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Private Law: Persons

Katherine Shaw Spaht

The Work of the Louisiana Appellate Courts for the 1975-1976 Term

A Symposium

[*Editor's Note*. The articles in this symposium discuss selected decisions of Louisiana appellate courts reported in the advance sheets dated July 1, 1975, to July 1, 1976.]

PRIVATE LAW

PERSONS*

*Katherine Shaw Spaht***

CONSTITUTIONALITY***

Despite the present failure to ratify the equal rights amendment[1] to the United States Constitution, there has been speculation that under the new

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* The following cases have not been commented upon in this article because they have been the subject of a student casenote or a leading article: *King v. Cancienne*, 316 So. 2d 366 (La. 1975), commented on in a student note at 36 LA. L. REV. 704 (1976); *Wilkinson v. Wilkinson*, 323 So.2d 120 (La. 1975), commented on in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Matrimonial Regimes*, 36 LA. L. REV. 409 (1976), and in a student note at 36 LA. L. REV. 826 (1976); and *Succession of Mitchell*, 323 So.2d 451 (La. 1975), *Cosey v. Allen*, 316 So.2d 513 (La. App. 1st Cir. 1975), and *Meaux v. Wiley*, 325 So. 2d 655 (La. App. 3d Cir. 1975), *discussed in* Spaht & Shaw, *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59, 80 n.54 (1976).

In last year's symposium article at 36 LA. L. REV. 335 (1976), the author commented on two court of appeal decisions interpreting the language "has not sufficient means for her maintenance" in article 160—*Webster v. Webster*, 308 So. 2d 302 (La. App. 1st Cir. 1975) and *Bryant v. Bryant*, 310 So. 2d 648 (La. App. 1st Cir. 1975). Five recent cases have also considered the proper interpretation of "means" —*Dugas v. Dugas*, 332 So. 2d 501 (La. App. 3d Cir. 1976); *Knight v. Knight*, 331 So. 2d 102 (La. App. 1st Cir. 1976); *Phillpott v. Phillpott*, 321 So. 2d 797 (La. App. 4th Cir. 1975); *Perry v. Perry*, 319 So. 2d 479 (La. App. 2d Cir. 1975); and *Gautreaux v. Cormier*, 315 So. 2d 164, 167 (La. App. 3d Cir. 1975), which cited *Webster*. Also, in the same article the author commented on two cases applying the doctrine of recrimination as a defense to a suit for separation from bed and board or divorce—*Schillaci v. Schillaci*, 310 So. 2d 179 (La. App. 4th Cir. 1975); *Maranto v. Maranto*, 297 So. 2d 704 (La. App. 1st Cir. 1974). During this term, the First Circuit Court of Appeal had the opportunity to apply this doctrine—*Fontenot v. Fontenot*, 327 So. 2d

Louisiana Constitution[2] certain Civil Code articles regulating the family are

678 (La. App. 1st Cir. 1976). However, La. Acts 1976, No. 495 (*adding* LA. CIV. CODE art. 141) now provides that parties can obtain a separation from bed and board even though the spouses are mutually at fault.

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*** Subsequent to the writing of this article the Louisiana Supreme Court reversed *Favorot v. Barnes*, 332 So. 2d 873 (La. App. 4th Cir. 1976), and *Ward v. Ward*, 332 So. 2d 868 (La. App. 4th Cir. 1976), and affirmed *Ducote v. Ducote*, 331 So. 2d 133 (La. App. 3d Cir. 1976). For treatment of these supreme court decisions, see the note to be published in a later issue of this Review.

1. The proposed amendment to the Constitution reads as follows:

"Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"Section 3. This amendment shall take effect two years after the date of ratification."

2. LA. CONST. art. 1, § 3: "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations." For an excellent discussion of the committee deliberations and debate in the Constitutional Convention which adopted this provision, see Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6-10 (1974): "Classifications based on birth, age, sex, culture, physical condition, or political ideas or affiliations are permissible if not arbitrary, capricious or unreasonable. . . . In any event, Louisiana has launched a long range inquiry into the rational state interests, the compelling state interests, and the reasonableness of all legislative classifications. In the future, evolving standards of society as developed by the courts of the state will have to be taken into account along with those applied in development of federal standards. The background of the provision indicates that a grudging application of the guarantee is not warranted. Rather, an expansive application independent of, and in some instances, *beyond* the federal standards is suggested." *Id.* at 8-9 (Emphasis added).

In *Perez v. Perez*, 334 So. 2d 719 (La. App. 4th Cir. 1976), the defendant wife in a divorce proceeding based upon LA. R.S. 9:302 (Supp. 1970) (judgment of separation plus one year living separate and apart without reconciliation) sought to introduce evidence of her freedom of fault. The husband had obtained the separation from bed and board on the basis of the defendant wife's abandonment; and following the Louisiana Supreme Court decision of *Fulmer v. Fulmer*, 301 So. 2d 622 (La. 1974), the trial court maintained the husband plaintiff's objection to the introduction of such evidence. In *Fulmer* the supreme court concluded that a determination of fault in a separation proceeding bars relitigation of the fault issue in a subsequent divorce proceeding when the final divorce is sought on the basis of the parties living separate and apart for one year following the judgment of separation. Defendant wife contended on appeal that the trial court's decision was unconstitutional under the Louisiana Constitution of 1974 as a denial of equal protection of the laws (art. I, § 3) and discrimination on the basis of sex (art. I, § 3). The appellate court rejected the

unconstitutional—for example, article 148[3] providing alimony pending suit for the wife and article 160[4] providing alimony after divorce for the wife not at fault. During the past year the Louisiana appellate courts had the opportunity to consider the constitutionality not only of these two Civil Code articles but also of the jurisprudential maternal preference rule[5] applied in child custody disputes and Civil Code article 39[6] providing that the domicile of a married woman is that of her husband. The attack against the constitutionality of all these rules was rejected. Yet in some subsequent decisions the appellate courts applied the same statutory provisions in a manner significantly different from the prior jurisprudence. Thus, the cases involving constitutional challenges have developed a rather revolutionary application of some of the statutory provisions.

Alimony Pending Suit—Article 148

In *Williams v. Williams*[7] the husband, in defense to his wife's claim for alimony pending suit for separation, asserted that article 148 of the Civil Code was unconstitutional.[8] Reversing the judgment of the lower court,[9] the

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contentions of the defendant: "The Fulmer decision applies equally to the husband and to the wife. We conclude that the 1974 Constitution does not affect the result reached in Fulmer, and that Fulmer is not violative of the provisions of the 1974 Constitution." 334 So. 2d at 723.

3. LA. CIV. CODE art. 148: "If the wife has not a sufficient income for her maintenance pending 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. 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."

5. See text at note 45, *infra*.

6. LA. CIV. CODE art. 39: "A married woman has no other domicile than that of her husband. . . ."

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

8. LA. CONST. art. I, § 3 (see note 2, *supra*) and U. S. CONST. amend. XIV.

9. The lower court had sustained an exception of no cause of action filed by the husband in response to the wife's petition for alimony pending suit under article 148 of the Civil Code. "The trial court sustained the exception of no cause of action predicated on the invalidity of the article and declared that article 148 denies married men equal protection of the law and due process of law and thereby violates the fourteenth amendment and art. I, §§ 2 and 3 of the Louisiana Constitution of 1974."

Louisiana Supreme Court held that article 148 does not discriminate arbitrarily against males because it "bears a fair and substantial relation to the legitimate objective of the article—a fair and orderly termination of the community regime."[10] The provision for alimony in favor of the wife only pending suit is to counterbalance, according to the court, her "lack of control over her own earnings . . . and the revenues from the community and her separate property . . . ."[11] Thus, the majority of the Louisiana Supreme Court believed that "it was reasonable for the legislature to seek to afford her special protection during the final . . . stage of the community existence."[12]

Again, in *Gravel v. Gravel*[13] the question of the constitutionality of article 148 was raised. The Third Circuit Court of Appeal cited *Williams* as authority in concluding that article 148 did not deny the defendant husband equal protection of the law. However, the court in dicta expressed the belief that article 148 as interpreted prior to the enactment of the Louisiana Constitution of 1974 was unconstitutional in application. Past jurisprudence[14] uniformly held that "the husband cannot escape the payment of alimony pendente lite to his wife on the grounds that she is capable of earning sufficient income for her support during the pendency of the suit."[15] Hereafter, according to the court, for purposes of articles 148 and 227[16] the wife must seek some gainful employment to contribute to her own support and that of her children.[17] Yet the rule is not without qualification. The wife

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331 So. 2d at 439. In a footnote in *Williams*, the court observes that the trial court did hold that the wife stated a cause of action for alimony under article 119 of the Civil Code, "which declares that husband and wife owe one another *mutual* support and assistance." (Emphasis by the court). *Id.* at 439 n.1.

10. *Id.* at 441.

11. *Id.*.

12. *Id. But see id.* at 442 (Calogero, J., dissenting).

13. 331 So. 2d 580 (La. App. 3d Cir. 1976). *But see* Best v. Best, 337 So. 2d 672 (La. App. 3d Cir. 1976), which followed *Gravel*.

14. *See, e.g.*, Bilello v. Bilello, 240 La. 158, 121 So. 2d 728 (1960); Abrams v. Rosenthal, 153 La. 459, 96 So. 32 (1923); Cabral v. Cabral, 245 So. 2d 718 (La. App. 4th Cir. 1971).

15. 331 So. 2d at 583 (La. App. 3d Cir. 1976).

16. 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."

17. The issue of whether the mother who is capable of gainful employment must seek such employment to fulfill her duty to support her children under article 227 was also raised in *Gravel*. It was concerning the issue of the mother's obligation to support her children that the court discussed the criteria of "employability." "We believe that where the mother is capable of gainful employment, she must work if necessary to fulfill her duty to support the children, unless she has good cause not to seek employment." 331 So. 2d at 582.

and mother *capable* of *gainful* employment need not seek it if she can prove *good cause*. Specifically, considering the mother's obligation to seek employment to support her children, the court considered what would constitute *good cause*. Citing *Ducote v. Ducote*[18] the court held that Mrs. Gravel would not be required to seek employment at this time because "she is enrolled in school and expects to obtain a Masters Degree soon. . . ."[19] No doubt the fact that Mrs. Gravel was to graduate in the spring of 1976 (case decided May 4, 1976) and obtain employment in the field of nursing education greatly influenced the court. In addition, the court noted that the plaintiff had two children, aged 9 and 11, and "their need for a mother's care and supervision in the home, and the other circumstances presented here, also would constitute sufficient grounds to relieve Mrs. Gravel from her obligation of obtaining employment and contributing to their support now."[20]

Despite what many have considered inequitable application of article 148,[21] the decision in *Gravel* is of far-reaching import and may ultimately create more problems than it solves. As a general rule prior to *Gravel* the employment capability of either spouse was never considered as a criterion for the award of alimony pendente lite.[22] However, in at least one recent case, the husband to relieve himself of providing support to his wife in the form of alimony had to prove that he was *absolutely unemployable,* not merely *unemployed* at the time.[23] With the introduction of "employability" as a factor to be considered under article 148, problems heretofore unencountered by the court are anticipated.

Adopting the formula of the court in *Gravel*, the immediate question is when a wife can be considered *capable* of gainful employment. Significantly, in both *Ducote* and *Gravel* the wife had been previously employed—in both cases as a nurse.[24] Based upon their previous experience, "employability" was proved. However, the situation is different if the wife has never been employed and has only a college degree or a high school diploma or a certificate from a trade school. Particularly, consider the case of a middle-aged woman who is now faced with the dismal prospect of the

18. 331 So. 2d 133 (La. App. 3d Cir.), *cert. granted*, 334 So. 2d 220 (La. 1976).
19. 331 So. 2d 580, 582 (La. App. 3d Cir. 1976).
20. *Id.*
21. *See* R. PASCAL, LOUISIANA FAMILY LAW COURSE 71, 147 (2d ed. 1975).
22. See note 14, *supra*.
23. Sykes v. Sykes, 308 So. 2d 816 (La. App. 4th Cir. 1975).
24. In *Ducote* the mother was a licensed practical nurse, and in *Gravel* she had previously worked as a registered nurse and for one year served as an instructor in a school of nursing.

disintegration of her marriage and the harsh reality that *she* somehow must prove her lack of capacity for gainful employment before she will be entitled to alimony.[25] In such a case she could prove that she had never been previously employed. Need she also prove that her skills and educational background make her incapable of *gainful* employment? Poor health could be a question either of *capacity* or of *good cause* not to seek employment. *Good cause* in *Ducote* and *Gravel* was (1) the necessity for remaining at home to care for relatively young children and (2) enrollment in a graduate program in the wife's chosen field. As to the former, problems of *good cause* exist in cases where the children are still minors.[26] Based upon other language in the opinion in *Gravel*,[27] enrollment in a university may not necessarily constitute *good cause*. Thus, as demonstrated by the previous discussion, it is imperative that the judiciary develop some functional standards by which to judge what in the future will be *capacity* for *gainful* employment or *good cause*.

Alimony After Divorce—Article 160

Paralleling the recent jurisprudential developments under article 148, three cases in the Fourth Circuit Court of Appeal have considered the constitutionality of article 160 providing alimony for the wife after divorce.[28] In *Whitt v. Vauthier*[29] the court held that article 160, which codifies a right to alimony for the wife after divorce, is not unconstitutional in that "the courts may, in the appropriate case and consistent with sound Civilian principles award alimony to a divorced husband. . . ."[30]

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25. If "employability" is to be considered a factor in determining if the wife has *insufficient income* for her maintenance, then the burden of proof would rest with the wife such that it would be necessary for her to prove either that she was not *capable* of *gainful* employment or that being so capable there was *good cause* for her not to seek employment.

26. In *Gravel* the ages of the children were 9 and 11 years. The obligation of support under article 227 exists until children reach the age of 18, however. *See, e.g.*, Bernhardt v. Bernhardt, 283 So. 2d 226 (La. 1973); DeMarie v. DeMarie, 295 So. 2d 229 (La. App. 3d Cir. 1974); Dubroc v. Dubroc, 284 So. 2d 869 (La. App. 4th Cir. 1973).

27. "Applying the above rules to this case, we have concluded that Mrs. Gravel should not be required to seek employment *at this time*, since that would make it necessary for her to discontinue her graduate course. We believe that the fact that she is enrolled in school and expects to obtain a Masters Degree *soon* is sufficient reason to relieve her of the necessity of seeking employment *now*." (Emphasis added). 331 So. 2d 580, 582 (La. App. 3d Cir. 1976).

28. See note 4, *supra*.

29. 316 So. 2d 202 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 558 (La. 1975).

30. *Id.* at 205. The court's conclusion is based upon the fact that article 301 of the Code Napoleon of 1804 provided for alimony after divorce for either spouse who was

Thus, article 160, much as article 148, withstood the constitutional challenge; but in two subsequent cases the court held that "an ex-wife must show circumstances which make her unable to support herself by working before she can obtain post-divorce alimony . . . ."[31] In *Ward v. Ward*[32] the court, examining the "means" of the wife under article 160, concluded that "means" should be given the same interpretation as "means" of the husband in article 148. According to the court, the established jurisprudence[33] is that "means" in article 148 includes the ability of the husband to

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in need and "when the Civil Code of 1808 was adopted this provision was omitted along with other Code Napoleon divorce related articles." *Id.* According to the court, which cited Professor A. N. Yiannopoulos, the Civil Code of 1808 did not repeal all prior laws but only those which were contrary to its dispositions; and such laws would continue to be in force unless "expressly modified, suppressed or superseded by the new provision." *Id.* Alimony for the needy wife following divorce was first provided for in 1827 and later incorporated into the 1870 Code. "Thus, we know that alimony for the divorced husband was once available by virtue of a positive statute in the Code Napoleon, we know that the Legislature has by positive enactment provided for alimony for divorced wives, there has never been a positive legislative statement to the effect that divorced husbands cannot claim alimony, and in our research of the jurisprudence we find no case where the husband has been denied or has even applied for alimony after a divorce." *Id.*

The decision of the court thus hinges upon the provision of the Code Napoleon providing alimony for either spouse. The court throughout its discussion necessarily assumes that the Code Napoleon was in force in Louisiana. France, however, assumed sovereignty in Louisiana "*only* on November 30, 1803, for a period of twenty days." A. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM pt. I, 54 (1971) (emphasis added). Professor Yiannopoulos further observes: "During the brief period of French control, Laussat, as Colonial Prefect representing Napoleon, abolished the Spanish authorities and created a municipal government for Louisiana. . . . He did not, however, have the time to organize a judiciary, and *did not reinstate the French laws*. Thus, Spanish laws remained in force until the United States took possession of the territory on December 20, 1803. . . . The first official act of Claiborne was to affirm the application of Spanish laws, that is, the laws then in force." (Emphasis added). *Id.* Thus, the Code Napoleon was never in force in Louisiana, although it may have served as a model for some of the provisions which were *actually* contained in the Civil Code of 1808.

31. Favrot v. Barnes, 332 So. 2d 873, 875 (La. App. 4th Cir.), *cert. granted*, 334 So. 2d 429 (La. 1976), *cert. denied*, 334 So. 2d 436 (La. 1976).

32. 332 So. 2d 868 (La. App. 4th Cir.), *cert. granted*, 334 So. 2d 430 (La. 1976).

33. The court cited *Zaccaria v. Beoubay*, 213 La. 782, 35 So. 2d 659 (1948), *Rakosky v. Rakosky*, 275 So. 2d 421 (La. App. 4th Cir. 1973), and *Viser v. Viser*, 179 So. 2d 673 (La. App. 2d Cir. 1965), primarily for the proposition that "the husband cannot escape liability for alimony pendente lite by refusing to work." 332 So. 2d 868, 871 (La. App. 4th Cir. 1976). The court thus reasoned that this ability to work and earn an income must be included in a determination of "means" of the husband under article 148 because otherwise "such ability to work could not be considered in the alimony determination and the husband could not be required to obtain employment." *Id.* at 872.

work and earn an income; therefore, "means" in article 160 should include the "divorced wife's capability of working and supporting herself."[34] In *Favrot v. Barnes*[35] the court cited and relied on *Ward*, decided the same day, and further stated, "Despite pre-Ward cases' having ignored the question, the ex-wife's burden of proving lack of means includes, at least since Louisiana's 1974 Constitution, proving circumstances that prevent her from supporting herself by working."[36]

The burden of proof, according to the court in *Ward*, was on the wife to show the unavailability of employment. Subsequently, in a *per curiam* opinion on application for rehearing, the proof required was further clarified. Not only will availability of employment be a consideration in determining whether a divorced wife must support herself, but also valid and compelling reasons for not accepting available employment—*i.e.*, "if she is required to stay at home to care for the small children of the marriage."[37] Both cases were remanded to the lower court for the presentation of further evidence on the issue of the wife's lack of "means."

In both cases the wives formerly had been employed as school teachers. Mrs. Ward had thirteen and one-half years experience and numerous degrees;[38] she was at the time of suit completing work on her Ph.D. Obliquely, the court indicated that her present enrollment in college might not be considered a compelling reason for failure to seek employment.[39] The wife in *Favrot* had previously been employed as a teacher but had made "passing references to unavailability of a teaching post and to an arthritis condition";[40] yet the court concluded that without further evidence they could not decide "that the wife cannot find work as a teacher and that she physically cannot do other work."[41]

By including this element—ability to earn and support oneself—in proof of the wife's "means" under article 160, the courts must resolve the same problems created by the decisions in *Gravel* and *Ducote*.[42] Just as the

34. *Id.*

35. 332 So. 2d 873 (La. App. 4th Cir.), *cert. granted*, 334 So. 2d 429 (La. 1976), *cert. denied*, 334 So. 2d 436 (La. 1976).

36. *Id.* at 876.

37. Ward v. Ward, 332 So. 2d 868, 873 (La. App. 4th Cir. 1976).

38. *Id.* at 870.

39. "Thus, insofar as is shown by the record now before us, *other than the fact that she attends college full time* there is no reason why the appellee should not be able to work as a school teacher, employment for which she is fully qualified and employment sufficiently remunerative for her support." (Emphasis added). *Id.*

40. 332 So. 2d 873, 876 (La. App. 4th Cir. 1976).

41. *Id.*

42. See text at notes 25 & 26, *supra*.

courts must establish some standards for determining what is "good cause" and "capable of gainful employment," they must do the same for "ability to earn" and "compelling reasons." However, based upon the very nature of alimony under article 160,[43] the court's decisions in *Ward* and *Favrot* are not as revolutionary as those in *Gravel* and *Ducote*. It is much easier to justify a requirement that the wife prove she is incapable of employment before awarding her a sum from her *ex*-husband in the nature of a gratuity.

Child Custody—The Maternal Preference Rule

In spite of the provisions of article 157 of the Civil Code,[44] the judiciary has developed the following rules in resolving custody disputes: (1) the paramount consideration is the best interest of the children, and (2) the best interests of children, particularly those of tender years, is that they be in the custody of the mother, unless she is morally unfit or otherwise incapable or unsuitable.[45]

The defendant husband in *Broussard v. Broussard*[46] appealed from a judgment of the trial court awarding custody of the two minor children to the wife, alleging that the judicial application of the maternal preference rule was unconstitutional under the 1974 Louisiana Constitution.[47] Noting that its decision as to the constitutionality of the jurisprudential rule was unnecessary,[48] the court nonetheless held that the preference in favor of the mother is "not unreasonable, capricious or arbitrary."[49] In eloquent terms the court justified its conclusion: "The preference is based on the simple

43. "[A]limony under Civil Code Article 160 is in the nature of a pension or a gratuity, obtainable by the former wife only when she has not been at fault and when she has not sufficient means for her support." Ward v. Ward, 332 So. 2d 868, 872 (La. App. 4th Cir. 1976). *See also* Frederic v. Frederic, 302 So. 2d 903 (La. 1974); Bernhardt v. Bernhardt, 283 So. 2d 226 (La. 1973); Hays v. Hays, 240 La. 708, 124 So. 2d 917 (1960); Brown v. Harris, 225 La. 320, 72 So. 2d 746 (1954).

44. LA. CIV. CODE art. 157 reads in part: "In all cases of separation and of divorce the children shall be placed under the care of the party *who shall have obtained the separation or divorce* unless the judge shall, for the greater advantage of the children, order that some or all of them shall be entrusted to the care of the other party." (Emphasis added).

45. *See, e.g.*, Nethken v. Nethken, 307 So. 2d 563 (La. 1975); Abreo v. Abreo, 281 So. 2d 695 (La. 1973); Estes v. Estes, 261 La. 20, 258 So. 2d 857 (1972).

46. 320 So. 2d 236 (La. App. 3d Cir. 1975).

47. LA. CONST. art. I, § 3.

48. The wife had filed suit for separation from bed and board on the basis of the husband's cruel treatment and was granted the separation judgment by the trial court. "Moreover, the award of custody here follows the rule established by Article 157 of the Louisiana Civil Code. . . ." (See note 44, *supra*). 320 So. 2d at 238.

49. *Id.*

fact that the day-to-day care of minor children has traditionally, in our society, been in the hands of the mother rather than the father. In addition, there is an obvious biological connexity between mother and child in that the mother carries the child during gestation, gives birth to it and suckles it (in some cases) during infancy. A relationship is created which gives, in our opinion, a biological basis for the historic legal preference given the mother in questions of custody."[50] No doubt the reference to the traditional practice of leaving children in the care of the mother will be an insufficient legal basis for the difference in treatment accorded to mothers and fathers. The question remains whether the biological basis of the classification will be sufficient to withstand the rigid scrutiny traditionally applied by the United States Supreme Court in cases of "suspect" classifications, if sex is a "suspect" classification.[51]

Wife's Domicile—Article 39

In *Welsh v. Welsh*[52] the Fourth Circuit Court of Appeal held that article 39 of the Civil Code, which provides that the domicile of a married woman is that of her husband, is unconstitutional under Louisiana Constitution Article 1, Section 3[53] in that it was "a law which would enable a husband, but not a wife, to move at will to a new parish and there sue. . . ."[54] Thus, the constitutional interpretation of that article, according to the court, is that the wife's domicile is that of her husband if they are living together at their matrimonial domicile.[55]

When the decision in *Welsh* was appealed, the Louisiana Supreme Court affirmed the judgment but was careful to do so on other grounds.[56]

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50. *Id.*

51. As defined in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973), a "suspect class" entitled to the protection of strict judicial scrutiny is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. The United States Supreme Court in *Mathews v. Lucas*, 96 S. Ct. 2755 (1976), in distinguishing the statutory classification of illegitimacy from classifications based on sex observed: "[P]erhaps . . . because illegitimacy does not carry an obvious badge, as race or *sex* do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." *Id.* at 2762 (Emphasis added).

52. 322 So. 2d 352 (La. App. 4th Cir. 1975), *cert. granted*, 325 So. 2d 604 (La. 1976).

53. For text of that provision see note 2, *supra*.

54. 322 So. 2d at 353. The court reaches this conclusion because the venue is non-waivable under LA. CODE CIV. P. art. 3941.

55. *Id.* at 354.

56. *Aff'd sub nom.* Johnson v. Welsh, 334 So. 2d 395 (La. 1976).

The court observed that the long established jurisprudential exception to the provisions of article 39 is that a married woman "may acquire a domicile separate from that of her husband if she is abandoned, or if her husband's misconduct justifies her leaving."[57] Because the plaintiff wife had obtained a judgment of separation from bed and board on the grounds of cruel treatment, plaintiff had proved herself legally entitled to acquire a separate domicile. The appellate court's decision that article 39 was unconstitutional was improper, according to the supreme court, for two reasons: (1) the constitutionality of that article had not been attacked by the pleadings in the trial court[58] and (2) the decision was contrary to "the settled judicial practice of declining to determine the constitutionality of laws unless such a determination is necessary for disposition of the cause."[59] Thus, for the moment at least article 39 has withstood the constitutional attack. Particularly because venue for separation and divorce suits is jurisdictional,[60] the constitutionality of article 39 is crucial. Under the United States Supreme Court's analysis for purposes of equal protection, the inquiry is a dual one: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[61] Is the governmental interest sought to be promoted in article 39 subjecting the wife during marriage to the authority of her husband by giving him the option to select the matrimonial domicile?[62] The appellate court referred to article 39's "aphorism" and practically concluded that "even if the wife unjustifiably abandons the husband, she today is not . . . imaginarily incarcerated in whatever domicile her husband may elect, as if she were a

57. *Id.* at 397. The court cited as authority *Berry v. Berry*, 310 So. 2d 626 (La. 1975); *Bush v. Bush*, 232 La. 747, 95 So. 2d 298 (1957); and *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248 (1891).

58. "Since the constitutionality of article 39 of the Civil Code was not attacked by the pleadings in the trial court, the court of appeal erred in passing upon the issue. The question of its constitutionality was not before that court; nor is it before us." *Id.* at 396-97.

59. *Id.* at 397.

60. LA. CODE CIV. P. art. 3941: "An action for an annulment of marriage, for a separation from bed and board, or for divorce shall be brought in a parish where either party is domiciled, or in the parish of the last matrimonial domicile.

"The venue provided in this article *may not be waived*, and a judgment rendered in any of these actions by a court of improper venue is an absolute nullity." (Emphasis added).

61. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972). *See also* Mathews v. Lucas, 96 S. Ct. 2755, 2761 (1976).

62. 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 to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."

runaway child."[63] In answer to the second question the personal right such a classification endangers is, as the appellate court indicates, the ability of the wife to move at will to a new parish and sue for separation or divorce. Should the proper case be presented to the Louisiana Supreme Court, it must be prepared to answer these two questions convincingly.

63. 322 So. 2d 352, 354 (La. App. 2d Cir. 1975).