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Private Law: Persons

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PRIVATE LAW

PERSONS

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EXTENSIONS OF *FULMER V. FULMER*

As discussed earlier in a symposium article,[1] the significance of the decision in *Fulmer v. Fulmer*,[2] which held that a determination of marital fault in a separation proceeding barred relitigation of fault for the purpose of alimony after divorce, was its attempt to go beyond the facts in the case and establish authoritative rules governing the application of Civil Code article 160.[3] Within the last term, four cases have considered the effect of *Fulmer* and have extended its application by applying the rules which appeared in dicta.

In *Trahan v. Trahan*[4] and *Moon v. Moon*[5] the courts of appeal considered whether the parties by mutual consent could alter the effect of *Fulmer*. The spouses in *Trahan* by consent judgment in a divorce proceeding, preceded by a judgment of separation from bed and board, agreed

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1. *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Persons*, 35 LA. L. REV. 259, 263 (1975).

2. 301 So. 2d 622 (La. 1974). The constitutionality of the decision in *Fulmer* was sustained in *Perez v. Perez*, 334 So. 2d 719 (La. App. 4th Cir. 1976).

3. 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.
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> This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries.

4. 340 So. 2d 676 (La. App. 4th Cir. 1976).

5. 345 So. 2d 168 (La. App. 3d Cir.), *writs refused*, 347 So. 2d 250 (La. 1977).

to pretermit the question of fault. The facts of *Moon* differed somewhat in that the spouses by stipulation contained in the judgment of separation provided that the determination of the husband's fault in the judgment of separation would not be determinative of the wife's lack of pre-separation "freedom from fault" for purposes of determining her eligibility for alimony after divorce. In each case[6] the court held that the language of *Fulmer* was explicit; relitigation of fault for purposes of post-divorce alimony is barred. The litigants "cannot require the courts to relitigate a matter that has been previously adjudicated."[7] To allow the litigants to do so would subvert the stated policy of judical economy and consistency afforded by the decision in *Fulmer*.[8]

The ground for divorce in *Fulmer* was non-reconciliation for the required statutory period following a judgment of separation.[9] There is no question but that the ground for separation is relevant, since the separation judgment forms a part of the ground for divorce. But in dictum the *Fulmer* court stated: "As to the pre-separation fault, it [judgment of separation from bed and board] should constitute a conclusive determination which equally bars relitigation of the issue of fault, when alimony is sought under

6. *Trahan* was cited by the court in *Moon*. 345 So. 2d at 171.

7. Trahan v. Trahan, 340 So. 2d at 677.

8. "We assume that the legislative choice [interpreted legislative intent of article 160] is based on the judicial economy and consistency represented by having the separation-causing fault determined once and in the separation proceeding itself, rather than litigating (or relitigating) it in the much later divorce proceedings—where with different testimony or less recent recollection, the separation-causing fault might even be determined contrary to that determined at an earlier well-tried and hotly-contested separation adjudication." Fulmer v. Fulmer, 301 So. 2d at 625.

9. When there has been no reconciliation between the spouses for a period of one year or more from the date the judgment of separation from bed and board was signed, either spouse may obtain a judgment of divorce.

If an appeal is taken, a suit for divorce may not be commenced until the day after the date upon which the judgment becomes definitive as provided by Article 1842 of the Louisiana Code of Civil Procedure or until the expiration of the time stated in the preceding paragraph, whichever is later.

When a judgment of divorce is obtained by the husband against whom the judgment of separation from bed and board was rendered, the wife has the same right to recover alimony as if she had obtained the divorce.

The provisions of this Section do not affect in any way the right of the spouse who obtained the judgment of separation from bed and board to retain the custody and care of the children, as provided by law.

LA. R.S. 9:302 (Supp. 1970), *as amended by* 1977 La. Acts, Nos. 448, 702. The statute as it was applied in *Fulmer* differed slightly, but the differences are not relevant to the cases under discussion.

Article 160, *whether the divorce is based either on La. R.S. 9:301 or on 9:302.*"[10]

Presumably, a determination of whose fault primarily caused the *initial separation* would also be relevant when the ground for divorce is continuously living separate and apart for two years. For if there were no separation judgment rendered prior to the divorce under 9:301[11] and the wife claimed alimony under article 160, the issue of the wife's lack of fault would center upon the facts surrounding the *initial separation* of the spouses, which initiated the time period under 9:301. Furthermore, even if the ground for divorce were 9:301, the rule that as to pre-separation fault the judgment of separation from bed and board would be conclusive under article 160 would serve the same policy as is served when the ground for divorce is 9:302—i.e., judicial economy and consistency. Not only would the same policies be served, but also application of the *Fulmer* rule when the ground for divorce is 9:301 would prevent a subversion of the policy considerations by a spouse against whom a judgment of separation had been rendered. By waiting an additional year or less to seek a divorce on the ground of 9:302, the spouse determined to be at fault in the separation proceedings could relitigate the question of whose fault caused the initial separation.

In *Hatch v. Hatch*[12] the Second Circuit Court of Appeal affirmed the trial court's judgment sustaining the husband's exceptions of lis pendens and res adjudicata to the wife's reconventional demand for alimony. Plaintiff-husband, seeking a divorce under 9:301, had previously obtained a judgment of separation from bed and board from his wife on the ground of abandonment.[13] The wife by reconventional demand, in answer to the husband's petition for divorce, sought alimony and the opportunity to relitigate the question of fault. Relying on *Fulmer* the court held that the wife was not entitled to relitigate the issue of pre-separation fault for the purpose of alimony after divorce when a divorce was sought by the husband under 9:301.[14]

10. 301 So. 2d at 629 (emphasis added).

11. "When the spouses have been living separate and apart continuously for a period of two years or more, either spouse may sue for and obtain a judgment of absolute divorce." LA. R.S. 9:301 (1960).

12. 341 So. 2d 1270 (La. App. 2d Cir.), *writs refused*, 343 So. 2d 1080 (La. 1977).

13. Hatch v. Hatch, 335 So. 2d 707 (La. App. 2d Cir.), *writs refused*, 338 So. 2d 113 (La. 1976).

14. "This judgment of separation was a judicial determination of the marital

A further extension of the dicta in *Fulmer* was considered in *Moon*—the issue of post-separation fault. In *Moon* the wife had obtained a judgment of separation on the ground of the husband's cruelty and then, subsequently, sought a divorce on the ground of non-reconciliation for the prescribed period after the separation judgment.[15] By reconventional demand the husband sought a divorce on the ground of adultery.[16] Thus, the issue squarely presented in *Moon* was whether the husband may introduce evidence of the wife's *post*-separation fault when she claims alimony after divorce. The court answered the inquiry in the affirmative, relying on specific language in *Fulmer* limiting its effect to pre-separation fault.[17] Although the dicta in *Fulmer* precluded its application when *a divorce was sought for* post-separation fault, the court in *Moon* concluded that its holding was consistent with the underlying policy considerations: (1) to encourage reconciliation during the post-separation waiting period[18] and

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fault which caused the separation. It constituted a conclusive determination of pre-separation fault when the wife seeks alimony under Civil Code Article 160. This rule applies whether the action of divorce is based on R.S. 9:301 or 9:302. *Fulmer v. Fulmer,* 301 So. 2d 622 (La. 1976) (sic); *Nethken v. Nethken*, 307 So. 2d 563 (La. 1975)." 341 So. 2d at 1271.

15. LA. R.S. 9:302 (Supp. 1970) (prior to 1977 amendments).

16. Relying on *Jones v. Floyd*, 154 So. 2d 604 (La. App. 3d Cir. 1953), the court recognized, and the husband conceded, that "after a suit for divorce under LSA-R.S. 9:302 has been filed by one spouse, a reconventional demand by the other spouse for a divorce on other grounds, including adultery, states no cause of action." 345 So. 2d at 173.

17. "Thus, where a judicial separation is decreed as caused by the fault of one spouse or the other, such fault as judicially determined to be the cause of the separation is normally determinative of the issue of whether the husband or the wife is or is not at fault, for purposes of deciding whether the wife is entitled to alimony under Article 160. Such a conclusion is, of course, not applicable *if the divorce is sought for post-separation fault such as adultery*; for the sole effect of the separation judgment is a conclusive adjudication as to which spouse's pre-separation fault primarily caused the separation." Fulmer v. Fulmer, 301 So. 2d at 629 (emphasis added). In *Webster v. Webster*, 308 So. 2d 302, 307 (La. App. 1st Cir. 1975), cited by the court in *Moon*, 345 So. 2d at 172, the court concluded: "We interpret the foregoing [*Fulmer*] to mean that once a wife's freedom from fault has been determined in a separation proceeding, the only issue concerning fault of the wife in a subsequent divorce proceeding is whether the wife has been guilty of fault subsequent to the decree of separation."

18. "Considering the Louisiana separation and divorce laws as a whole, we believe our holding is consistent with the intent of the legislature. The post-separation waiting period of LSA-R.S. 9:302 is designed principally to give the spouses a chance to reconcile their differences and resume their marriage. If serious post-separation fault were not a defense to the wife's claim for alimony after divorce, the intent of the legislature in providing the waiting period of LSA-R.S.

(2) to avoid the economic necessity of the husband's filing suit for divorce on the ground of the wife's post-separation fault.[19]

CHANGE OF CUSTODY—"CONSIDERED DECREE"

When a spouse seeks a change in legal custody of his child, generally the jurisprudence has required the spouse to prove (1) that the present environment of the child is deleterious and (2) that the petitioning spouse could provide a better environment.[20] The "double burden" of proof is applicable when there has been a considered decree of custody by the trial court and thereafter the other parent seeks a change in custody. As defined by the jurisprudence, a "considered decree" means "a trial of the issue

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9:302 would be subverted. Adultery is a serious form of fault, and its occurrence after the judgment of separation would probably lessen the chances of a reconciliation." 345 So. 2d at 173.

19. "We do not think the law should force the husband to seek a divorce on the grounds of serious post-separation fault in order to avoid payment of alimony after divorce. Such a holding could encourage divorce and discourage reconciliation. With the possiblilty of alimony payments looming ahead, even a husband who desires a reconciliation and resumption of the marriage could be moved by economic considerations to seek a divorce on account of the wife's post-separation fault." *Id.*

20. In *Bushnell v. Bushnell*, 348 So. 2d 1315, 1316 (La. App. 3d Cir. 1977), according to the majority opinion by Judge Watson, "the double burden rule has been abandoned in favor of the approach that the courts must seek, above all else, the welfare of the child." Authority cited for the proposition that the "double burden rule" had been abandoned in favor of a more flexible rule in change of custody matters was *Fulco v. Fulco*, 259 La. 1122, 254 So. 2d 603 (1971). As clarified by the dissent, *Fulco* could be interpreted as modifying the "double burden rule" of *Decker v. Landry*, 227 La. 603, 80 So. 2d 91 (1955), as it makes reference not to "double burden" but "heavy burden" of proof in change of custody suits. The author of the dissenting opinion reviews the jurisprudence and concludes: "The *Monsour* case [Monsour v. Monsour, 347 So. 2d 203 (La. 1977)], the most recent pronouncement on the subject, fails to clarify that burden ["heavy burden" of *Fulco*], which is a pressing need of our courts. That clarification can only issue from our Supreme Court and I urge the court to clear up the confusion now in existence." Bushnell v. Bushnell, 348 So. 2d at 1321 (Domengeaux, J., dissenting).

The *Bushnell* decision was cited disapprovingly in *Languirand v. Languirand*, 350 So. 2d 973 (La. App. 2d Cir. 1977). After reviewing all of the jurisprudence, the *Languirand* court concluded that *Fulco* did not discard the "double burden" of proof in change of custody cases. In summarizing the policy reasons for imposing such a difficult burden of proof, the court stated: "This latter factor [length of time the stable and secure environment has been maintained] is the reason for the existence of the rule imposing the burden of proof on the parent seeking the change and that is to avoid whimsically unsettling a child's stable and secure environment. In that sense, we are considering of paramount importance, the best interest and welfare of the child." *Id.* at 976.

and decision thereon applying pertinent principles of law to the facts adduced."[21]

In *Stevens v. Stevens*,[22] the question whether a default judgment may constitute "a considered decree" was presented. The First Circuit Court of Appeal concluded that a default judgment may be a "considered decree" depending upon the evidence taken at the proceedings.[23] If evidence is adduced concerning a spouse's fitness to have the care, custody and control of the children, it is a considered decree; but there is no presumption that a judgment (default or otherwise) is a considered decree.

> Because, as a matter of practice, custody awards are often rendered incidental to the rendition of the judgment of separation or divorce, with no evidence being offered on the issue of custody, we will not presume, *in the absence of any evidence in the record on appeal*, that such an award of custody was a considered decree. Thus the party alleging the applicability of the double burden rule must show, *through introduction of the transcript of the default proceedings or otherwise*, that the custody was "considered" in the prior proceeding.[24]

By virtue of its decision that there is no presumption that a judgment is a considered decree (even if it is contested), the court has placed the evidentiary burden on the spouse with legal custody. Practically speaking, the burden may not be so onerous if what is required is simply introduction of the transcript of the proceedings. Whether this decision, placing the evidentiary burden on the spouse with legal custody, is consistent with the policy underlying the "double burden" rule is questionable.[25] Yet, because of the legal significance attached to a "considered decree" and the difficulty in bearing the "double burden" of proof, the decision in *Ste-*

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21. Partin v. Partin, 339 So. 2d 450 (La. App. 1st Cir. 1976), *writ refused*, 341 So. 2d 419 (La. 1977); Gulino v. Gulino, 303 So. 2d 299 (La. App. 1st Cir. 1974).

22. 340 So. 2d 584 (La. App. 1st Cir. 1976), cited in Languirand v. Languirand, 350 So. 2d 973, 974 n.1 (La. App. 2d Cir. 1977).

23. 340 So. 2d at 587. *See* Swann v. Young, 311 So. 2d 617 (La. App. 3d Cir. 1975); Southern v. Southern, 308 So. 2d 424 (La. App. 3d Cir. 1975).

24. 340 So. 2d at 587 (Emphasis added).

25. In *Bushnell v. Bushnell*, 348 So. 2d at 1321, Judge Domengeaux in his dissenting opinion stated: "Not only is the party seeking change required to prove the child is in an environment detrimental to him, the party must also prove the environment he can provide is better. This effectively prevents children from being bounced back and forth from parent to parent, like so many tennis balls, when the

vens may be justified in light of the prevailing consideration in matters of custody—the best interests of the children.[26]

INTERSPOUSAL BAR TO SUIT

Under title 9, section 291 of the Revised Statutes,[27] a wife is prohibited from suing her husband[28] unless judicially separated except for: (a) a separation from bed and board; (b) a divorce; (c) a separation of property; (d) restitution of her paraphernal property. Two significant cases this term considered the questions whether this statute barred (a) a suit by the wife against her husband to make executory past due alimony pendente lite prior to a judgment of separation[29] and (b) a habeas corpus action during the existence of the marriage by the wife against her husband, seeking custody of her minor children.[30] In both cases, the respective courts ultimately answered the questions in the negative.

In *Hartley v. Hartley*[31] the First Circuit Court of Appeal reasoned that there is specific authority under section 291 to sue for a separation from bed and board and "an award of alimony is an incident to such a suit, . . . therefore, we now hold that the same would be true for a suit to make past due alimony executory."[32] To rule otherwise, the court correctly

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parents are equally equipped to care for the children." For a discussion of the prevailing policy of the "double burden" in *Languirand v. Languirand*, see note 20, *supra*.

26. *See* LA. CIV. CODE art. 157, *as amended by* 1977 La. Acts., No. 448. Prior to the 1977 amendment article 157 provided that custody should be granted to the party obtaining the separation or divorce, with judicial discretion to derogate from this rule for the "greater advantage" of the children. Act 448 of 1977 eliminated the former presumption; the children's "best interest" is now the only factor to be considered.

27. As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for:
(1) A separation of property;
(2) The restitution and enjoyment of her paraphernal property;
(3) A separation from bed and board; or
(4) A divorce.
LA. R.S. 9:291 (Supp. 1960).

28. The same prohibition applies to the husband by jurisprudential interpretation. *See, e.g.*, Dumas v. United States Fidelity & Guar. Co., 241 La. 1096, 134 So. 2d 45 (1961); Harvey v. Engler, 184 La. 858, 168 So. 81 (1936).

29. Hartley v. Hartley, 341 So. 2d 1257 (La. App. 1st Cir.), *writs granted*, 343 So. 2d 204 (La. 1977).

30. Stelly v. Montgomery, 339 So. 2d 956 (La. App. 3d Cir. 1976), *rev'd*, 347 So. 2d 1145 (La. 1977).

31. 341 So. 2d 1257 (La. App. 1st Cir.), *writs granted*, 343 So. 2d 204 (La. 1977).

32. *Id.* at 1260.

noted,[33] would have the effect of making the alimony award *unenforceable* until after the judgment of separation from bed and board.

A much more difficult question involving an interpretation of section 291 was raised in *Stelly v. Montgomery*[34]: may a wife during the marriage institute habeas corpus proceedings against her husband to regain custody of the children? The Court of Appeal for the Third Circuit responded in the negative on the basis that section 291, by its statutory language, would prohibit such a suit.[35] Furthermore, an earlier supreme court decision permitting such a suit, *State ex rel. Lasserre v. Michel*,[36] could be distinguished on the following grounds: (a) at the time *Lasserre* was decided, applications for writs of habeas corpus were made in the name of the state,[37] whereas the Code of Civil Procedure now provides that the writ "may be ordered by the court only on petition"[38] and (b) when the legislature adopted section 291 in 1960 it decided not to follow the rationale of *Lasserre*.[39] The dissenting opinion took issue with the majority as to the validity of *Lasserre*, "a decision of the highest court of our

33. "Otherwise, an award of alimony would have no meaning, and could not be enforced until after a judgment of separation." *Id.*

34. 339 So. 2d 956 (La. App. 3d Cir. 1976), *rev'd*, 347 So. 2d 1145 (La. 1977).

35. In *Wilkinson v. Wilkinson*, 323 So. 2d 120 (La. 1975), the court stated that section 9:291 limits to four the causes of action that a married woman can bring against her husband during the marriage, and the four so enumerated are exclusive, not illustrative.

36. 105 La. 741, 30 So. 122 (1901). The supreme court held that even though no suit for separation or divorce has been filed the statutory interspousal immunity from suit does not bar the courts from hearing a habeas corpus proceeding instituted by one parent against the other, the reason being such a suit is "actually instituted in the interest of the children, although done so by a parent, to effectuate the state's interest in the welfare of these children." Stelly v. Montgomery, 347 So. 2d 1145, 1147 (La. 1977).

37. "When the writ issues, the wife is called into court in the name of and by the state itself, though this be done on the relation of a husband. It is true that the ultimate action of the court upon the writ may be an aid and in enforcement of private rights,—of the rights of the husband or of the wife in the premises,—but the result is incidental and consequential." State *ex rel.* Lasserre v. Michel, 105 La. 741, 747, 30 So. 122, 125 (1901).

38. LA. CODE CIV. P. art. 3781: "A writ of habeas corpus, mandamus, or quo warranto may be ordered by the court only on petition. The proceedings may be tried summarily and the writ when ordered may be signed by the clerk under the seal of the court, or it may be issued and signed by the judge without further formality."

39. "Perhaps the legislature reasoned that permitting interspousal suits for custody during marriage, where there is no pending suit for separation or divorce, could cause many problems as to child support, administration of the child's estate,

state . . . ."[40] Convincingly, the author of the dissenting opinion observed that "at the time of the *Lasserre* decision it was well established that a suit, such as this, need not be instituted in the name of the state."[41] Since there was thus no real substantive difference between section 291 and its source and Code of Civil Procedure article 3781 and its source, *Lasserre* should be considered controlling. Furthermore, by a rather lengthy quotation from *Lasserre*, the dissent established that the same policy considerations exist which dictated the result in *Lasserre*.

On appeal the supreme court, in reversing the ruling of the Third Circuit, quoted at length from the dissenting opinion. Although the supreme court had in non-habeas situations interpreted the four exceptions provided in section 291 as exclusive, not illustrative,[42] the supreme court in *Stelly* stated: "We did not intend to overrule or affect the long-settled interpretation, *State ex rel. Lasserre v. Michel*, 105 La. 741, 30 So. 122 (1901), of the statute's inapplicability to habeas suits under the present factual situation."[43] In the dissenting opinion, Chief Justice Sanders challenged the majority opinion's position that there is no real difference between the provisions of Code of Practice article 791 and Code of Civil Procedure article 3781:

> The change made is not that refuted in the majority opinion, that the suit no longer need be brought in the name of the state. No such requirement has been in our law for many years. Rather, the change made is that the writ of habeas corpus does not issue in the name of the State . . . . Thus, any basis for suggesting that a habeas corpus suit is a state inquiry has been eliminated.[44]

Summarizing the contervailing policy considerations in favor of a strict construction of section 291, Chief Justice Sanders concludes that the purpose of the statute is to promote "family stability," reflecting the state's "strong public policy against suits between husband and wife."[45]

There is no question that section 291, as effectively argued by the

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liability for the child's torts, etc. Apparently the legislature decided that all of these matters should be handled as incidental to separation or divorce proceedings." Stelly v. Montgomery, 339 So. 2d 956, 959 (La. App. 3d Cir. 1976).

40. *Id.* at 959 (Guidry, J., dissenting).

41. *Id.* at 960 (Guidry, J., dissenting).

42. *See, e.g.*, Wilkinson v. Wilkinson, 323 So. 2d 120 (La. 1975).

43. 347 So. 2d at 1148. The rest of the opinion was dedicated to a consideration of the custody issue on its merits.

44. *Id.* at 1150-51 (Sanders, C. J., dissenting).

45. "If they are living together, the policy prevents disruption of domestic

Chief Justice, does reflect a strong public policy against suits between husband and wife. Yet, when examining all of the stated policy considerations, the result reached by the majority seems the most desirable. In fact, as observed by the dissent, the validity of the *Lasserre* decision in light of procedural changes is questionable as a matter of statutory interpretation. The statute is explicit; and properly, "any expansion of the allowable suits addresses itself to the legislative branch."[46] In default of legislative action, however, a majority of the supreme court obviously felt compelled for policy reasons to construe the statute liberally, a departure from some of its earlier decisions, and rely upon a precedent of dubious viability.

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tranquility. If they are separated, though not judicially, the policy encourages reconciliation." *Id.* at 1160 (Sanders, C. J., dissenting).

46. *Id.*