

Louisiana Law Review

Volume 29 | Number 3
April 1969

Sufficient Means Under Article 160 of the Louisiana Civil Code

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Repository Citation

Charles W. Wilson III, *Sufficient Means Under Article 160 of the Louisiana Civil Code*, 29 La. L. Rev. (1969)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol29/iss3/12>

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fails then there is no consent.¹⁷ The report of a commission appointed by the Archbishops of Canterbury and York in 1955 points out that English law looks to consent as expressed and will not allow the parties to derogate privately from their public professions.¹⁸ Even a private written agreement entered into before marriage that the parties will never live together does not render an English marriage invalid.¹⁹ The report emphasizes the obvious abuses that may result from a recognition of simulated or conditional consent as a basis of nullity. It does not seem illogical to assume that had the framers of our Code intended that a serious, public manifestation of consent, by one of sound mind and in full control of his faculties, could be overcome by proof of an absence of actual internal consent they would have so stated in clear explicit terms. On the other hand it would seem logical that where a party was insane, under the influence of narcotics or alcohol, or was otherwise not in control of his mental faculties, a finding of no consent would be within the intent of Article 90 even though there was a public manifestation of consent.

It does not appear that there is a basis within Article 90 for finding an absence of consent in this case. Neither is there a basis for finding that the consent was not freely given if we look only to the three conditions listed in Article 91. Should our courts hold that the three conditions listed in Article 91 are not exclusive they will then be faced with the problem of where to draw the line. This writer suggests that expansion of the conditions listed in Article 91 is a legislative matter and if social conditions today indicate a need to expand the list of causes that will render consent to marriage unfree, the expansion should be made by the legislature and not the judiciary.

Roy L. Wood

SUFFICIENT MEANS UNDER ARTICLE 160 OF THE LOUISIANA CIVIL CODE

Article 160 reads: "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income . . . This alimony

17. *Id.* at 556.

18. THE REPORT OF A COMMISSION APPOINTED BY THE ARCHBISHOPS OF CANTERBURY AND YORK, THE CHURCH OF ENGLAND 27 (1955).

19. *Id.*

shall be revoked if it becomes unnecessary, and terminates if the wife remarries.”¹ This Note will consider the construction and application given this article in the Louisiana jurisprudence.

The leading case interpreting Article 160 is *Smith v. Smith*.² The court in this case held that a wife with \$20,000.00 capital in war bonds, interest-bearing notes, and an automobile had sufficient means. The court said:

“In other words, under Article 160, the Court is not concerned with the wife’s income as such, but only with the means she has, including income, and whether they are sufficient for her maintenance. . . . Maintenance may be said to include primarily food, shelter, and clothing. . . . It is not to be inferred from this that the wife must be practically destitute before she can act. In fact the language of Article 160 implies the opposite because it expressly stipulates that it is in case she has not sufficient means that she can apply for the alimony from which it follows that she may have some means. . . . To what extent the wife should be made to use up her capital before applying for the alimony is a matter with which we are not concerned at the moment. . . . That again would be a question of fact left to the discretion of the trial judge for decision.” . . .³

Subsequent cases of the Louisiana Supreme Court have provided further examples of what will be considered “sufficient means.”

The Supreme Court, in *Brown v. Harris*⁴ reversed the trial court’s holding that a wife with \$6,600.00 in a savings account plus \$150.00 per month income had sufficient means for her support, and thus was not entitled to alimony. The court quoted from *Fortier v. Gelpi*, which said:

“The test by which the Court must be guided in such cases in fixing the amount of alimony or pension is not what it takes to support the divorced wife in the manner in which she is accustomed to live, but what will provide her with ‘sufficient means for her maintenance’.”⁵

1. LA. CIV. CODE art. 160 (as amended by La. Acts 1964, No. 48). The word *support* read as *maintenance* before the 1964 amendment. In *Burris v. Burris*, 197 So.2d 89 (La. App. 1st Cir. 1967), the court said that they could see no difference in the two words and that they believed the legislature intended no difference in meaning.

2. 217 La. 646, 47 So.2d 32 (1950).

3. *Id.* at 654, 47 So.2d at 35.

4. 225 La. 320, 72 So.2d 746 (1954).

5. 195 La. 449, 456, 197 So.2d 138, 140 (1940).

It would appear from this that what is "sufficient means for maintenance" would be the same for every wife. However, one gets the impression from reading the cases that the courts do look to some extent to the status of the wife. For example, they would be willing to allow more for food, shelter, and clothing for the wife of a millionaire than for the wife of a common laborer. It should be stressed that this is merely the impression of the writer and that the courts have repeatedly said that she is not entitled to support in the manner in which she is accustomed to live.⁶

In *Stabler v. Stabler*,⁷ the court followed *Smith v. Smith*,⁸ and held that assets totaling \$20,000.00 constituted sufficient means. The wife contended that the rule of the *Smith* case was inapplicable because the means involved in that case were derived from the partition of the community, whereas the means involved in *Stabler* were her separate property. It was argued that the decision of the *Smith* case was based on the fact that it would be inequitable to cause the husband to deplete his share of the community while allowing the wife to keep her share intact. The court rejected this argument, but did not elaborate on its reasons.⁹ Since Article 160 requires only "sufficient means" and makes no mention of the source of the means, it would seem that the court was correct in rejecting her contention.¹⁰

One point which is not in itself a factor in determining sufficient means, but which is important at the appellate court level is the discretion of the trial court. It is often said that the amount necessary for the maintenance of the divorced wife is a

6. See also *Vicknair v. Vicknair*, 237 La. 1032, 112 So.2d 702 (1959); *Martin v. Lewis*, 236 La. 751, 109 So.2d 81 (1959); *Rabun v. Rabun*, 232 La. 1004, 95 So.2d 635 (1957); *Stabler v. Stabler*, 226 La. 70, 75 So.2d 12 (1954); *Wilmot v. Wilmot*, 223 La. 221, 65 So.2d 321 (1953); *Smith v. Smith*, 217 La. 646, 47 So.2d 32 (1950); *Matheny v. Matheny*, 205 La. 869, 18 So.2d 324 (1944).
7. 226 La. 70, 75 So.2d 12 (1954).

8. 217 La. 646, 47 So.2d 32 (1950). See text accompanying note 3 *supra*.

9. The attorney for the wife raised this contention, but the court, without discussing the point, held that she was not entitled to alimony.

10. For other Supreme Court cases which have considered sufficient means under Article 160 of the Louisiana Civil Code, see *Martin v. Lewis*, 236 La. 751, 109 So.2d 81 (1959) (wife with \$30,000.00 assets in the form of cash, notes, stock, and a house held to have such means as to allow a reduction in alimony from \$600.00 to \$300.00); *Rabun v. Rabun*, 232 La. 1004, 95 So.2d 635 (1957) (wife with net assets of \$11,000.00 plus an income of \$125.00 per month held to be with sufficient means); *Howell v. Howell*, 229 La. 310, 85 So.2d 885 (1956) (wife with a house valued at \$11,500.00 and an income of from \$4,500.00 to \$4,700.00 a year held to have sufficient means). It has also been held that the wife carries the burden of proving insufficient means. *Vicknair v. Vicknair*, 237 La. 1032, 112 So.2d 704 (1959). The only evidence offered was that it would take \$30.00 per week to support her in the manner to which she was accustomed; this was held insufficient to meet her burden of proof.

question of fact left to the sound discretion of the trial judge and that his decision will be overturned only if he abuses this discretion.¹¹ But the question remains as to just how much weight the appellate court will give to the decision of the trial court; or, in other words, what amounts to an abuse of his discretion. The court in *Fruehan v. Fruehan*¹² upheld the trial court's decision that \$13,000.00 in cash and interest bearing notes constituted sufficient means and said it was important to note that in other cases¹³ the trial court's decision had been upheld. In *Radar v. Radar*,¹⁴ the court said, in affirming the trial court's award of award of \$120.00 a month alimony, they would have set the amount higher, but refused to do so out of respect for the decision of the trial judge whose function it was to determine in his sound discretion the amount necessary for maintenance. The First Circuit Court of Appeal said in *Burris v. Burris*¹⁵ that the trial judge's decision should not be disturbed unless there was manifest error. The court also stated that they believed the trial judge had abused his discretion in allowing alimony to a wife with a take home pay of \$203.10 a month plus \$35.00 a month income from rental property, valued at from \$3,500.00 to \$5,000.00.¹⁶

The ease with which the assets can be converted into cash is

11. *Smith v. Smith*, 217 La. 646, 47 So.2d 32 (1950); *Weaver v. Burks*, 211 La. 913, 31 So.2d 17 (1947); *Matheny v. Matheny*, 205 La. 869, 18 So.2d 324 (1944); *Gerstner v. Stringer*, 205 La. 791, 18 So.2d 195 (1944); *Jones v. Jones*, 200 La. 911, 9 So.2d 227 (1942); *Street v. Street*, 205 So.2d 839 (La. App. 2d Cir. 1967); *Lucas v. Lucas*, 157 So.2d 615 (La. App. 2d Cir. 1963); *Fruehan v. Fruehan*, 153 So.2d 75 (La. App. 1st Cir. 1963); *Calloway v. Calloway*, 139 So.2d 55 (La. App. 2d Cir. 1962).

12. 153 So.2d 75 (La. App. 1st Cir. 1963).

13. *Calloway v. Calloway*, 139 So.2d 55 (La. App. 2d Cir. 1962). The court allowed the wife \$200.00 a month where the husband's take home pay was \$686.00 per month and her needs were shown to be \$171.30 a month. The wife had almost no income, and no mention was made of means. *Roberts v. Roberts*, 145 So.2d 669 (La. App. 4th Cir. 1962). The court held that \$5,200.00 equity in a double cottage was not sufficient means and the wife was entitled to alimony.

14. 126 So.2d 189 (La. App. 4th Cir. 1961). Here the husband had a net income of \$14,880.00 per year, and the only assets of the wife were an automobile and \$40.00 per week income. She had received \$55,000.00 from the estate of her first husband, but it had been dissipated.

15. 197 So.2d 89 (La. App. 1st Cir. 1967).

16. For Supreme Court cases reversing or amending the trial court's decision as to the amount of or eligibility for alimony, see *Vicknair v. Vicknair*, 237 La. 1032, 112 So.2d 702 (1959); *Martin v. Lewis*, 236 La. 751, 109 So.2d 81 (1959); *Brown v. Harris*, 235 La. 320, 72 So.2d 746 (1954); *Stabler v. Stabler*, 226 La. 70, 75 So.2d 12 (1954); *Smith v. Smith*, 217 La. 646, 47 So.2d 32 (1950). See also *Cox v. Cox*, 199 So.2d 365 (La. App. 1st Cir. 1967) and *Misko v. Capuder*, 147 So.2d 661 (La. App. 3d Cir. 1962). The *Cox* case reversed the trial court and allowed alimony to a wife with property worth \$22,000.00 and an income of \$120.00 per month. In *Misko v. Capuder*, the court reversed the trial court and held that the wife was not entitled to alimony where her own testimony showed her expenses to be less than her income.

one factor which the trial court and the appellate court may both consider. It has been suggested that the liquid character of the assets involved in *Smith v. Smith*¹⁷ may have been an important element in the decision of that case.¹⁸ In *Cox v. Cox*¹⁹ the court allowed alimony in the amount of one-third of the husband's income minus the amount the wife would receive if she invested the value of her capital. Her assets consisted of property worth \$22,000.00 plus an income of \$120.00 per month. The court distinguished *Smith v. Smith*, saying the capital in that case was either liquid or easily convertible into cash. The wife's capital in *Cox*, however, was not liquid or easily convertible into cash. The court, therefore, felt it would be more equitable to debit the property to her under the formula of the case of *Roberts v. Roberts*²⁰ than to require her to divest herself of interest in the property before allowing alimony.²¹

In *Roberts* the court, after finding the wife to be in need, allowed her one-third of the husband's income minus the theoretical income she would receive from interest if she invested the total amount of her assets.²² The wife in *Derussy v. Derussy*²³ contended that she was entitled to alimony under the rule of the *Roberts* case even though she had \$54,000.00 assets. In rejecting her contention the court made it clear that the rule of those cases applied only in determining the amount of alimony the wife is entitled to *after* she has been found to be in need and was not a factor in determining whether she had sufficient means for her maintenance.

The courts, through the reasoning of cases such as *Cox* and *Montz v. Montz*²⁴ seem to be shifting the focus from means to income. They are apparently saying that, at least in some cases, it does not matter how much capital the divorced wife has; but

17. 217 La. 646, 47 So.2d 32 (1950).

18. *The Work of the Louisiana Supreme Court for the 1949-1950 Term—Persons*, 11 LA. L. REV. 168, 173 (1951).

19. 199 So.2d 365 (La. App. 1st Cir. 1967). See also *Montz v. Montz*, 209 So.2d 799 (La. App. 4th Cir. 1968), where the court, in allowing alimony to a divorced wife with an \$18,000.00 mortgage-free house and \$6,000.00 equity in certain stocks from which she had no income, considered the theoretical monthly income from the wife's capital as the basis of determining the amount.

20. 145 So.2d 669 (La. App. 4th Cir. 1962).

21. It should be noted that this is a court of appeal case and seems to be contra to the Supreme Court's decision in *Stabler v. Stabler*, 226 La. 70, 75 So.2d 12 (1954), where a wife with property worth \$20,000.00 and only a small income was held not entitled to alimony.

22. See *Vedenne v. Vedenne*, 163 So.2d 853 (La. App. 4th Cir. 1964).

23. 175 So.2d 15 (La. App. 4th Cir. 1965).

24. *Montz v. Montz*, 209 So.2d 799 (La. App. 4th Cir. 1968); *Cox v. Cox*, 199 So.2d 365 (La. App. 1st Cir. 1967).

only how much income she can theoretically derive from her capital. Article 160, however, makes no mention of the wife's income. The test under that article is simply, does the wife have "sufficient means." Income is only one type of means. It may be that the method the court used in *Cox* and *Montz* in determining whether the wife has sufficient means is more equitable where her assets are not easily convertible into cash; but that is a matter for the legislature to determine, and it is not the function of the court to bring about this change. It is submitted that it is the duty of the courts to determine whether the wife is without such means as will entitle her to alimony and it is suggested that they have gone beyond their function in the *Cox* and *Montz* cases. The formula used in those cases should be applied only in determining the amount of alimony the wife is entitled to after she has been found to be in need and should not be applied in determining whether she is in need.

Another question which arises is can a divorced wife who is being supported by her parents or the parents of her ex-husband be considered to be without sufficient means for her support? In *Simon v. Simon*²⁵ the husband argued that the financial ability of a mother should be considered as a factor in determining whether the divorced wife has sufficient means. He relied on *Stabler v. Stabler*²⁶ but in rejecting his contention, the court said that in the *Stabler* case it was found that the wife and not the mother actually owned the property and received the rents. In *Hicks v. Hicks*²⁷ the court said, in allowing alimony, that the fact that her father provided her with necessities does not relieve the husband of his obligation.²⁸

A factor which the courts have never mentioned, but which should be considered here is the shrinking purchasing power of the dollar.²⁹ Should this be a justifiable basis for distinguishing cases of today from 1950 cases where similar dollar amounts are concerned? It is submitted that this should not be a factor because decrease in the value of the dollar is shown directly in the increase in price of goods. Since the divorced wife must show

25. 127 So.2d 769 (La. App. 2d Cir. 1961).

26. 226 La. 70, 75 So.2d 12 (1954). See text accompanying note 7 *supra*.

27. 147 So.2d 750 (La. App. 2d Cir. 1962).

28. See *Laughman v. Laughman*, 170 So.2d 207 (La. App. 2d Cir. 1964), where the court did consider the fact that the divorced wife was living with her ex-husband's mother when the court was balancing the needs of the wife against the husband's ability to pay.

29. U.S. News and World Report, October 7, 1968, Vol. 65, No. 15, p. 78. If the 1950 dollar is considered as being worth full value, the 1968 dollar is worth 62.7¢.

what her needs are in order to receive alimony,³⁰ inflation will necessarily though not expressly be brought out in this proof.

A factor closely related to the issue of whether the wife has sufficient means is the ability of the husband to pay. It should be noted that this is important only after the wife has already been found to be in need and therefore entitled to alimony.³¹ It is mentioned here only because the courts often fail to make this clear. It is merely a limiting factor based on the common sense rule that there is no reason to award the divorced wife a judgment of alimony that the husband cannot pay.

Just how far a wife must deplete her capital before she is entitled to alimony is a question which cannot be answered directly from our jurisprudence. It is a question of fact to be decided in each case.³² In some cases \$20,000.00 has been held to be sufficient means,³³ while in other cases it has been held not to be. Generally a wife with less than \$6,000.00 capital is considered to be without sufficient means.³⁴ Since no sharp dividing line can be drawn one can only determine which factors the courts consider most important. Appellate courts are inclined to follow the decision of the trial court, but no set rule can be deduced from the cases.³⁵ There is some evidence that the courts are willing to consider whether the assets are easily convertible into cash.³⁶ The fact that the wife is not in need because her needs are being provided by her parents or the parents of her divorced husband does not relieve the husband of his obligation to pay alimony.³⁷ A related factor is the ability of the husband to pay, but it should be noted that this comes into play only after the wife has been found to be in need and is not a consideration in determining whether she is in need.³⁸

30. *Vicknair v. Vicknair*, 237 La. 1032, 112 So.2d 702 (1959). See text accompanying note 10 *supra*.

31. *Laughman v. Laughman*, 170 So.2d 207 (La. App. 2d Cir. 1964); *Harris v. Harris*, 127 So.2d 747 (La. App. 3d Cir. 1961).

32. *Smith v. Smith*, 217 La. 646, 47 So.2d 32 (1950). See text accompanying note 2 *supra*.

33. *Id.* *Stabler v. Stabler*, 226 La. 70, 75 So.2d 12 (1954). See text accompanying note 7 *supra*.

34. *Roberts v. Roberts*, 145 So.2d 669 (La. App. 4th Cir. 1962); *Loe v. Loe*, 131 So.2d 106 (La. App. 2d Cir. 1961).

35. See text accompanying notes 11-16 *supra*.

36. *Montz v. Montz*, 209 So.2d 799 (La. App. 4th Cir. 1968); *Cox v. Cox*, 199 So.2d 365 (La. App. 1st Cir. 1967). See text accompanying note 24 *supra*.

37. *Hicks v. Hicks*, 147 So.2d 750 (La. App. 2d Cir. 1962). See text accompanying note 25 *supra*. *Simon v. Simon*, 127 So.2d 769 (La. App. 3d Cir. 1961). See text accompanying note 27 *supra*.

38. *Laughman v. Laughman*, 170 So.2d 207 (La. App. 2d Cir. 1964); *Harris v. Harris*, 127 So.2d 747 (La. App. 3d Cir. 1961). See text accompanying note 31 *supra*.

The rule of *Smith v. Smith*³⁹ has proven difficult to administer. One writer has suggested that it would be more workable to allow the wife one-third of the husband's income and subtract from this the amount of interest she would receive if she invested the total amount of her capital.⁴⁰ This rule would be easier to administer and there is some indication that the courts are willing to follow it when the assets are not easily convertible into cash.⁴¹ However, where the assets are easily convertible into cash, the courts will probably continue to decide each case on its particular facts. It is submitted that the ease of conversion into cash should not be a factor under our present legislation since this shifts the emphasis to "income" and not to "means" as required by Article 160.

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39. 217 La. 646, 47 So.2d 32 (1950). See text accompanying note 3 *supra*.

40. *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Persons*, 23 LA. L. REV. 247, 251 (1963).

41. See *Montz v. Montz*, 209 So.2d 799 (La. App. 4th Cir. 1968); *Cox v. Cox*, 199 So.2d 365 (La. App. 1st Cir. 1967).