

The Nature of Alimony - Separate or Community Obligation?

Phillip L. McIntosh

Repository Citation

Phillip L. McIntosh, *The Nature of Alimony - Separate or Community Obligation?*, 37 La. L. Rev. (1977)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol37/iss4/11>

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

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.

law, arise monthly during the marriage, and are not antenuptial debts under Louisiana Civil Code article 2403,³ the wife is due no accounting for the community funds expended. *Connell v. Connell*, 331 So. 2d 4 (La. 1976).

The Civil Code does not specifically state whether alimentary obligations are separate or community. Article 2403 provides that debts incurred prior to marriage are to be paid with separate funds,⁴ while debts incurred during marriage are to be paid with community funds. The jurisprudence has consistently held that a judgment of alimony is neither an ordinary debt nor an antenuptial debt, but rather an obligation imposed by law⁵ which is uncertain as to amount and maturity.⁶ Thus article 2403 does not explicitly categorize alimentary obligations.

Under Spanish law, recognized by Louisiana jurisprudence as the source of article 2403,⁷ if a spouse was burdened by an obligation imposed by law, such as a penal⁸ or delictual obligation,⁹ his share of the community could be reached to satisfy the obligation provided his separate assets

3. LA. CIV. CODE art. 2403: "In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."

4. *E.g.*, *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497 (La. 1973) (notes issued in settlement of a former community); *Markham v. Allen*, 22 La. Ann. 513 (1870) (debt contracted by husband before marriage); *Bank of Louisiana v. Wilcox*, 2 La. Ann. 344 (1847) (antenuptial note made by wife).

5. *E.g.*, *Arabie v. Arabie*, 230 La. 1036, 89 So. 2d 890 (1956) (ten-year prescription of Louisiana Civil Code article 3547 does not apply to a judgment of alimony because it is not a money judgment founded on a debt, but rather is a continuing legal obligation); *Fazzio v. Krieger*, 226 La. 511, 76 So. 2d 713 (1954) (judgment of child support is not an antenuptial debt, but an obligation imposed by law); *State ex rel. Huber v. King*, 49 La. Ann. 1503, 22 So. 887 (1897) (imprisonment for failure to pay alimony is not imprisonment for failure to pay debt). The United States Supreme Court has also held that alimony is not a debt. *Wetmore v. Markoe*, 196 U.S. 68 (1904); *Dunbar v. Dunbar*, 190 U.S. 340 (1903); *Audubon v. Shufeldt*, 181 U.S. 575 (1901).

6. *Festervand v. Laster*, 15 La. App. 159, 130 So. 634 (2d Cir. 1930).

7. *Creech v. Capitol Mack, Inc.*, 287 So. 2d 497, 504 (La. 1973); *Fazzio v. Krieger*, 226 La. 511, 518, 76 So. 2d 713, 715 (1954); *Guice v. Lawrence*, 2 La. Ann. 226, 228 (1847). For a discussion of the Spanish community of gains, see *Pugh, The Spanish Community of Gains in 1803: Sociedad De Gananciales*, 30 LA. L. REV. 1 (1969).

8. *Pugh, supra* note 7, at 22.

9. *See* L. ROBBINS, COMMUNITY PROPERTY LAWS WITH TRANSLATIONS OF THE COMMENTARIES THEREON OF MATIENZO, AZEVEDO AND GUTTIERREZ 86 (1940) [hereinafter cited as ROBBINS].

were insufficient. Alimentary obligations, also imposed by law, were dealt with similarly.¹⁰ Spanish law also characterized as separate those debts incurred during marriage for the benefit of one spouse only, such as debts resulting from that spouse's suretyship.¹¹ It seems clear from the examples given that any obligation, whether a contractual debt or one imposed by law, not ultimately benefiting the marriage but concerning the affairs of only one spouse, was regarded as a separate obligation of that spouse.¹²

Prior to the instant case the jurisprudence had not dealt squarely with the issue of whether an alimony *judgment* is a community or separate obligation.¹³ The courts had, however, dealt with the nature of *voluntary* support payments. In *Succession of Boyer*¹⁴ the wife was not allowed to claim recompense from her husband's heirs for expenditures of common funds by the husband for the support of his child of a former marriage in the absence of evidence that he intended such expenditures to be separate expenses. Subsequent cases¹⁵ also treated voluntary satisfaction of the husband's alimentary obligation with community funds as non-reimbursable to the wife. This treatment was not consistent with the Spanish view that alimentary obligations are separate with reimbursement due for community funds expended to satisfy the obligation.¹⁶

Unlike the clear holding in *Boyer* regarding voluntary payments, there had been no determination of the nature of alimony judgments. However, there were cases which, while dealing with other issues, may aid in understanding the issue before the court in the instant case. The supreme court in *Fazzio v. Krieger*¹⁷ held that one-half of the income of the second community could be considered in determining the amount to be awarded for the support of the children of a prior marriage. The language of the decision indicates the court may have considered the obligation the husband's alone because the court spoke of considering *his*

10. *See id.* at 86, 262-63; W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 165 at 393 (2d. ed. 1971); Pugh, *supra* note 7, at 21.

11. Pugh, *supra* note 7, at 22.

12. *Id.* at 21-25.

13. But there had been a federal case in which alimony was held to be a community obligation. *Godchaux v. United States*, 102 F. Supp. 266 (E.D. La. 1952), discussed in the text at note 40, *infra*.

14. 36 La. Ann. 506 (1884).

15. *E.g.*, *Succession of Ratcliff*, 209 La. 224, 24 So. 2d 456 (1945); *Succession of Applegate*, 39 La. Ann. 400, 2 So. 42 (1887).

16. ROBBINS, *supra* note 9, at 263.

17. 226 La. 511, 76 So. 2d 713 (1954).

share of the community income.¹⁸ Several appellate cases followed *Fazzio* in determining the husband's ability to pay alimony by considering the husband's half of the second wife's income.¹⁹ One of these, *White v. Klein*,²⁰ discussed garnishing the husband's half of the second community. Such language indicates that the courts considered the obligation as owed by the husband alone because they spoke of considering or garnishing only the husband's half of the community income rather than the whole. However, the appellate court in the instant case²¹ interpreted the *Fazzio* court's inclusion of the husband's share of the second wife's income to mean that "the obligation of the husband to make current payments of alimony and child support to his first wife are debts of the second community, and that they are not separate debts of the husband."²² This interpretation is based upon the conclusion in *Fazzio* that the obligation is "clearly a valid liability of the second community."²³ However, when considered in the context of the opinion, which relied heavily upon Spanish sources,²⁴ the statement should be interpreted to mean that the obligation, while initially enforceable out of the community, is ultimately enforced out of the husband's *half* of the community.²⁵

In 1973 *Fazzio* and *White* were overruled by the landmark case of *Creech v. Capitol Mack, Inc.*²⁶ insofar as they permitted the husband's separate creditors to seize only his half of the community to satisfy his separate obligations. *Creech* held that the husband's separate creditors could seize the entire community in satisfaction of his separate debts because, as between the husband and third parties, the husband's patrimony includes the entire community. The wife, however, is entitled to

18. "[T]he trial judge was correct in considering the husband's half of the income of the second community in fixing the amount awarded for the maintenance and support of his children by a former marriage." *Id.* at 522, 76 So. 2d at 716.

19. *Lopez v. Lopez*, 264 So. 2d 354 (La. App. 4th Cir. 1972); *White v. Klein*, 263 So. 2d 496 (La. App. 1st Cir.), *cert. denied*, 262 La. 1097, 266 So. 2d 223 (1972); *Morace v. Morace*, 220 So. 2d 775 (La. App. 1st Cir. 1969); *Lytell v. Lytell*, 144 So. 2d 925 (La. App. 4th Cir. 1962).

20. 263 So. 2d 496 (La. App. 1st Cir.), *cert. denied*, 262 La. 1097, 266 So. 2d 223 (1972).

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

22. *Id.* at 426.

23. 226 La. 511, 518, 76 So. 2d 713, 715 (1954).

24. *Id.*

25. See the text at notes 7-12, *supra*.

26. 287 So. 2d 497 (La. 1973). *Creech*, however, may be overruled by Louisiana Civil Code article 2398 as reenacted by the legislature in the 1976 Regular Session. See *The Work of the Louisiana Legislature for the 1976 Regular Session—Matrimonial Regimes*, 37 LA. L. REV. 123, 125-29 (1976).

reimbursement for her half of the community assets seized to satisfy those debts because, as between husband and wife, the debts are separate and must be acquitted from separate assets. Subsequent to *Creech*, cases involving the fixing of alimony merely state that the second wife's income must be considered in fixing the amount to be awarded without specifically referring to the husband's half of her income.²⁷ This may be construed as simply meaning that alimony is enforceable out of the entire community as part of the husband's patrimony leaving unresolved the question of reimbursement to the wife on dissolution. However, not all of the cases, even before *Creech*, specifically spoke of considering only the husband's share of the second wife's income.²⁸

In another post-*Creech* case, *Finley v. Finley*,²⁹ the First Circuit Court of Appeal held that it is proper to consider the second wife's income, even though she is separate in property, in fixing the amount to be awarded to the husband's children of a former marriage since the second wife must contribute to the expenses of the marriage. In denying a rehearing, the court stated that the obligation of the second wife to contribute enhanced the ability of the husband to support his children.³⁰ The ambiguous language of the court could be interpreted to mean that the alimony payments were expenses of the marriage. A better interpretation is that the court was simply stating that because the wife must contribute to the expenses of the marriage, the husband has more resources to commit to obligations not involving the marriage. This construction seems proper because alimony payments have little in common with expenses traditionally regarded as expenses of the marriage such as family supplies, housing, education of the children of the marriage,³¹ taxes on community property and taxes on separate property producing community income³²—

27. *Swider v. Swider*, 314 So. 2d 372 (La. App. 4th Cir.), *cert. denied*, 320 So. 2d 551 (La. 1975); *Phillips v. Phillips*, 319 So. 2d 566 (La. App. 4th Cir. 1975).

28. *Marcus v. Burnett*, 282 So. 2d 122 (La. 1973).

29. 305 So. 2d 654 (La. App. 1st Cir. 1974).

30. The court stated, "[W]e find that the obligation of the present Mrs. Finley to contribute to the marriage expenses enhances the ability of Mr. Finley to provide for the support of his children." *Id.* at 658.

31. See LA. CIV. CODE arts. 2345, 2389, 2395; *First Natchez Bank v. Moss*, 52 La. Ann. 1524, 28 So. 133 (1900); *McElvin v. Taylor*, 30 La. Ann. 552 (1878); *Hardin v. Wolf & Cerf.*, 29 La. Ann. 333 (1877); *Hill v. Tippet*, 10 La. Ann. 554 (1855); *Fenn v. Holmes*, 6 La. Ann. 199 (1851); *Madison v. Jackson*, 14 La. App. 279, 131 So. 736 (La. App. Or. Cir. 1928).

32. R. PASCAL, *LOUISIANA FAMILY LAW COURSE* 78 (2d ed. 1973) [hereinafter cited as PASCAL]. Wives who are separate in property or administer their paraphernal property must contribute to the expenses of the marriage. Wives under a community regime are not required to contribute if the husband has administration

all of which involve the common life of the spouses. Applying the Spanish criterion of benefit to the marriage, these traditional marital expenses would be community obligations but alimony would not. If, as seems unlikely, *Finley* stands for the proposition that alimony payments are expenses of the marriage, the case would of course mean that alimony payments are community obligations.

In the instant case, the Louisiana Supreme Court held that the obligation to support arises monthly during the existence of the second marriage and is therefore dischargeable from community funds. The court relied on the holding in *Fazio* that the husband's obligation to support his first family is not an antenuptial debt, but one imposed by law and arising during the second marriage. The court further stated that the wife was due no accounting for funds used to satisfy the obligation.³³ *Creech* was distinguished because it dealt with debts arising before marriage so that the wife was entitled to reimbursement on dissolution. The opinion further denied recovery by the wife on the ground that she failed to show that the husband's support payments enhanced his separate property as required by Louisiana Civil Code article 2408.³⁴

The decision in the instant case supports the view that any debt or obligation of the husband arising during the existence of the community is a community obligation unless there is a showing that his separate property

of the paraphernal property because the revenues produced by her property are community. LA. CIV. CODE arts. 2385, 2386. Any obligation incurred by the husband, or wife with his authorization, which is an expense of the marriage—a matter of common concern—is certainly a community obligation.

33. Justice Summers concurred in the result but was of the opinion that the obligation to support was antenuptial and followed the spouse into the second marriage as a community obligation because of the special status of obligations imposed by the state as opposed to obligations owed to other creditors. He argued that ordinary creditors, unlike the state, should not be able to compel use of community assets to satisfy separate debts. 331 So. 2d at 8-9. Justice Tate also concurred, being of the opinion that the obligation was not antenuptial but a continuing obligation arising periodically during the second marriage; thus no accounting was due the second wife on dissolution. *Id.* at 9, 11. In a footnote to his opinion, Justice Tate pointed out that the decision does not address the issue of the husband's accountability if the support payments exceeded the second wife's share of the earnings. *Id.* at 10 n.2.

34. This part of the opinion seems unnecessary since the court had already concluded that the obligations were community obligations. To apply article 2408, it would have to be shown that the debt was of a separate nature, which the court denied in its interpretation of article 2403. It does seem that if the obligation were declared separate the wife could support her claim by arguing that the use of community funds enhanced the husband's separate estate by reducing debt claims against it. No cases were found in which such an argument was made.

has been enhanced by the use of community funds.³⁵ Construed against their Spanish background,³⁶ however, articles 2403 and 2408 do not support the supreme court's reasoning. An obligation is not a community obligation simply because it arises during the existence of the community. For example, a wife who commits a tort while not on a community mission may not bind the community assets for the liability³⁷ imposed by article 2315³⁸ because the wife may bind the community only with the husband's consent. That the wife's delictual obligation is her separate obligation is certainly consistent with the Spanish view, though the rule is based on her lack of authority to bind the community without the husband's consent. Applying Spanish principles, obligations which are of common concern would be community and those which are not, regardless of when they arise, would be separate. Those obligations which would be of common concern would logically seem to be those which benefit the common life of the husband and wife and the children of their marriage such as the traditional expenses of the marriage discussed earlier.³⁹ It is difficult to see how alimony payments benefit the common life of the husband and wife and the children of the marriage.

Apart from the theoretical aspects of the case, a policy consideration not discussed but possibly pertinent to the court's reasoning is the income tax liability of the second wife. In *Godchaux v. United States*⁴⁰ the government, arguing that alimony is a separate debt, sought to bar the second wife from taking a deduction for one-half of the husband's alimony

35. This view has support in prior jurisprudence: *Godchaux v. United States*, 102 F. Supp. 266 (E.D. La. 1952) (alimony payments are community obligations); *Fazzio v. Krieger*, 226 La. 511, 76 So. 2d 713 (1954) (interpreted by the appellate court in the instant case as meaning the obligation to pay alimony is community); *Succession of Boyer*, 36 La. Ann. 506 (1884) (second wife could not recover for voluntary support payments by her husband to his child of a prior marriage).

36. See PASCAL, *supra* note 32, at 78.

37. *E.g.*, *Walker v. Fontenot*, 329 So. 2d 762 (La. App. 1st Cir.), *cert. denied*, 332 So. 2d 217 (La. 1976); *Kipp v. Hurdle*, 307 So. 2d 125 (La. App. 1st Cir.), *cert. denied*, 310 So. 2d 643 (La. 1975). It would be consistent also if the husband's delicts committed while engaged in activity not benefiting the community were also to be considered separate, with reimbursement to the wife upon dissolution should community assets be used to satisfy the obligation. No cases have been found on this point but *Brantley v. Clarkson*, 217 La. 425, 46 So. 2d 614 (1950), suggests the obligation would be community were such an issue to be raised.

38. LA. CIV. CODE art. 2315 provides in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

39. See the text at notes 31 and 32, *supra*, with regard to traditional expenses of the marriage which are, of course, common concerns.

40. 102 F. Supp. 266 (E.D. La. 1952).

payments made to his former wife. While the court held that the obligation was community and the wife was thus entitled to the deduction, the implication is clear that should the obligation be considered separate by the courts, the second wife would not be entitled to any deduction and the husband would be allowed to deduct the entire amount. Considering the obligation as separate would therefore increase the wife's tax liability, a result the court in the instant case may have wished to avoid.⁴¹

Although it has been suggested that alimentary obligations of both spouses should be community,⁴² as the codal scheme now exists, properly interpreted in light of its historical foundation, obligations of one spouse only should ultimately be paid out of that spouse's separate property. Relying on the Spanish sources, Professor Pascal states that under the principles evident in Louisiana Civil Code articles 2403 and 2408, "[o]bligations incurred by the spouses *in matters pertaining to common concerns* should be paid out of the common funds. On the other hand obligations incurred by either spouse in relation to his separate affairs should be paid out of his separate funds."⁴³ He further states that "[i]f community funds are used to pay separate obligations . . . , then there must be an accounting at the dissolution of the community of gains."⁴⁴ Professor Pascal regards alimentary obligations as the separate responsibility of the obligated spouse under the codal scheme as they concern only that spouse.⁴⁵

It is hoped that the supreme court will reconsider the instant case in light of the principles and background of Louisiana's community property laws and decide in accordance with those principles. Regardless of whether the court takes such action, the legislature should amend article 2403 to insure the consistent treatment of both spouses' alimentary obligations. If alimentary obligations are to be community, certainly the wife's obligation to support her ascendants and descendants,⁴⁶ if not former spouses as well,⁴⁷ should be treated just as the husband's obligation of

41. *Godchaux* involved separate returns filed by husband and wife. Apparently the deduction problem would not arise if a joint return is filed.

42. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Matrimonial Regimes*, 37 LA. L. REV. 358, 359-60 (1977).

43. PASCAL, *supra* note 32, at 78.

44. *Id.* at 220-21.

45. *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Persons*, 16 LA. L. REV. 218, 220-22 (1956). This view is reiterated in Professor Pascal's comment on the instant case in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Matrimonial Regimes*, 37 LA. L. REV. 358, 359-60 (1977).

46. LA. CIV. CODE art. 229.

47. *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). This case has been heavily

support. Practicality may demand that one spouse be the manager of community assets, but fairness demands the manager not be given unfair advantages at the expense of the other spouse. Alternatively, the legislature should clarify the article to reflect its Spanish heritage by specifically making alimentary obligations separate. The primary purposes of community property are to provide for the expenses of the common life and to provide that the spouses share equally in the growth and acquisition of assets produced by their common labor and industry. Without the consent of the other spouse, neither spouse should be able to jeopardize the assets properly belonging to the other in pursuance of his own affairs. By treating alimentary obligations as separate such jeopardy would be avoided consistently with the purposes of community property. Fairness and clarity demand one alternative or the other, but as few persons would like the idea of supporting a spouse's former spouse, in addition to the other reasons set forth, the proposal that the obligations be made separate is more plausible.

Phillip L. McIntosh

RACIAL DISCRIMINATION UNDER THE CONSTITUTION AND TITLE VII—
MORE DEFERENCE TO THE REASONABLE PRACTICES OF
LAWMAKERS AND EMPLOYERS

Alleging racial discrimination in effect, though not in purpose, claimants asserted that a personnel test given by the District of Columbia police, resulting in the rejection of their job applications, was unrelated to job performance and thus violated the due process clause of the fifth amendment as well as certain federal statutes.¹ Following a district court dismissal,² the court of appeals³ found a constitutional violation, based upon the

criticized. See *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Persons*, 37 LA. L. REV. 305, 310-11 (1977).

1. Claimants, intervenors in a class action challenging D.C. police force recruiting policies, asserted violations of 42 U.S.C. § 1981 (1970) and D.C. Code § 1-320 (1973 & Supp. 1975) requiring that police force appointments be made in conformity with federal Civil Service provisions. The instant case dealt only with a motion for summary judgment regarding the validity of a written Civil Service personnel exam.

2. 348 F. Supp. 15 (D.C. 1972) (granting federal parties' motion for summary judgment based on constitutional and statutory grounds and denying claimants' motion based solely on the Constitution).

3. 512 F.2d 956 (D.C. Cir. 1975).