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Caroline B. Blitzer

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NOTES

McConathy v. McConathy: A Diploma, a Divorce, and a Dilemma

I. FACTS AND PROCEDURAL HISTORY

In September of 1983, Mr. McConathy married Ms. Prestridge.¹ Later that fall, Mr. McConathy returned to Louisiana Tech University to complete a degree in elementary education that he had begun in 1976.² In November of 1988, Mr. McConathy received his degree. A judgment of divorce was granted in favor of Ms. Prestridge on February 8, 1990.³ Ms. Prestridge requested an award, based on Louisiana Civil Code article 121, for her financial contributions to Mr. McConathy's education.⁴ The trial court awarded Ms. Prestridge \$11,877.⁵ The appellate court reduced her award to \$5,605 based on her financial contributions to her husband's direct educational costs and to his one-half of their joint living expenses.⁶

II. LOUISIANA CIVIL CODE ARTICLE 121

Louisiana has codified a remedy for the contributions made by one spouse to the other spouse's education.⁷ Louisiana Civil Code article 121 states:

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1. *McConathy v. McConathy*, 632 So. 2d 1200 (La. App. 2d Cir.), writ denied, 637 So. 2d 1052 (1994).

2. Mr. McConathy enrolled in Louisiana Tech University in the fall of 1976 and left in 1980 without obtaining a degree.

3. *McConathy*, 632 So. 2d at 1202.

4. *Id.* The broad language of La. R.S. 9:2801 (1991) indicates that the claim for contributions to the spouse's education may be part of the proceedings for judicial partition of the community. See Katherine S. Spaht, *Developments in the Law 1985-1986—Persons and Matrimonial Regimes*, 47 La. L. Rev. 391, 406 (1986). The introduction to La. R.S. 9:2801 (1991) states:

When the spouses are unable to agree on a partition of community property or on the settlement of the claims between the spouses arising from the matrimonial regime, either spouse, upon termination of the matrimonial regime, or as an incident of the action which would result in a termination of the matrimonial regime, may institute a proceeding (emphasis added). Article 121 provides that the claim may be brought "[i]n a proceeding for divorce or thereafter" The claim for contributions need not be combined with any other proceeding as it may be "awarded . . . in addition to a sum for support and to property received in the partition of community property." La. Civ. Code art. 121.

5. *McConathy*, 632 So. 2d at 1203. The trial court rendered its judgment on October 7, 1991. On December 11, 1991, the trial court issued an amended judgment due to "clerical and arithmetic errors" in the original opinion. *Id.* at 1202.

6. *Id.* at 1205. The court based its award on the formula articulated in a Minnesota case, *DeLaRosa v. DeLaRosa*, 309 N.W.2d 755 (Minn. 1981).

7. For purposes of pronoun reference in this article, it is assumed the student spouse is the

In a proceeding for divorce or thereafter, the court may award a party a sum for his financial contributions made during the marriage to education or training of his spouse that increased the spouse's earning power, to the extent that the claimant did not benefit during the marriage from the increased earning power.

The sum awarded may be in addition to a sum for support and to property received in the partition of community property.⁸

Courts in states without similar legislation must first determine whether the degree is properly classified as property. Then, the court must decide if or how the supporting spouse should be compensated based on whether the degree is classified as marital property.⁹ Article 121, by contrast, assumes that the degree is not property¹⁰ and that an award may be granted to the supporting spouse.

Article 121 is virtually identical to its predecessor, Article 161 (enacted in 1986), but provides the following principal change: Article 161 required that financial contributions be made to the student spouse's education, training, or increased earning power.¹¹ Article 121, however, requires that the financial contributions made by the supporting spouse actually increase the student spouse's earning power. There must be a causal connection between the education to which the supporting spouse financially contributed and the student spouse's increased earning power.¹²

husband and the supporting spouse is the wife, although the reverse situation is not unlikely to occur.

8. Article 121 was originally enacted as Article 117 by Acts 1990, No. 1008, § 2 from House Bill No. 1102 introduced on recommendation by the Louisiana State Law Institute. Article 117 was redesignated as Article 121 pursuant to Acts 1990, No. 1008, § 8, and Acts 1990, No. 1009, § 10. Article 121 was amended by Acts 1991, No. 367, § 6, to remove the reference to actions based on separation from bed and board.

9. Courts have treated the claim in four principal ways:

- 1) The degree or license is marital property subject to division.
- 2) The degree or license is not marital property, but the court may award reimbursement alimony to cover the supporting spouse's financial contributions to the student spouse's education.
- 3) The degree or license is not marital property, but the court may award rehabilitative alimony to the supporting spouse, who postponed her own education, to assist her spouse in completing her education.
- 4) The degree or license is not marital property, but it is a factor to consider in awarding traditional alimony, maintenance, and other property distribution.

See Deborah A. Batts, *Remedy Refocus: In Search Of Equity In "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. Rev. 751, 799 (1988); Theodore P. Orenstein & Gary N. Skoloff, *When A Professional Divorces: Strategies for Valuing Practices, Licences, and Degrees* (1994).

10. La. Civ. Code art. 121 cmt. f.

11. Article 121 contains another slight modification of Article 161. Article 161 excluded recovery to the extent that the other party previously benefited from such education, training, or increased earning power. Article 121, however, reduces recovery only to the extent that the contributing spouse has benefited from the increased earning power. Thus, if any reduction on recovery is necessary, Article 121 provides for a lesser reduction.

12. The student spouse may raise a defense to performance of his obligation. The student spouse

The language of Article 121 suggests the potential parameters of the trial judge's discretion in granting an award.¹³ The phrase "a sum for" is significant in defining the scope of the award. The word "sum" suggests an award that may exceed actual financial contributions made.¹⁴ The use of the indefinite article "a" also supports the availability of an award not necessarily equal to the amount of the supporting spouse's financial contributions.

An award exceeding actual financial contributions could be a proportionate part of the student spouse's increased earning capacity. Although nothing in the article expressly authorizes such an award, the permissive language indicates the legislature's intent to give the trial judge the discretion to grant such an award.

The legislative history of Article 121 also supports the flexibility the trial judge has in granting and in calculating an appropriate award for the supporting spouse. The original Louisiana State Law Institute bill was introduced with the phrase, "a sum not to exceed financial contributions." This phrase capped the award at the sum of the spouse's direct and indirect financial contributions. On the Senate floor, however, the bill was amended to read, "a sum for financial contributions."¹⁵ The amendment codified the legislature's intent to remove the ceiling on the award. This removal of the ceiling on the award demonstrates a preference for allowing a judge to use his discretion to award a proportionate part of increased earning power. Because comments to a proposed article are not amended once the bill is introduced, the comments to Article 121 were not

may claim that the financial contributions did not increase his earning capacity. Even if the student spouse did not pursue a career with the new degree, the supporting spouse's financial contributions increased the student spouse's earning capacity. The student spouse's actual earning power was not increased only because the student spouse chose not to take advantage of his new degree.

If the student spouse is injured and thus unable to use the degree, the student spouse may also raise the defense of impossibility of performance in seeking a partial or complete release from the obligation. The obligor, however, must meet the requirements of Article 1873 and prove his inability to exercise his increased earning capacity is a "fortuitous event" as defined by Article 1875 and prove none of the exceptions of Article 1873 applies.

13. "This Article restates the basic elements of the cause of action created by the 1986 Act, including the discretionary character of the remedy." La. Civ. Code art. 121 cmt. b.

14. Spaht, *supra* note 4, at 397. Clearly, the court may award a lesser amount if the supporting spouse has already benefited during the marriage from the increased earning power. Presumably, the court may award less than the amount of financial contributions made even when no benefit was realized. However, the purpose of the award under Article 121 is to compensate the supporting spouse who was deprived of her expectation of sharing in her husband's enhanced income and who was left with few compensating community assets. La. Civ. Code art. 121 cmt. c. The purpose of the article suggests that the court should not award less than the financial contributions made by the supporting spouse, unless a benefit was realized by the supporting spouse.

The court of appeal will employ the abuse of discretion standard to determine whether the trial court made the correct decision. A finding of an abuse of discretion is based on the purpose underlying the award. *See, e.g., Arrendell v. Arrendell*, 390 So. 2d 927 (La. App. 2d Cir. 1980). If the trial court has unlimited discretion in awarding an amount, the court of appeal can never find an abuse of discretion. Thus, the purpose of the award should guide the trial court in determining the appropriate award.

15. 3 La. Senate J. 1675-76 (July 3, 1990).

amended during the legislative process to reflect the removal of the ceiling on the award. The legislative history of Article 121, however, confirms prior speculation about the flexibility of the total sum of the award.¹⁶

By contrast to the implicit, potential award of a proportionate part of increased earning capacity, financial contributions are explicitly recoverable under Article 121. Financial contributions include both the "direct educational or training expenses" and "the living expenses of the supported spouse."¹⁷ Support for the conclusion that a minimum award includes both direct and indirect financial contributions is found in comment (d) which contains the definition of financial contributions in two separate sentences. Moreover, comment (d) cites *DeLaRosa v. DeLaRosa*,¹⁸ a case in which both direct and indirect financial contributions were awarded.

Louisiana Civil Code article 123 indicates that the legislature envisioned a lump sum award but would permit payments in installments for convenience to the obligor.¹⁹ Distinguishable from permanent periodic alimony,²⁰ this award for financial contributions to the spouse's education is not based on need and does not terminate upon remarriage of the claimant spouse. In addition, fault does not bar recovery under Article 121.²¹

III. *MCCONATHY v. MCCONATHY*

McConathy contains the first thorough interpretation and application of Article 121 by the Louisiana courts. The appellate court recognized that the trial court erroneously based its award to Ms. Prestridge on her lost ability to share

16. Spaht, *supra* note 4, at 396. Professor Spaht suggested that Article 161 permitted an award in excess of the financial contributions of the supporting spouse. The language in Article 161, "a sum for financial contributions," suggested that the sum awarded was not necessarily limited to the actual financial contributions. The language indicated the possibility of an award that included a prorated portion of the student spouse's increased earning capacity. The Louisiana legislature's enactment of Article 121 with amended language to reject the ceiling on the award confirms Professor Spaht's speculation about the scope of Article 161. See also Kenneth Rigby & Katherine S. Spaht, *Louisiana's New Divorce Legislation: Background and Commentary*, 54 La. L. Rev. 19, 22-24 (1993).

17. La. Civ. Code art. 121 cmt. d. "'Financial contributions' include direct educational or training expenses paid by the claimant for the other spouse—such as tuition, books, and school fees. The term also includes financial contributions made to satisfy the living expenses of the supported spouse." *Id.*

18. 309 N.W.2d 755 (Minn. 1981).

19. The sum awarded for contributions made to the education or training of a spouse may be a sum certain payable in installments. La. Civ. Code art. 123.

20. The supporting spouse is likely to be denied alimony as she has demonstrated her earning capacity as the family supporter. On the other hand, the spouse likely to receive alimony may be denied an award under Article 121 if she has benefited from the education of the student spouse. See La. Civ. Code art. 121 cmt. c; La. Civ. Code art. 123 cmt. b.

21. La. Civ. Code art. 121 cmt. c.

in Mr. McConathy's enhanced income.²² The appellate court properly corrected the trial court's error by calculating Ms. Prestridge's award based on the amount of her financial contributions to Mr. McConathy's education. The prerequisite to recovery under Article 121 is not proof of the lack of opportunity to share in the student spouse's enhanced income; rather, it is financial contributions made by the supporting spouse to the student spouse's education. However, the lack of opportunity to share in the student spouse's enhanced income is a fundamental assumption underlying this award.²³

The *McConathy* court attempted to correct the third circuit's interpretation of former Article 161, the predecessor of Article 121, in *Krielow v. Krielow*.²⁴ In *Krielow*, the court refused to include indirect living expenses in the award to the supporting spouse. The *McConathy* court, however, quoted the two sentences of comment (d), thus acknowledging the article's coverage of both direct and indirect financial contributions. Moreover, the *McConathy* court included in Ms. Prestridge's award the financial contributions she made to the family's living expenses—expenses considered indirect in comment (d).

Applying Article 121, the appellate court calculated Ms. Prestridge's award of direct and indirect financial contributions based on her financial contributions to Mr. McConathy's education. In amending the trial court award from one based on Mr. McConathy's increased earning power to one based on Ms. Prestridge's financial contributions,²⁵ the appellate court implied the trial court had abused its discretion.

22. The appellate court cited the standard used by the trial court "[i]n calculating Ms. Prestridge's lack of opportunity to share in Mr. McConathy's enhanced income." *McConathy v. McConathy*, 632 So. 2d 1200, 1203 (La. App. 2d Cir.), writ denied, 637 So. 2d 1052 (1994). The court later stated, "[b]ecause the assets of the community were insufficient to compensate Ms. Prestridge for her inability to share in the enhanced income, the [trial] court made a separate award to her." *Id.* (emphasis added).

23. Usually the wife has had little opportunity to share in the husband's enhanced income, and ordinarily little or no community property has accumulated to be divided between them. Thus, the only way to compensate her is by means of a monetary award akin to support, but different from support in that it is not affected by the various factors that govern such an award.

La. Civ. Code art. 121 cmt. c. The award is reduced to the extent the supporting spouse has already benefited from the student spouse's increased earning power.

24. 622 So. 2d 732 (La. App. 3d Cir. 1993), *rev'd on other grounds*, 635 So. 2d 180 (La. 1994). In *Krielow*, the only case interpreting and analyzing Article 161, the court awarded the husband one half of his direct financial contributions to his wife's education. The award included direct expenses for tuition and books but did not include the husband's indirect expenses for child care and transportation. The court reasoned that "these costs do not constitute direct financial contributions to educational expenses as intended by the legislature." *Krielow*, 622 So. 2d at 741. The *Krielow* court only cited the first sentence of the comment and limited recovery to direct financial contributions. *Id.* at 740.

25. Mr. McConathy also alleged the trial court erred in considering his present salary as evidence of his enhanced income or earning capacity. Because the court based the award solely on Ms. Prestridge's direct and indirect financial contributions, the court properly did not address this alleged error.

The trial court labeled its award as the "value of lost benefit."²⁶ The trial court calculated the value of lost benefit as simply the difference between the amount Mr. McConathy earned during his first year teaching and the highest amount he earned during the marriage. An award based on a one-year salary increase is not an adequate measure of the value of lost benefit.

The appellate court implied there are two additional prerequisites to recovery under Article 121, neither of which is supported by the text of the article. First, the appellate court recognized that Ms. Prestridge "met the requirements of [Article] 121"²⁷ by stating, "[s]pecifically, the [trial] court found that Ms. Prestridge earned substantially more than Mr. McConathy during the marriage."²⁸ Thus, the appellate court implied a requirement that the supporting spouse earn substantially more than the student spouse during the marriage. The text of Article 121, however, requires only that some financial contribution to the student spouse's education or training be made during the marriage and makes no reference to the amount of the supporting spouse's earnings.²⁹

Second, the court stated, "[b]ecause the assets of the community were insufficient to compensate Ms. Prestridge, . . . the [trial] court made a separate award" The court implicitly agreed with the trial court by assuming the total income of the spouses was consumed by the educational and living expenses. The court thereby suggested that an insufficiency of community assets is a prerequisite to recovery. Article 121, however, contains no requirement of insufficient community assets.³⁰

The insufficiency of community assets in *McConathy*, however, is relevant. Under Article 121, the sum for financial contributions is subject to reduction to the extent that the supporting spouse has previously benefited from the student spouse's increased earning power.³¹ The court's reference to the insufficiency of community assets may suggest the supporting spouse had not yet benefited. If the insufficiency of community assets indicated Ms. Prestridge's failure to benefit from Mr. McConathy's increased earning power, the court was correct in not reducing the award. The court's opinion, however, could be misinterpreted to mean that insufficient community assets are a prerequisite to recovery.

A. *The DeLaRosa Formula*

The appellate court, in calculating Ms. Prestridge's award, applied the formula from *DeLaRosa v. DeLaRosa*³² as suggested in comment (d) to Article

26. *McConathy*, 632 So. 2d at 1203.

27. *Id.*

28. *Id.*

29. Article 121 does not require that a degree be granted during the marriage.

30. Generally, the couple has few assets of value because all resources are expended on their educational and living expenses. *McConathy*, 632 So. 2d at 1205 (citing *Spaht*, *supra* note 4, at 394).

31. La. Civ. Code art. 121.

32. 309 N.W.2d 755 (Minn. 1981). The formula provides:

121. The *DeLaRosa* formula provides a method for calculating "the figure that represents the supporting spouse's financial contributions."³³ The formula limits the award to the supporting spouse's financial contributions to the direct educational costs and the living expenses of the student spouse.³⁴ First, any financial contributions made by the student spouse apply to the direct costs of the student spouse's education. The supporting spouse's financial contributions cover any difference between the the student spouse's financial contributions and the cost of the education. Then, the formula assumes the measure of the couple's living expenses is the remainder of the supporting spouse's financial contributions. The formula imputes one half of the couple's living expenses (the combined total of the student and supporting spouses' financial contributions less the cost of the education) to the student spouse and the other one half to the supporting spouse's own living expenses.

The *McConathy* court improperly applied the *DeLaRosa* formula because *DeLaRosa*, which arose in a non-community property jurisdiction, did not consider the community obligation aspect of the student loan. The *McConathy* court classified the student loan as a community obligation.³⁵ However, in calculating the equitable award to Ms. Prestridge, the court included the entire loan as Mr. McConathy's financial contributions. The attribution of the entire loan to Mr. McConathy's financial contributions increased his total financial contributions and, consequently, reduced Ms. Prestridge's award. Had the court attributed to each spouse a share of the community obligation, as determined in the community partition, then the award to Ms. Prestridge would have been greater.³⁶

[W]orking spouse's financial contributions . . . [including joint living expenses and educational costs of student spouse]

less

1/2 (working spouse's financial contributions plus student spouse's financial contributions less cost of education)

equals

equitable award to working spouse

The student spouse's financial contributions include any earnings and any student loans, grants, stipends, or other funds obtained. *Id.* at 759.

33. La. Civ. Code art. 121 cmt. d.

34. *DeLaRosa*, 309 N.W.2d at 759.

35. Article 2360 defines a community obligation as one "incurred by a spouse during the existence of a community property regime for the common interest of the spouses or for the interest of the other spouse." Article 2361 presumes that an obligation incurred by a spouse during the existence of the community is a community obligation unless it is a separate obligation as provided in Article 2363. The student loan was obtained for the common interests of the spouses. Mr. McConathy secured the loan during the existence of the community property regime. At that time, the McConathys contemplated Mr. McConathy's schooling would ultimately benefit the community by increasing his earning capacity. *McConathy v. McConathy*, 632 So. 2d 1200, 1207 (La. App. 2d Cir.), writ denied, 637 So. 2d 1052 (1994). Thus, the court classified the student loan as a community obligation. See generally Katherine S. Spahit & W. Lee Hargrave, *Matrimonial Regimes* § 7.12, at 271-76, in 16 Louisiana Civil Law Treatise (1989).

36. The community obligation was divided equally between the spouses; therefore, the loan can

Any future court should consider adjusting the *DeLaRosa* formula for application in Louisiana, a community property state. A persuasive argument may be made that if the student loan is treated as community property, then the earnings of the spouses should also be recognized as community property. Such a modification in the formula may reflect each spouse's one-half interest in the other spouse's earnings.³⁷

B. Contributions Made by Others

The court declined to include in Ms. Prestridge's award the child support payments she received from a previous marriage and the house trailer payments made as a gift to the couple by Mr. McConathy's mother. The court's refusal to include these sums was consistent with the language of Article 121, which provides for recovery of the supporting spouse's own financial contributions. Although the trailer payments and child support payments were technically the property of both the McConathys and only Ms. Prestridge respectively,³⁸ this money was ultimately the property of the third party creditor of the trailer note

be excluded from the equation. Applying the *DeLaRosa* formula without inclusion of the student loan results in an award of \$8855.00 as follows:

$$\begin{aligned} & \$16,378 \text{ (wife's financial contributions)} - 1/2 [\$16,378 \text{ (wife's financial contributions)} + \\ & \$1727 \text{ (husband's earnings)} - \$3059 \text{ (husband's direct educational costs)}] = \$8855.00. \end{aligned}$$

The formula assumes that all of the spouses' earnings are spent on the educational and living expenses and that the student's contributions include any student loans, grants, stipends, or other funds obtained by the student spouse. *McConathy*, 632 So. 2d at 1205 (citing Spaht, *supra* note 4, at 394); *DeLaRosa*, 309 N.W.2d at 759.

37. For a calculation of the award taking into account community property principles, see section IV, *infra*. Arguably, community property should not be considered in calculating the award to the supporting spouse. The earnings of the spouses probably do not exceed the Article 98 mutual obligation of support, since it is assumed all of their earnings are expended on the educational and living expenses. Thus, if the Article 98 obligation is disregarded, the reference to community property should similarly be disregarded. Moreover, Article 121 states the award may be apart from and in addition to the partition of community property.

38. The trailer payments were either paid to the couple subject to the explicit or implicit condition that the money be used to make payments on the trailer note or were paid directly to the third party creditor. The child support payments, although considered by the jurisprudence to be property of Ms. Prestridge, were for the benefit of her children from a previous marriage. Child support payments are the property of the custodial parent. *Simon v. Calvert*, 289 So. 2d 567 (La. App. 3d Cir.), *writs refused*, 293 So. 2d 187 (1974). A persuasive argument may be made, however, that child support payments are actually the property of the child, but that payment to the custodial parent satisfies the obligation of the noncustodial parent. In *Dubroc v. Dubroc*, 388 So. 2d 377 (La. 1980), the court emphasized that each parent owes to a child the obligation of upbringing and support. To facilitate enforcement of this obligation, the law gives the custodial spouse a right of action against the other spouse to compel the advancement of money necessary to contribute to the child's maintenance. The purpose underlying the parent's right to receive child support is to enforce the child's right to receive support and upbringing. *Id.* at 379-80. Therefore, it follows that the child support payments should be considered property of the child as the child is the creditor of the parent's obligation to support the child. The custodial parent merely receives the payments on behalf of the child to whom the parental obligation is owed.

and of the child. Thus, the court was correct in not considering these amounts as part of Ms. Prestridge's own financial contributions. The trailer payments and the child support payments were living expenses, indirect financial contributions, but these financial contributions had a specifically designated purpose other than the education of the student spouse.³⁹

IV. AN AWARD OF THE STUDENT SPOUSE'S INCREASED EARNING CAPACITY

The court should be reluctant to award the extraordinary remedy of a proportionate part of increased earning capacity. This remedy should be limited to the most compelling cases. The assumptions underlying an award of financial contributions, which under Article 121 include both educational and living expenses, are the supporting spouse's expectation of shared benefit, the degree of detriment suffered by the supporting spouse, and the magnitude of the benefit received by the student spouse.⁴⁰ Once the threshold of financial contributions is awarded, then the court may consider the supporting spouse's non-financial contributions in determining whether to award more—possibly a proportionate part of the student spouse's increased earning power. Non-financial contributions include foregone opportunities of the supporting spouse,⁴¹ moral support, and relocation.⁴² Other factors to consider are the immediacy of divorce, the length of the education, the type of degree,⁴³ and the choice of institution.

In the most compelling cases, the considerations just described may justify a redistribution of the wealth by awarding a sum that represents a proportionate part of the student spouse's increased earning power. An example is a case of a student spouse who uses the supporting spouse as a vehicle to finance his education and who immediately thereafter divorces the supporting spouse.

39. A gift to either spouse without a designated purpose might not be excluded from the recoverable amount if the recipient chooses to contribute the gift to the education or the training of the student spouse.

40. Spaht, *supra* note 4, at 393; Orenstein & Skoloff, *supra* note 9, at 71.

41. Batts, *supra* note 9, at 793. Batts also suggests the supporting spouse who has permanently foregone her own professional goals rather than one who has merely postponed her professional goals might be more likely to recover a portion of the student spouse's increased earning capacity because her contributions were greater and because she may depend more heavily on the student spouse. *Id.*

42. For other non-financial contributions, see *Reiss v. Reiss*, 500 A.2d 24, 25 (N.J. Super. App. Div. 1985). See also Batts, *supra* note 9, at 792-94 (Non-financial contributions include providing a comforting, clean, nurturing living space; furnishing and repairing the home; maintaining a social environment; and coordinating holiday arrangements). Some of these contributions, however, constitute the mutual obligation of assistance under Article 98 and are only relevant if they exceed this obligation.

43. Article 121 applies to claims for contributions to any type of education or training including undergraduate, graduate, professional, or vocational degrees. Article 121 also applies to education or training in which no degree is earned but to which financial contributions were made during the marriage. Pursuit of a professional degree, however, creates a larger expectation of return for the supporting spouse whose investment is longer and more costly. Thus, when the supporting spouse is deprived of the expected community benefits, equity entitles her to a more generous award.

Absent an admission by the student spouse, such bad faith is extremely difficult to prove.

Ordinarily, law and equity recognize that after divorce, the student spouse is free to acquire separate property. Income earned after dissolution of the community is income earned by the student spouse's own time, work, and effort. Therefore, a typical claim under Article 121 may not always warrant the generous award of a proportionate part of increased earning capacity.

Ms. Prestridge, a typical claimant under Article 121, would not be a candidate for an award of a proportionate part of her husband's increased earning capacity. Ms. Prestridge certainly expected a return on her investment in her husband's education. However, Mr. McConathy received his degree in just one year and eight months which is a relatively short period within which to obtain a degree.⁴⁴ The family did not relocate to allow Mr. McConathy to attend a particular institution. He simply continued, at his wife's urging, his undergraduate education which he had begun prior to their marriage. Under these circumstances, it was appropriate for the court to limit Ms. Prestridge's award to her direct and indirect financial contributions.

A. Proposed Method of Calculation

The *McConathy* court, guided by *DeLaRosa*, combined the calculations of direct and indirect living expenses into one formula. A clearer method of calculation separates the calculations of the direct and indirect financial contributions and consequently, facilitates computation of an award under the *DeLaRosa* formula. As in *DeLaRosa*, any financial contributions made by the student spouse apply to direct educational costs. If the student spouse's financial contributions exceed direct educational costs, the excess applies to the indirect financial costs of his education. At this point, this method assumes the supporting spouse has not yet benefited from the student spouse's increased earning power; therefore, no deduction is required. Moreover, this method presumes that the supporting spouse is not entitled to a portion of the student spouse's increased earning power. Finally, this method assumes all of the spouses' earnings are expended on the educational and living expenses of the couple.

The following computation, using the figures from *McConathy*, illustrates this method. The court should begin with the direct costs of the education, \$3059, and subtract the husband's total financial contributions, \$1727. The difference, \$1332, equals the direct educational costs covered by the wife's financial contributions—giving her a dollar for dollar credit. Next, the court should subtract the wife's direct educational contributions, \$1332, from her total financial contributions, \$16,378. The difference, \$15,046, equals the wife's financial contributions to the indirect costs of her husband's education. This

44. Mr. McConathy had completed four years of his education when he married Ms. Prestridge.

amount, \$15,046, divided by two, imputes one half of the indirect educational costs (living expenses), or \$7523, to the husband while the other one half is deemed spent on the wife herself. Finally, the court should add the wife's financial contributions to the direct educational costs, \$1332, to her financial contributions to the indirect educational costs, \$7523. The sum, \$8855, equals the award to the wife.⁴⁵ An argument can be made that this formula should consider community property and, consequently, reduce the supporting spouse's award.⁴⁶

B. Proposed Valuation of Increased Earning Capacity

Should the court choose to award the extraordinary remedy of a proportionate part of increased earning capacity, the court must determine the value of the student spouse's education. Most methods equate the value of an education with the student spouse's future earning capacity.⁴⁷ These methods suggest that the

45. Wife's direct educational financial contributions = Direct cost of the education - Husband's financial contributions = $\$3059 - 1727 = \1332 .

Wife's indirect educational financial contributions = $1/2(\text{wife's total financial contributions} - \text{wife's direct educational financial contributions}) = 1/2(\$16,378 - 1332) = \$7523$.

Award to wife = wife's direct educational financial contributions + wife's indirect educational financial contributions = $\$1332 + 7523 = \8855 .

The student loan is excluded from the calculation because, as a community obligation, each spouse owes an equal one-half.

46. If the spouses' earnings are community property, each spouse's earnings should be divided by two and increased by the amount of the student loan attributable to each spouse. The husband's financial contributions apply first to the direct educational expenses. The difference between the remainder of the husband's financial contributions, if any, and the wife's financial contributions (less any direct educational costs not covered by the husband) should be divided by two so as to impute one-half of the indirect living expenses to each spouse. The quotient is the wife's award. Using this formula, the wife's award is \$5192.25:

Husband's financial contributions = his earnings/2 + his half of the student loan = $\$1727/2 + 4886.40 = \5749.90 .

Husband's financial contributions - direct educational costs = husband's financial contributions to indirect educational costs = $\$5749.90 - 3059 = \2690.90 .

Wife's financial contributions = her earnings/2 + her half of the student loan = $\$16,378/2 + 4886.40 = \$13,075.40$.

Wife contributes nothing to the direct educational costs.

Wife's award = $1/2(\text{wife's financial contributions} - \text{husband's financial contributions to indirect educational costs}) = 1/2(\$13,075.40 - 2690.90) = \$5192.25$.

47. For a variety of methods, see Orenstein & Skoloff, *supra* note 9, at 111-13; Albert A. Fitzpatrick & Robert E. Doucette, *Can The Economic Value Of An Education Really Be Measured? A Guide For Marital Property Dissolution*, 21 J. Fam. L. 511 (1982-83); Kenneth R. Davis, *The Doctrine of O'Brien v. O'Brien: A Critical Analysis*, 13 Pace L. Rev. 863, 894 (1994); Helen A. Boyer, *Recent Development: Equitable Interest in Enhanced Earning Capacity: The Treatment Of A Professional Degree At Dissolution—In re Marriage of Washburn*, 60 Wash. L. Rev. 431 (1985); Eugene T. Maccarrone & Martha S. Weisel, *The CPA License at Divorce*, *The CPA Journal* 22 (March 1992).

court first calculate the difference between the student spouse's expected income with the degree and the expected income had his education ceased at the date of the marriage.⁴⁸ Next, the court should reduce the difference due to the risk of death according to mortality tables.⁴⁹ Finally, the court should discount the amount to present value. Additional modifications in the valuation methods may include an increase for rising productivity,⁵⁰ an increase for inflation, and an adjustment for taxes.⁵¹ The present value figure should be multiplied by the fraction representing the proportion the supporting spouse's financial contributions bear to the couple's total financial contributions to the student spouse's education.⁵²

Because of the speculative nature of the figures, no method of calculation is flawless. These methods often estimate income based on averages. The estimations do not account for potential career changes or potential loss of license. Moreover, the methods do not consider any further education or experience the student spouse may acquire.⁵³

The court should award, at a minimum, the supporting spouse's direct and indirect financial contributions. The court then has flexibility to increase the award depending on the significance and the magnitude of the supporting spouse's non-financial contributions.

McConathy illustrates one step toward an increased award to the supporting spouse—using both direct and indirect financial contributions. The court has yet to be presented with a situation that warrants an award of a proportionate part of the student spouse's increased earning capacity. However, the possibility for such an award does exist. Students who are financially supported by their

48. These figures may be obtained from the U.S. Department of Commerce Bureau of the Census, Social and Economic Statistics Administration.

49. If either spouse dies before a judgment is rendered under Article 121, the personal obligation is extinguished. See La. Civ. Code. art. 122. If the obligor spouse dies after the judgment of the award, nothing in the law changes the amount of the award. The judgment is enforceable against the deceased obligor's heirs. For this reason, the trial judge should use caution in granting an award of a portion of the student spouse's increased earning capacity. If granted, the court should reduce the award based on the risk of mortality.

50. Fitzpatrick & Doucette, *supra* note 47, at 517.

51. Maccarrone & Weisel, *supra* note 47, at 27.

52. Similar calculations are made in community property pension cases. See, e.g., *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *T. L. James & Co. v. Montgomery*, 332 So. 2d 834 (La. 1975), *on reh'g*, 332 So. 2d 849 (La. 1976).

53. Orenstein & Skoloff, *supra* note 9, at 113. In community property pension cases, see *supra* note 52, after *Hare v. Hodgins*, 586 So. 2d 118 (La. 1991), the court may, upon proper showing by the employee spouse, modify the fraction representing the community interest as originally calculated to reflect post-divorce increases in the employee spouse's pension benefits. See Katherine S. Spaht, *To Divide or Not to Divide the Community Interest in an Unmatured Pension: Present Cash Value Versus Fixed Percentage*, 53 La. L. Rev. 753, 761 (1993); Lee Hargrave, *Matrimonial Regimes*, 52 La. L. Rev. 655, 664-68 (1992). The parallel situation may develop in Article 121 awards. A future court may reserve jurisdiction to modify the formula representing the supporting spouse's interest in the student spouse's increased earning capacity based on future changes in the student spouse's income.

spouses should be aware of the court's ability to grant this most generous award to the supporting spouse. Even if such an award is inappropriate, after *McConathy*, the student spouse should at least note the likelihood of a court awarding the supporting spouse his or her direct *and* indirect financial contributions.

Caroline B. Blitzer

