Louisiana Law Review

Volume 25 | Number 1
Symposium Issue: Louisiana Legislation of 1964
December 1964

Civil Code and Related Legislation: Persons and the Family

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PERSONS AND THE FAMILY

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ALIMONY AFTER DIVORCE

Article 160 of the Civil Code, the principal legislation on the substantive law of alimony after divorce, has been amended by Act 48 of 1964, pursuant to a bill recommended by the Louisiana State Law Institute and growing out of that body's consideration of proposals to amend the new Code of Civil Procedure.[1]

A great merit of the amendment is that article 160 now makes it perfectly clear that only the wife *not at fault* can ever be entitled to alimony. The prior legislation was not so clear, although, in the opinion of this writer, this should always have been its interpretation. When article 160 first became part of our law, divorce was obtainable only by that spouse who had obtained, or who had the right to obtain, a separation from bed and board, and a separation was obtainable only by a party who could prove a cause in the nature of fault on the part of the defendant spouse. Thus, at that time, the language of article 160, that only the wife who had "obtained the divorce" should be entitled to alimony, was entirely suitable to limit alimony to the wife who had not been at fault. When Act 25 of 1898 (later, as amended, R.S. 9:302) introduced the possibility that the party against whom the separation had been pronounced might obtain the divorce on a showing of non-reconciliation over a period of time, the quoted language of article 160 became inaccurate, inasmuch as its literal application could result (1) in the wife's being *denied* alimony, even if she had obtained the separation, if the husband obtained the divorce under Act 25 of 1898, and (2)

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1. See LOUISIANA STATE LAW INSTITUTE, THIRD ANNUAL REPORT ON THE LOUISIANA CODE OF CIVIL PROCEDURE 20-23 (Feb. 20, 1964); LOUISIANA STATE LAW INSTITUTE, RECOMMITTED AND REVISED MATERIALS INCLUDED IN THE THIRD ANNUAL REPORT ON THE LOUISIANA CODE OF CIVIL PROCEDURE 1-2 (April 17, 1964).

in the wife's being *allowed* alimony if she obtained the divorce on the basis of non-reconciliation, even if the husband had obtained the separation because of her fault. Act 25 of 1898 itself foresaw at least the first of these results, for it provided that the wife obtaining the separation should not lose her right to alimony merely because the husband later sued for divorce under that act. Nothing was said about the wife's right to alimony if she obtained the divorce after the husband had obtained the separation, but in practice she was not awarded alimony in such a case.

A further complication was introduced in 1916,[2] with the acceptance of divorce based simply on separation in fact for a definite period of time. Were the words of article 160, allowing alimony to the wife who had "obtained the divorce," to be applied literally to allow her alimony if she sued and obtained the judgment, and to deny it to her if her husband obtained the judgment, without regard to which of the spouses had been at fault in causing the separation which led to the divorce? Once more legislation intervened, but unsatisfactorily. Article 160 was amended by the addition of language which allowed the wife alimony when the husband obtained the divorce on this ground of separation in fact for a period of time, provided she had not been "at fault."[3] But nothing was said of denying alimony to the wife who *obtained* the divorce if she had been at fault, and for years our decisions allowed her alimony if she obtained the divorce, without requiring her to prove she had not been at fault or even permitting the husband to show she had been at fault.[4] Finally, in 1956, the Supreme Court indicated it would not allow alimony to the wife at fault even if she obtained the divorce on the basis of separation in fact for a period of time;[5] but until this year article 160 had been permitted to remain in its inadequately stated form. Thus the new amendment is a welcome accomplishment.

The effectuation of this improvement was not, however, the

2. La. Acts 1916, No. 269, which as amended became LA. R.S. 9:301 (1950).
3. La. Acts 1928, No. 21.
4. This interpretation of the law is forcefully presented in Justice McCaleb's dissenting opinion in McKnight v. Irving, 228 La. 1088, 85 So. 2d 1 (1956), a decision which implied that the majority was ready to overrule the prior jurisprudence.
5. McKnight v. Irving, 228 La. 1088, 85 So. 2d 1 (1956); *accord*, Sachse v. Sachse, 150 So. 2d 772 (La. App. 1st Cir. 1963); *contra*, Moreau v. Moreau, 142 So. 2d 423 (La. App. 3d Cir. 1962).

primary motive of the Louisiana State Law Institute in recommending the amendment to article 160 of the Civil Code. It was rather to add to article 160 language giving the wife a right to alimony from her husband (where she was not at fault and is without sufficient means) in instances in which the husband obtained the divorce *ex parte* in another state or country. That this legislation was intended to state a substantive right as distinguished from a procedural one is clear from the Institute's documents.[6] What, however, is the realm of application of this new substantive provision?

This new provision extends certainly to an ex-wife's suit for alimony in this state when both she and her husband are domiciled here, but after the husband has obtained an *ex parte* divorce in another state where he was then domiciled. This would be the minimal interpretation of the provision, an interpretation as a rule of domestic law only. Does the provision extend the right of alimony to a wife so divorced but not domiciled in Louisiana at the time of suit for alimony? The Institute's documents show that its intention was to extend the right to wives domiciled in this state when divorced elsewhere (and, probably, still domiciled here).[7] The provision itself does not carry such a limitation in express terms, but it would not be difficult to infer one from the context of the article. More seriously, however, may the wife ask for alimony *under this provision* even if her ex-husband is domiciled outside this state when suit is brought? Here the Institute's documents leave no doubt that this is precisely the case which the new provision was intended to cover.[8] In the opinion of this writer this rule is not a good one. It is, however, a rule which will stand the test of permissibility under existing United States Supreme Court decisions interpreting the United States Constitution; but, in the writer's opinion, these decisions are open to question.

The opinion given above is predicated on the writer's firm conviction that one's familial obligations ought to be deter-

6. LOUISIANA STATE LAW INSTITUTE, THIRD ANNUAL REPORT ON THE LOUISIANA CODE OF CIVIL PROCEDURE 1 (Feb. 20, 1964); LOUISIANA STATE LAW INSTITUTE, RECOMMITTED AND REVISED MATERIALS INCLUDED IN THE THIRD ANNUAL REPORT ON THE LOUISIANA CODE OF CIVIL PROCEDURE 24 (April 17, 1964).

7. See note 1 *supra*.

8. LOUISIANA STATE LAW INSTITUTE, RECOMMITTED AND REVISED MATERIALS INCLUDED IN THE THIRD ANNUAL REPORT ON THE LOUISIANA CODE OF CIVIL PROCEDURE 21 (April 17, 1964).

mined primarily by his personal law, that is to say, the law of the state or country of whose society he forms a part. Being convinced, further, that domicile is the factor most appropriate to determine one's membership in a legal community, the writer would say that one's familial obligation should be determined by the law of the state or country of his domicile. The attempt to force upon a person a familial obligation not imposed by his domiciliary law is both a denial to his community of the right to determine the laws under which its citizens shall live and a denial to the individual person of his right to live according to the rules of his chosen community. This premise, on reflection, will be understood as that necessarily implicit in the doctrine of *Williams v. North Carolina I*[9] and subsequent cases on divorce jurisdiction under the full faith and credit clause: only the state of a party's domicile (and logically only that of the plaintiff's domicile) may determine the bases on which his marital status may be altered, for his familial relationships are appropriately the concern only of that society of which he forms part.

If the above reasoning is accepted, then it will be apparent that a rule of law permitting one party to claim alimony according to a substantive law other than that of the defendant's domicile *should be* considered in violation of the full faith and credit clause of the United States Constitution, for in fact full faith and credit is then being denied to the law of the defendant's domicile.[10] On the other hand, it would seem unjustifiable to

9. 317 U.S. 287 (1942).

10. The full faith and credit clause (U.S. CONST. art. IV, § 1) requires that such credit "shall be given in each state to the *public acts, records, and judicial proceedings* of every other state"; and, by its second sentence, "the Congress may by general laws prescribe the manner in which such *acts, records, and proceedings* shall be proved, and the *effect* thereof." It would seem that this language gives the Congress the power to delineate the law-making as well as the judgment-rendering authority of the several states. 28 U.S.C. § 1738 (1952), passed pursuant to the full faith and credit clause, requires the states and territories of the United States to give full faith and credit to each other's public acts, records, and judicial proceedings. This legislation, however, does not provide the norm or norms for delineating interstate legislative and judicial authority, and thus the states continue to determine such jurisdiction for themselves subject to decisions by the United States Supreme Court. The Supreme Court, however, has rendered decisions delineating the legislative authority of the states in only some matters, and at times has done so under the *due process* clause (amend. XIV, § 1) rather than under the full faith and credit clause. For example, Williams v. North Carolina I, 317 U.S. 287 (1942), though not articulated as such, is in reality a decision on *legislative* jurisdiction as to authorize divorce as well as on judicial jurisdiction to pass on the merits of the suit therefor. See also First National Bank v. United Air Lines, 342 U.S. 396 (1952), in which the majority, through Mr. Justice Black, decided that an Illinois statute (according to which wrongful death actions arising under the laws of other states were not to be tried in Illinois) denied full faith and credit to the statutes of other states.

impose upon the defendant (obligor) liability to pay more than the amount to which the plaintiff (obligee) would be entitled under the law of his own domicile; the obligee should not be entitled to expect more. Hence it would seem that the substantive obligation for alimony should never exceed either that imposed by the law of the defendant's domicile or that which would have been imposed by the law of the plaintiff's domicile, were it applicable.

It is to be admitted, however, that the imposition of alimentary obligations according to the law of the defendant's domicile has been upheld by the United States Supreme Court. The principal case is *Vanderbilt v. Vanderbilt*,[11] but the writer submits that the decision is unsound. There the court affirmed New York's application of its own law, against a non-domiciliary husband who had obtained an *ex parte* divorce in Nevada, on the ground that without personal jurisdiction over the wife Nevada had no jurisdiction to terminate "any right which she had under the law of New York" for support from her non-domiciliary husband. The writer is of the opinion that this decision resulted from a failure to give the issue its proper characterization. The question should not have been whether Nevada could terminate the wife's right to alimony under New York law, but whether the husband's obligation was to be determined by the law of New York or by that of his domicile; or, to phrase the issue in more scientific legal language, whether *legislative competence* in the matter properly belonged to New York or to Nevada. Whatever one's opinion of the merits of *Vanderbilt v. Vanderbilt*, however, that decision does not *require* a state to grant a substantive right of alimony in such cases, and the writer submits that it would have been better to refrain from doing so in Louisiana.

Again, the decisions on the authority of a state to levy taxes on persons or property must be understood in terms of decisions as to legislative jurisdiction to tax, regardless of how they may be phrased. Of interest on the general problem are Mr. Justice Stone's *dissenting* opinion in Yarborough v. Yarborough, 290 U.S. 202 (1933), which involved an alimony judgment; Cook, *Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919); Corwin, *The Full Faith and Credit Clause*, 81 U. OF PA. L. REV. 371 (1933); Cheatham, *Federal Control of the Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449 (1959); and JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 41-44 (1955).

11. 354 U.S. 416 (1957).