condition." R. PASCAL, LOUISIANA FAMILY LAW COURSE 70, 71 (2d ed. 1973) [hereinafter cited as PASCAL]; 1 M. PLANIOL, CIVIL LAW TREATISE pt. 1, nos. 893-95 at 514-16 (12th ed. La. St. L. Inst. transl. 939).

41. PASCAL, *supra* note 40, at 70, 71: "The [husband's obligation under article 120] ceases whenever the wife fails to live with her husband without having just cause. This does not mean, however, that the ordinary obligations of support and assistance cease to exist."

Louisiana jurisprudence reconstructs article 120 to require the husband to provide this support regardless of whether the wife fulfills her obligation.

In effect, the court treated the different burden placed on males and females as immune from equal protection analysis because it was based on a Civil Code provision. The court failed to discuss the equal protection arguments that proved successful at the appellate level and was more concerned with presenting a view which minimized the significance of alimony. It emphasized that the wife must not be at fault and that the award is limited to cover only the basic necessities.⁴² Additionally, the court recognized that because alimony after divorce provides for the wife's maintenance and not for the style of living to which she has been accustomed, the necessary incentive for a divorced wife to work is present.

In *Ducote* the supreme court in dicta approached differently the wife's potential earning capacity and conceivably acquiesced in the Third Circuit's buttressing of the wife's obligation to provide child support since, despite the fact that the court upheld the rejection of the husband's contention that his former wife should seek employment, the rejection was not based on the *absence* of a duty to work on the wife's part.⁴³ The court declared that the mother's custody of three minor children rendered her *unavailable* for employment.⁴⁴ By virtue of this language, the court intimates that if the mother is capable of securing employment, she must work if necessary to fulfill her duty of support. This would be a departure from prior jurisprudence which has not required a wife to seek employment in order to provide child support. Reasons underlying this possible expansion of the mother's obligation were not discussed by the court. Although the Third Circuit based its decision on the state constitution's equal protection guarantee, the supreme court did not mention it.

The dictum in *Ducote* is weak because of the court's discussion of factors which could prevent the mother from having to seek employment.⁴⁵ For instance, the court stated that young children need the attention of their mother and if she provides "day-to-day" services, it will contribute "substantially" to the fulfillment of her obligation of support.⁴⁶

42. 339 So. 2d at 842. However, "basic necessities" was expanded in *Bernhardt v. Bernhardt*, 285 So. 2d 226 (La. 1973).

43. *Id.* at 839. The court did not expressly state that a mother need not work if she is capable of employment. Instead the court discussed the circumstances which allowed the divorced wife to escape employment.

44. *Id.*

45. *Id.*

46. As a result of the maternal preference rule the mother is usually given custody of the children. *Broussard v. Broussard*, 320 So. 2d 236 (La. App. 3d Cir.

The court left unanswered whether it is the wife's burden to prove the reasons why she should not accept available work and to what extent her reasons must be valid or compelling. No indication was given when children no longer need the constant attention of their mother or what guidelines will be used to measure the performance of day-to-day services against the mother's duty of support.⁴⁷ Furthermore, due to the inchoateness of its position, the court may not have been sanctioning a duty requiring the wife to seek employment but only endorsing jurisprudence which recognizes that performance of day-to-day services satisfies the wife's obligation of support.

While the state concededly does have an interest in protecting a spouse left in a disadvantaged financial position, the relationship between allowing an ex-wife who is capable of employment to avoid work and the state's objective is tenuous. The approach of the courts of appeal in determining alimony and child support seems more reasonable because it established the needs and abilities of the parties in a like manner while at the same time recognizing that there are circumstances, such as raising children, which would affect a finding of whether or not the wife is capable of employment. The intent of the appellate courts was to interpret the alimony articles in compliance with the Louisiana Constitution, and also to ease the financial burden placed on the husband, while the supreme court was concerned only with the technical application of the code articles. The supreme court was unwilling to examine the alimony provisions and determine whether the sex classifications they contain are reasonable or permissible as a form of benign discrimination.⁴⁸ The court, firm in its belief that the husband is the chief protector and provider for the family, may have realized that if it dealt with the equal protection issue it would have been difficult to justify the sex differentiations in terms of

1975). If the courts adhere to the belief that young children need the attention of their mother, she may not be forced to secure employment to support them unless they are in their mid- or late teens. Once an individual reaches the age of majority he is not "in need" if he is capable of gainful employment. *Demarie v. Demarie*, 295 So. 2d 229 (La. App. 3d Cir. 1974); *Dubroc v. Dubroc*, 284 So. 2d 869 (La. App. 3d Cir. 1974).

47. 339 So. 2d at 839. Although the daughters were school age (14, 10, and 9), the court stated that they needed the attention of their mother. The court did not discuss the possibility of the mother, who is a licensed and qualified nurse, working a 7 a.m. to 3 p.m. hospital shift which presumably would not interfere with the mother's watching over the children. *See Gravel v. Gravel*, 331 So. 2d 580 (La. App. 3d Cir. 1976) (court stated that a divorced wife need not work since she was enrolled as a fulltime graduate student and also cared for and supervised her two minor children).

48. 339 So. 2d at 839.

reasonableness.⁴⁹ Louisiana is therefore left with an alimony scheme which allows the wife or ex-wife to place the burden of support on her husband by her refusal to work, without any justification for such a system. Now that Louisiana's alimony scheme has escaped constitutional "scrutiny," the only change from the prior jurisprudence may be a lessening of the husband's duty to support his children and perhaps the *husband* may receive alimony after divorce if subsequent decisions follow the dicta in *Whitt v. Vauthier*. In its refusal to face the problem of sex discrimination in *Ward* and *Favrot* the court missed an opportunity to revise its interpretation of the alimony articles to make the burden on the husband more reasonable. However, due to the holdings of the supreme court, an ex-wife may refuse to supply her own needs for reasons of "indolence, spite or revenge"⁵⁰ and force her ex-husband to support her.

Douglas C. Longman, Jr.

THE NATURE OF ALIMONY—SEPARATE OR COMMUNITY OBLIGATION?

Following a judgment of separation from his second wife, a husband sued for partition of the community property. The wife sought reimbursement for one half of the alimony and child support payments made by her husband to his first wife using funds of the second community. The Third Circuit Court of Appeal held that the wife was not entitled to reimbursement.¹ The Louisiana Supreme Court upheld the appellate court ruling with regard to the alimony and child support payments² and *held* that because the obligations to pay alimony and child support are imposed by

49. The United States Supreme Court upheld classifications which discriminated against men in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), and *Kahn v. Shevin*, 416 U.S. 351 (1974), as more stringent promotion requirements for male officers and a state taxation plan granting property tax deduction to widows but not to widowers were approved. Both classifications were concerned with a female receiving benefits from the state or governmental operation and not a classification that levied a duty on the male to provide a female with a portion of his economic resources. *But see* *Murphy v. Murphy*, 232 Ga. 352, 206 S.E. 2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975).

50. 339 So. 2d at 843.

1. *Connell v. Connell*, 316 So. 2d 421 (La. App. 3d Cir. 1975).

2. The judgment was amended on other grounds, however.