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PERSONS

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EFFECT OF PRIOR ADJUDICATION OF FAULT UPON ALIMONY INCIDENTAL TO DIVORCE

Frequently, an adjudication of fault on the part of one spouse is a necessary element to a judgment of separation or divorce. Since the 1964 amendment to Civil Code article 160, it is clear that courts may grant post-divorce alimony only to the wife who "has not been at fault."[1] Fault, in the alimony context of article 160, has been construed to be at least co-extensive with, and perhaps more expansive than, the concept of fault employed in separation and divorce actions.[2] The question thence arises, what effect, if any, should a court give to a prior adjudication of fault in a separation or divorce proceeding in a subsequent action for alimony incidental to divorce?

It has been generally declared that the wife carries the burden of proving her freedom from fault under article 160. In the 1971 case of *Rayborn v. Rayborn*,[3] however, the First Circuit Court of Appeal stated that a wife who had obtained a judgment of separation on grounds of cruelty could shift the burden to her husband by offering the prior judgment in proof of her own absence of fault.[4]

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1. LA. CIV. CODE art. 160: "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 the husband, alimony which shall not exceed one-third of his income when:

"1. The wife obtains a divorce;

"2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or

"3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person.

"This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries."

2. *See, e.g.*, Felger v. Doty, 217 La. 365, 46 So. 2d 300 (1950); Smith v. Smith, 216 So. 2d 391 (La. App. 3d Cir. 1968). Professor Pascal concludes, "The decisions as they now stand are consistent with the view that under Article 160 fault for alimony purposes includes, but is more inclusive than, fault for divorce purposes." R. PASCAL, LOUISIANA FAMILY LAW COURSE 188 (1973).

3. 246 So. 2d 400 (La. App. 1st Cir. 1971), *writ refused*, 258 La. 775, 247 So. 2d 868 (1971).

4. The decision reversed a refusal by the lower court to allow the husband to introduce any evidence to show wife's fault. Note that the court limited its decision to instances in which the husband does not put mutual fault at issue in the prior separation. In *Guarisco v. Guarisco*, 271 So. 2d 553 (La. App. 1st Cir. 1972), the court reiterated its intention to follow the *Rayborn* rule.

Two cases decided by the courts of appeal in 1973 presented situations in which the husband, rather than the wife, had previously obtained a judgment of separation based on fault. In *Broussard v. Broussard*,[5] where the husband's prior judgment was based on abandonment, the Third Circuit held that the wife was thereafter judicially estopped from introducing evidence to show her alleged freedom from fault for alimony purposes. As authority for the rule of judicial estoppel, the court cited the well-known case of *California Co. v. Price*.[6] For application of the rule to the instant facts, however, it is probable that the court relied on dicta in *Rayborn*, in which the First Circuit opined that it would be repugnant to the law to allow a spouse in an alimony action to refute a prior adjudication of fault.[7]

In the second case, *Richardson v. Richardson*,[8] the husband had obtained an uncontested jugment of separation on grounds of habitual intemperance. The unusual procedural history of the case and an imprecise definition of the crucial issue complicate the opinion, but the court apparently held that the wife was barred from receiving alimony under article 160 solely by virtue of the prior judgment adjudicating her at fault. The court did not rest its decision upon estoppel but rather upon its construction of article 160, which "presupposes instances in which the question of fault has not been determined."[9] Apparently, under this theory, the court determined that the wife had no right of action under the article to claim alimony.

5. 275 So. 2d 410 (La. App. 3d Cir. 1973).

6. 234 La. 338, 99 So. 2d 743 (1957).

7. The *Broussard* opinion actually cites *Rayborn*, although it is unclear for what point. Judge Miller, dissenting in *Broussard*, interpreted the opinion as an adoption of the following dicta from *Rayborn*: "In a separation suit grounded on cruel treatment the decision of a husband-defendant not to respond and put at issue mutual fault on the part of his wife-plaintiff can be based on valid and proper considerations. Often the accusations and counter-accusations in a domestic dispute worsens an already unfortunate situation. The decision of the husband not to appear is not repugnant to the law because the wife must still come forward with proof of his cruelty to be successful. However, in a suit for separation grounded on abandonment the decision not to put the wife's fault at issue is not left to the defendant. The law makes that decision for him because C.C. Article 143 provides that a judgment can be entered *only* in the case where the wife is free from fault, i.e., gave her husband no lawful cause to leave the common dwelling. This is an essential and indispensable element of proof. After requiring this proof, we deem it repugnant to the law to allow the husband to refute the previous judgment when the wife later seeks alimony and fault is again put at issue. The sanction of such a practice renders the abandonment article meaningless and judicially condones the misrepresentation of facts presented to the court in the abandonment proceedings." 275 So. 2d 410, 413-14 (La. App. 3d Cir. 1973).

8. 275 So. 2d 845 (La. App. 4th Cir. 1973).

9. *Id.* at 847.

The reasoning of *Broussard* is clearer and more persuasive than that of *Richardson*, and the principle of estoppel is easier to apply. However, it is important to observe the pattern of results as well as to analyze the opinions themselves. Unless checked by an adverse supreme court decision, lower courts will probably continue to apply to alimony actions, rules whose purpose is to give effect to prior adjudications of fault.[10]

Already, logically integrated results have begun to emerge. Thus, where the husband obtains a judgment of separation or divorce based on fault of the wife, *Broussard* and *Richardson* indicate that fault for purposes of article 160 is determined thereby. Where the wife obtains such a judgment based on fault of the husband, except on grounds of abandonment, *Rayborn* shifts to the husband the burden of proof in the action for post-divorce alimony. Where the wife obtains a judgment of separation on grounds of abandonment, the wife's freedom from fault is a necessary element of her cause of action; dicta in *Rayborn* indicates judicial estoppel would then apply to establish conclusively her freedom from fault for post-divorce alimony purposes.[11] Consequently, the ordinary rule under article 160 that the wife carries the burden of proving absence of fault would govern only when divorce has been granted on grounds of living separate and apart either for two years, or for one year following a judgment of separation on grounds of living separate and apart for one year, as well as when a divorce has been granted to the wife based upon the husband's fault.

Judge Miller of the Third Circuit, dissenting in *Broussard*, has raised a grave objection to the application of estoppel in actions for alimony under article 160.[12] He points out that a prior adjudication of fault may not reflect the underlying reality, particularly where the spouses obtain a mutually desired separation on the relatively inoffensive ground of abandonment. The source of the problem is the requirement that spouses live apart for one year before bringing an action for separation on no-fault grounds,[13] a delay which induces

10. Justifications include notions of judicial economy, antipathy to conflicting determinations of fact, and suspicions of collusion in obtaining judgments of separation.

11. Rayborn v. Rayborn, 246 So. 2d 400, 407 (La. App. 1st Cir. 1971). Interestingly, Justice McCaleb had earlier suggested such a result, concurring in *Olivier v. Abunza*, 226 La. 456, 76 So. 2d 528 (1954). However, the *Rayborn* dicta is in conflict with such cases as *Davidson v. Jenkins*, 216 So. 2d 682 (La. App. 3d Cir. 1968) and *Gamino v. Gamino*, 199 So. 2d 202 (La. App. 4th Cir. 1967).

12. Broussard v. Broussard, 275 So. 2d 410, 413 (La. App. 3d Cir. 1973).

13. LA. CIV. CODE art. 138(9).

many to seek what in reality is a collusive judgment based on fault. The remedy, however, is not necessarily to try anew the issue of fault in an alimony context. The legislature can give appropriate relief by shortening the length of time necessary to live apart before obtaining a judgment of separation, perhaps to thirty days. Such a change would eliminate the need for collusion, without drastically restructuring our law or sacrificing the public policy favoring reconciliation.[14]

SUPPORT FOR EIGHTEEN-YEAR-OLD CHILDREN

Recent decisions of both the Supreme Court of Louisiana and various appellate courts may have a profound impact on the divorced wife granted custody of the children. In *Bernhardt v. Bernhardt*,[15] the supreme court held that the court of appeal[16] erred in refusing to take judicial notice of Act 98 of 1972, which amended article 37 of the Civil Code so as to lower the age of majority to eighteen.[17] Thus, a mother granted custody of a child had no standing to claim alimony for the support of a child who was then a major. The major child's remedy, as suggested by the court, was to "bring an action for support in his own right under the general right to support article, Civil Code Article 229,[18] in the event that he feels he is entitled to support from his father."[19]

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14. The policy favoring reconciliation will continue to be well served by the one year interval between a judgment of separation and a judgment of divorce under LA. R.S. 9:302 (1950), *as amended by*, La. Acts 1960, No. 31 § 1, 1970, No. 476 § 1.

15. 283 So. 2d 226 (La. 1973). See also *State v. Jordan*, 283 So. 2d 223 (La. 1973) which concerns the impact of Act 98 of 1972 upon the crime of neglect of family (LA. R.S. 14:74 (1950), *as amended by* La. Acts 1952, No. 368 § 1; 1968, No. 233 § 1; 1968, No. 647 § 1; 1968, Ex. Sess., No. 14 § 1) and the accessory punitive measures of a conviction (LA. R.S. 14[75 (1950), *as amended by* La. Acts 1968, No. 647 § 1).

16. 271 So. 2d 342 (La. App. 2d Cir. 1972), *writ granted*, 273 So. 2d 836 (1973). The issue was raised as to the effect of Act 98 of 1972 on the right of the mother to maintain an action against the father for support of a nineteen-year-old. The court held that the trial court judgment awarding alimony for support of the child had been rendered prior to the effective date of the statute, thus the Act had no effect on the proceeding. (The judgment was rendered on May 11, 1972, and the effective date of the Act was July 26, 1972.)

17. LA. CIV. CODE art. 37 now provides: "Persons of the age of eighteen years shall be considered of full age and until they attain that age shall be minors. A person who is [Persons] eighteen years of age or older shall be regarded as being fully emancipated, shall be considered adults and shall have the same rights, duties, responsibilities and capacities as persons who are twenty-one years of age or older."

18. LA. CIV. CODE art. 229: "Children are bound to maintain their father and mother and other ascendants, who are in need; and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal."

19. 283, So. 2d 226, 228 (La. 1973).

Prior to *Bernhardt* numerous appellate court decisions had held that a child having reached the age of eighteen years was no longer entitled to alimony for his support.[20] In *Fellows v. Fellows*,[21] the earliest of such decisions, the defendant husband appealed that portion of a judgment awarding alimony for the children's support to the plaintiff wife. At the time the appeal was perfected, one of the children was a twenty-year-old student at Louisiana State University School of Nursing in New Orleans. The court held that since the child was no longer a minor under the Civil Code articles 227,[22] 230,[23] and 231,[24] her remedy was to seek support under the general right to support governed by Civil Code article 229.

Undoubtedly, the courts have correctly determined that the divorced father's obligation to support his children by means of alimony payments ceases with a child's majority.[25] The legislative basis for awarding alimony for the support of minor children has been article 227 of the Civil Code, imposing a duty upon parents to support their children; it has never been disputed that this duty relates only to minor children.

Prior to Act 98 of 1972, the parent under article 227 still had the duty of educating his children until they reached the age of twenty-one, an important fact since many children between the ages of eighteen and twenty-one were enrolled in colleges. The courts consistently held that the obligation of a divorced parent to educate his minor children included contribution to his college education if "the parents are financially able to do so, and where the child's desire, ambition, capability, academic background and other circumstances indicate college as a logical and necessary step in the complete education of the child."[26] An award of alimony for support of minor children en-

20. Jackson v. Jackson, 275 So. 2d 456 (La. App. 2d Cir. 1973); King v. Sanchez, 273 So. 2d 45 (La. App. 4th Cir. 1973); Hargrove v. Hargrove, 272 So. 2d 394 (La. App. 2d Cir. 1973); Fellows v. Fellows, 267 So. 2d 572 (La. App. 3d Cir. 1972).

21. 267 So. 2d 572 (La. App. 3d Cir. 1972).

22. 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."

23. LA. CIV. CODE art. 230: "By *alimony* we understand what is necessary for the nourishment, lodging and support of the person who claims it.

"It includes the education, when the person to whom the alimony is due, is a minor."

24. LA. CIV. CODE art. 231: "Alimony shall be granted in proportion to the wants of the person requiring it, and the circumstances ot those who are to pay it."

25. Wilson v. Wilson, 205 La. 196, 17 So. 2d 249 (1944); Tolley v. Karcher, 196 La. 685, 200 So. 4 (1941); Wright v. Wright, 189 La. 539, 179 So. 866 (1938).

26. Pettitt v. Pettitt, 261 So. 2d 687, 689 (La. App. 2d Cir. 1972).

rolled in college was usually substantial.[27]

It is highly dubious that the award of alimony under article 229 will be comparable to awards previously made under article 227. A difference exists between the duty imposed upon a parent under article 227 and that imposed upon an ascendant under article 229. Planiol in his treatise recognized the difference and described it as follows:

> Care must be taken not to confuse the special duty imposed upon a father and a mother toward their children [Article 227] with the much more general obligation called the alimentary obligation. [Article 229] . . . The duty of parents ceases at their children's majority. After its majority, a child may still have a right to receive sustenance, but under the ordinary conditions applicable to it, that is when it is in need. Its upbringing, with the special expenses it entails, is finished.[28]

The obligation of a parent toward his minor children under article 227 must be considered a more onerous obligation than that imposed upon ascendants under article 229. In recqgnition of the distinction between the obligations, courts have usually awarded substantially lower amounts under article 229.[29] A divorced mother who previously eagerly anticipated her children's entrance into college confident of an increase in court-ordered child-support payments must now carefully consider whether or not a college education is essential to her child's welfare.

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27. *Id.* at 687. Mrs. Pettitt had brought an action for an increase in alimony for the children's support to include college expenses. The court increased the child support payment for the minor entering college from $100 per month, which was a provision of the original divorce judgment, to $175 per month beginning in September conditioned upon the minor's actual enrollment in college. *See also* Paddison v. Paddison, 255 So. 2d 504 (La. App. 4th Cir. 1971) (Because one of the three remaining minor children had entered college, the court increased the child support award from $230 per month to $330 per month for each child.)

28. 1 PLANIOL, CIVIL LAW TREATISE no. 1682 (La. St. L. Inst. transl. 1959).

29. Tolley v. Karcher, 196 La. 685, 200 So. 4 (1941) (*destitute* middle-aged daughter awarded $10 per week from mother); Barcelo v. Barcelo, 175 La. 398, 143 So. 354 (1932) (*destitute* granddaughter awarded $15 per month from grandfather); Elchinger v. Elchinger, 181 So. 2d 297 (La. App. 4th Cir. 1965) (*mentally afflicted* major son originally awarded $450 per month reduced to $150 per month); Johnson v. Johnson, 128 So. 2d 779 (La. App. 3d Cir. 1961) (*interdicted* major child awarded $40 per month.)