**Louisiana Law Review**

Volume 45 | Number 1
*September 1984*

# Alimony Pendente Life and Earning Capacity

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## ALIMONY *PENDENTE LIFE* AND EARNING CAPACITY

Prior to its recent amendment, Civil Code article 148 stated:

> If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband.

As indicated by the language of the article, an award of alimony *pendente lite* was not discretionary, provided that the trial court found that the wife lacked sufficient income for her maintenance and that the means of the husband were adequate. The "income" encompassed money earned on invested capital as well as that earned through personal labor,[1] but "regardless of whatever assets [the wife might] own . . . she [was] not required to deplete her capital."[2] The "means" of the husband included all assets, income from labor, and any other resource from which the wants of life might be supplied,[3] including his capacity to earn income.[4] The husband could not avoid liability for alimony *pendente lite* by refusing to work or by deliberately reducing his means to avoid his responsibility. [5] The merits of the suit for separation or divorce were irrelevant,[6] and the amount to which the wife was entitled was that amount necessary to maintain her in the style of living which the spouses had enjoyed prior to their separation.[7]

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1. See Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950); Abrams v. Rosenthal, 153 La. 459, 96 So. 32 (1923).

2. Hargrave, The Work of the Louisiana Appellate Courts for the 1967-1968 Term—Private Law, 29 La. L. Rev. 171, 174 (1969).

3. Bowsky v. Silverman, 184 La. 977, 168 So. 121 (1936), overruled on other grounds, Lewis v. Lewis, 404 So. 2d 1230, 1234 (1981). See also Ryan v. Ryan, 401 So. 2d 514 (La. App. 2d Cir. 1981).

4. Kemp v. Kemp, 144 La. 671, 81 So. 221 (1919); Viser v. Viser, 179 So. 2d 673 (La. App. 2d Cir. 1965).

5. Zaccaria v. Beoubay, 213 La. 782, 35 So. 2d 659 (1948).

6. Hillard v. Hillard, 225 La. 507, 73 So. 2d 442 (1954); Leger v. Leger, 222 La. 301, 62 So. 2d 492 (1952); Grisamore v. Grisamore, 191 La. 770, 186 So. 98 (1939); Lauber v. Master, 15 La. Ann. 593 (1860).

7. Williams v. Williams, 331 So. 2d 438 (La. 1976); Abrams v. Rosenthal, 153 La. 459, 96 So. 2d 32 (1923).

The courts have always held that if a wife has chosen to work, her right to alimony under article 148 would be reduced to the extent of her work income.[8] Prior to *Smith v. Smith*,[9] however, the courts had consistently rejected the idea that a wife's earning capacity was in any way germane to the issue of her right to alimony.

In 1906 in *Jackson v. Burns*[10] the Louisiana Supreme Court stated in dicta that it could "hardly be contended that, upon an application under article 148, the husband could escape the payment of alimony by showing that his wife was capable of earning an 'income' by her own labor."[11] After quoting this language in *Abrams v. Rosenthal*,[12] the supreme court stated that:

> If such a contention was made, it would not receive a moment's consideration. The test is not whether the wife who is separated from her husband is capable of earning an income by her own labor, but whether, as a matter of fact, she actually does earn an income sufficient, or more than sufficient for her maintenance in the state of society to which she is accustomed. . . . [A] wife, without property of her own, who sues her husband for a separation from bed and board, is not required to go out into the arena of business in order to obtain the funds necessary to support herself, as the law imposes that obligation upon the husband . . . .[13]

The Louisiana Supreme Court was last presented with this issue under the old law in 1976 in *Gravel v. Gravel*.[14] The husband in *Gravel* appealed a judgment of the trial court awarding, *inter alia*, alimony *pendente lite* to the wife, claiming that she was not entitled to alimony because she was capable of gainful employment. Even though the Louisiana Supreme Court earlier that same year had found article 148 constitutional,[15]

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8. Williams v. Williams, 331 So. 2d 438 (La. 1976); Bilello v. Bilello, 240 La. 158, 121 So. 2d 728 (1960); Abrams v. Rosenthal, 153 La. 459, 96 So. 32 (1923); McMath v. Masters, 198 So. 2d 734 (La. App. 3d Cir. 1967); Small v. Small, 173 So. 2d 854 (La. App. 4th Cir. 1965).

9. 382 So. 2d 972 (La. App. 1st Cir. 1980).

10. 116 La. 695, 41 So. 40 (1906).

11. 116 La. at 697, 41 So. at 40.

12. 153 La. 459, 96 So. 32 (1923).

13. Id. at 465-66, 96 So. at 34. See also Bilello v. Bilello, 240 La. 158, 121 So. 2d 728 (1960); Cabral v. Cabral, 245 So. 2d 718 (La. App. 4th Cir. 1971); McMath v. Masters, 198 So. 2d 734 (La. App. 3d Cir. 1967); Street v. Street, 188 So. 2d 164 (La. App. 2d Cir. 1966).

14. 331 So. 2d 580 (La. 1976).

15. Williams v. Williams, 331 So. 2d 438 (La. 1976). In *Williams* the court found that article 148 was not a denial of equal protection as the discrimination against males was not arbitrary but rather bore "a fair and substantial relation to the legitimate objective of the article—a fair and orderly termination of the community regime." 331 So. 2d at 441. The holding of *Williams* was, of course, overruled by Orr v. Orr, 440 U.S. 268 (1978); see also Smith v. Smith, 382 So. 2d 972 (La. App. 1st Cir. 1980). See also Hingle v. Hingle,

the appellant in *Gravel* claimed that the article was unconstitutional in its *application*. Appellant argued that the jurisprudence held that a husband could not "escape the payment of alimony *pendente lite* on the grounds that [the wife] is capable of earning sufficient income for her support during the pendency of the suit,"[16] but that a *husband's* earning capacity *was* a factor to be considered in determining his ability to pay.[17] Appellant claimed this application of article 148 denied married men equal protection of the law. The court avoided the issue by finding that appellee was entitled to alimony regardless of whether her earning capacity was to be considered and stating that "the views [the court] might express on that issue thus would be dicta."[18]

Then, in 1978 the United States Supreme Court, in *Orr v. Orr*,[19] declared an Alabama statute providing alimony only for wives unconstitutional. Because Louisiana's laws relating to alimony[20] were similar to the unconstitutional Alabama law, the Louisiana legislature amended the alimony articles in 1979 to render them gender-neutral.[21]

After these amendments had become effective, the first circuit, in *Smith v. Smith*,[22] held unconstitutional a judgment awarding alimony *pendente lite* to the wife under article 148 as it existed prior to the amendments. The court felt this result was compelled by the *Orr* decision and by a recent Louisiana Supreme Court decision which had declared former Civil Code article 160 (providing for permanent alimony for wives only) violative of equal protection.[23] The court noted, however, that the Civil Code does provide another basis for alimony *pendente lite*—article 119, which imposes on husbands and wives mutual obligations of fidelity and support.

The court further suggested that the changes in social policies which had precipitated the amendments to the alimony articles also demanded

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369 So. 2d 271, 272 (La. App. 4th Cir. 1979) (holding article 148 to be constitutional since it was "properly interpreted to allow temporary alimony to be awarded to either spouse in need if the other spouse [had] the means to pay").

16. 331 So. 2d at 583.

17. See infra text accompanying notes 3-7 (Jurisprudence holds that a husband's earning capacity constitutes an aspect of his "means" by which he can fulfill his alimentary obligation.).

18. 331 So. 2d at 582. Appellee in *Gravel* was a full-time student in graduate school, expecting to graduate near the time that the court ultimately issued its opinion. To force her to seek employment at that point would have been to require her to terminate her graduate work; the court refused to do this.

19. 440 U.S. 268 (1978).

20. La. Civ. Code arts. 148, 160.

21. La. Civ. Code arts. 148, 160, as amended by 1979 La. Acts, No. 72, § 1 (effective June 29, 1979).

22. 382 So. 2d 972 (La. App. 1st Cir. 1980).

23. Lovell v. Lovell, 378 So. 2d 418 (La. 1979).

that the courts consider the earning capacity of the claimant spouse in fixing awards of alimony *pendente lite* under article 119. This determination was in direct contravention to a long line of jurisprudence rejecting application of this criterion under old article 148. Judge Ellis, speaking for the court, found that "[i]n a case such as this, in which no impediment exists to the employment of the wife, she should not be entitled to alimony *pendente lite* unless it is made to appear that she is unable to find employment with which to support herself."[24] In this particular case, the wife was twenty-two years old and in good health, she had a high school equivalency certificate and had worked at a number of jobs before and after her marriage, the parties had been married less than five months, and there were no children of the marriage. Because the wife had failed to show that she was unable to find employment with which to support herself, the judgment awarding her alimony *pendente lite* was reversed.

The burden that *Smith* places on the claimant spouse, to show that the claimant is unable to find employment in order to establish eligibility for alimony *pendente lite*, marks a drastic departure from the traditional applications of article 148. The *Smith* holding has also caused a split among the circuits of the courts of appeal on the earning capacity issue.

This note will examine the effect that *Smith* has had on the consideration of the earning capacity of the claimant spouse in fixing alimony *pendente lite* under new article 148 by the Louisiana Courts of Appeal, and will then propose a resolution of the conflict.

*Application After Smith v. Smith*

Since the first circuit intimated in *Smith* that changing social policies required consideration of a claimant spouse's earning capacity in determining that spouse's entitlement to alimony *pendente lite*, the issue has been considered by four of the five circuits of the Louisiana Courts of Appeal.

The first case to address the issue of earning capacity after *Smith* was *Arrendell v. Arrendell*.[25] In that case, the claimant spouse appealed a lower court award of alimony *pendente lite*, asserting that the lower court erred in considering her earning capacity when fixing the amount of the award. Finding for the appellant, the second circuit distinguished *Smith* on its facts—the wife in *Smith* had worked prior to separation—and on the grounds that *Smith* had been decided under the law in effect prior to the effective date of the 1979 amendments to Civil Code article 148. The court stated:

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24. 382 So. 2d at 974.

25. 390 So. 2d 927 (La. App. 2d Cir. 1980).

To the extent, however, that the *Smith* case may be considered as authority for the proposition that, as a general rule not limited to the facts of that case, a wife must show she is unable to find employment as a precedent to obtaining alimony pendente lite under amended Article 148, we disagree with the proposition.[26]

In *Arrendell*, the second circuit examined closely the changes made by the amendments to Civil Code articles 148 and 160.[27] It noted that

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26. 390 So. 2d at 931.

27. Louisiana Civil Code article 148, prior to its amendment by § 1 of Act 72 of 1979, read:

> If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband.

Article 148 now reads:

> If the spouse has not a sufficient income for maintenance pending suit for separation from bed and board or for divorce, the judge may allow the claimant spouse, whether plaintiff or defendant, a sum for that spouse's support, proportioned to the needs of the claimant spouse and the means of the other spouse.

Louisiana Civil Code article 160, prior to its amendment by § 1 of Act 72 of 1979, read:

> 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:
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> (1) The wife obtains a divorce; [or]
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> (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
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> (3) The husband obtained a valid divorce from his wife in a court of another state or country which had not jurisdiction over her person.
>
> This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries.

Article 160 now reads:

> When a spouse has not been at fault and has not sufficient means for support, the court may allow that spouse, out of the property and earnings of the other spouse, alimony which shall not exceed one-third of his or her income. Alimony shall not be denied on the ground that one spouse obtained a valid divorce from the other spouse in a court of another state or country which had no jurisdiction over the person of the claimant spouse. In determining the entitlement and amount of alimony after divorce, the court shall consider the income, means, and assets of the spouses; the liquidity of such assets; the financial obligations of the spouses, including their earning capacity; the effect of custody of children of the marriage upon the spouse's earning capacity; the time necessary for the recipient to acquire appropriate education, training, or employment; the health and age of the parties and their obligations to support or care for the dependent children; any other circumstances that the court deems relevant.
>
> In determining whether the claimant spouse is entitled to alimony, the court shall consider his or her earning capacity, in light of all other circumstances.
>
> This alimony shall be revoked if it becomes unnecessary and terminates if the spouse to whom it has been awarded remarries or enters into open concumbinage.

the amendment had changed article 160 substantially, not only removing the sexual bias but also adding certain explicit criteria to be considered when determining eligibility, including the earning capacity of the claimant spouse.[28] Article 148 was changed very little, however. The court surmised that, in light of the relatively minor changes to article 148, the legislature did not intend to overrule jurisprudence interpreting article 148. The concluded that prospective applications of the article should remain unchanged, except that it should be applied in a gender-neutral manner. While recognizing that earning capacity might be a proper consideration in some instances,[29] the court stated that it would be improper in a case such as this in which the claimant spouse had no income at the time of the trial, had not been employed for three years prior to the parties' separation, and had not been regularly employed during the entire twenty-five years of the marriage.

While the *Arrendell* approach continues to be followed by the second circuit,[30] the third circuit appears to be split between that approach and the approach adopted by the first circuit in *Smith*. Initially, the court observed in *Vidrine v. Vidrine*[31] that the obligation to pay alimony *pendente lite* was not affected by the 1979 amendment.[32] In *Desormeaux v. Brignac*,[33] the court avoided specifically adopting either view, but affirmed the lower court's holding which considered *Smith* in arriving at its decision. However, Judge Foret, in his concurring opinion, called for

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28. Inclusion of earning capacity in article 160 legislatively overruled the supreme court decision of Ward v. Ward, 339 So. 2d 839 (La. 1976), which held that earning potential may not be considered when fixing a permanent alimony award.

29. The court recognized that perhaps the respective earning capacities should be considered in cases where neither spouse is employed or in cases where a spouse who was regularly employed during the marriage happens to be unemployed at the moment of the alimony hearing and would otherwise be able to secure employment immediately.

30. In Clayton v. Clayton, 431 So. 2d 1082 (La. App. 2d Cir.), cert. denied, 439 So. 2d 1075 (La. 1983), the court noted the exceptions set forth in *Arrendell* to the general principle that earning capacity is irrelevant to the alimony issue. It determined that while the wife in *Clayton* had her own business, the business was closed. She was unemployed at the time of the trial and there had been no showing that she was capable of securing immediate employment, thus removing that fact situation from the exceptions set forth in *Arrendell*. See supra note 29. *Clayton* indicates that the non-claimant spouse is to bear the burden of showing that the *Arrendell* exceptions are applicable to the particular case. See also Hollowell v. Hollowell, 437 So. 2d 908 (La. App. 2d Cir. 1983) (declaring that alimony *pendente lite* awards must relate to facts as they actually existed at the time litigation commenced, not future capabilities).

31. 402 So. 2d 793 (La. App. 3d Cir. 1981).

32. Specifically, the court was dealing with the jurisprudential rule that "maintenance" as used in article 148 is construed to mean that a wife is entitled to be maintained in the lifestyle enjoyed prior to separation and not with whether earning capacity should be considered when determining her entitlement.

33. 408 So. 2d 32 (La. App. 3d Cir. 1981).

a specific adoption of the first circuit approach.[34] In the later decision of *Cooley v. Cooley*[35] the court again upheld the lower court's ruling which had given consideration to the wife's prior employment, but again failed to specifically adopt either position.[36] Finally, in *Morris v. Morris*,[37] a panel consisting of members of the same panels which sat in *Desormeaux* and *Cooley*[38] stated that "[b]ased on the amendment to LSA-C.C. Article 148 and the decision of the United States Supreme Court in *Orr v. Orr* . . ., in which it found unconstitutional a provision of Alabama law, similar to LSA-C.C. Article 148 (prior to its amendment), we agree with the holding of the court in *Smith*."[39]

But in *Harrington v. Campbell*,[40] a separate panel of the third circuit stated:

> It is well settled that the ability of a spouse to obtain employment producing some income in the future is not an appropriate consideration in determining alimony pendente lite; if, however, the spouse chooses to earn her own living, or a part of it, alimony is reduced to the extent of her earnings. . . . Therefore, an award of alimony pendente lite granted to the wife only "to rehabilitate her earning capacity and become self-supporting" is not proper.[41]

Thus, the third circuit still has not clearly stated whether the earning capacity of the claimant spouse may be considered in determining that spouse's eligibility for alimony *pendente lite*.

In *Cortinez v. Cortinez*,[42] the fourth circuit rejected an appellant's

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34. 408 So. 2d at 34.

35. 411 So. 2d 750 (La. App. 3d Cir. 1982), cert. granted, 413 So. 2d 505 (La. 1982), cert. dismissed, No. 82-C-0769 (Oct. 15, 1982).

36. In *Cooley*, the lower court found that, while the wife had voluntarily given up a job as a real estate agent after separation and before the hearing on the rule for alimony, thus providing the court with justification for a denial of support, it would award her alimony for three months "in order to help her get rehabilitated and back into her employment." 411 So. 2d at 754. Although the court did not state specifically that it was adopting earning capacity as a consideration in alimony, it upheld the lower court's decision, which obviously did so.

37. 413 So. 2d 285 (La. App. 3d Cir. 1982).

38. Judges Foret, Swift, and LaBorde sat on the panel in *Desormeaux*; Judges Domengeaux, Swift, and LaBorde sat in *Cooley*; Judges Domengeaux, Foret, and LaBorde sat in *Morris*, and Judge Foret authored the opinion. As noted previously, Judge Foret had advocated an adoption of *Smith* in his concurring opinion in *Desormeaux*. See supra text accompanying note 34.

39. 413 So. 2d at 287 (citation omitted).

40. 413 So. 2d 297 (La. App. 3d Cir. 1982) (decided the same day as Morris v. Morris, 413 So. 2d 285 (La. App. 3d Cir. 1982)). The panel in *Harrington* consisted of Judges Guidry, Cutrer, and Stoker.

41. 413 So. 2d at 302 (citations omitted).

42. 414 So. 2d 830 (La. App. 4th Cir. 1982).

contention that his wife was not entitled to alimony pendente lite under *Smith v. Smith*, finding that *Smith* had been severely repudiated by *Arrendell v. Arrendell*. Because the claimant spouse's earning capacity was not considered in *Cortinez* in determining that spouse's entitlement to alimony pendente lite, it may be assumed that the fourth circuit intends to follow the traditional application of Louisiana Civil Code article 148.[43]

The first circuit has adhered to the rule it suggested in *Smith*. In *LeBlanc v. LeBlanc*,[44] which was the first case the first circuit decided after the amendment to Civil Code article 148, the court reiterated its rationale in *Smith*, asserting that article 148 (as amended) must be read and applied consistently with Civil Code article 119 on a non-discriminatory basis and that the jurisprudence that had previously applied only to the husband must now be applied to both spouses. Specifically, the court observed that "the wife may not establish need for alimony pendente lite by merely refusing to work, just as the husband may not escape his obligation of support by merely refusing to work."[45]

In a subsequent case, *Whipple v. Whipple*[46] the first circuit followed *Arrendell*, but it reversed itself on rehearing, specifically repudiating *Arrendell* and following its own decisions in *Smith* and *LeBlanc*.[47] In *Watkins v. Watkins*,[48] which had been consolidated for hearing with *Whipple*, the court, sitting *en banc*, solidified its position by sustaining the lower court's finding that Mrs. Watkins was not entitled to alimony *pendente lite* because she had the capacity to support herself and she had failed to prove that she could not find employment.[49]

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43. The main issue in *Cortinez* was whether the parents of the claimant spouse were obligated to provide her support. The issue of earning capacity was dealt with only cursorily.

44. 405 So. 2d 1187 (La. App. 1st Cir. 1981).

45. 405 So. 2d at 1189. As authority for the proposition that a husband may not escape his alimentary responsibilities by refusing to work, the court cited Zaccaria v. Beoubay, 213 La. 782, 35 So. 2d 659 (1948); Rakosky v. Rakosky, 275 So. 2d 421 (La. App. 4th Cir.), cert. denied, 278 So. 2d 508 (La. 1973); Viser v. Viser, 179 So. 2d 672 (La. App. 2d Cir. 1965).

46. 424 So. 2d 263 (La. App. 1st Cir. 1982), cert. denied, 426 So. 2d 279 (La. 1983).

47. Although the court on rehearing stated specifically that the *Smith-LeBlanc* approach was to be followed, it nevertheless affirmed the lower court's award of alimony *pendente lite* despite the lower court's refusal to consider the claimant's earning capacity. The wife in *Whipple* had been unemployed during the five year marriage, and the court noted that trial courts should not expect claimant spouses to seek employment immediately. Thus, although the trial court's application of article 148 was incorrect, its result was valid.

48. 424 So. 2d 269 (La. App. 1st Cir. 1982).

49. 424 So. 2d at 269. The first circuit assumed from the trial court's written reasons for judgment that this was the basis of its decision as appellant had not caused the trial testimony to be transcribed.

*Proposal*

It seems that the difficulties the courts are experiencing over whether earning capacity should be considered when determining alimony *pendente lite* awards are manifestations of an unwillingness on the part of some courts to impose a burden which might force an unprepared spouse into the work force and a realization by other courts that fairness to the non-claimant spouse requires an examination of the ability of the claimant to be self sufficient. Yet it seems that these objectives could be met in all circuits by a proper application of article 148, *i.e.*, only applying article 148 to awards of alimony *pendente lite*. Just as in *Smith v. Smith*,[50] the courts should use article 119[51] as their basis for post-separation awards and then consider all relevant factors (including earning capacity) at the hearing for that award.

Just as the Civil Code is silent today, the Civil Codes of 1825 and 1870 were silent on the subject of alimony after separation, allowing only alimony pending the suits for separation and divorce and permanent alimony after divorce. Despite the absence of Civil Code authority for awards of alimony between judgment of separation and suit for divorce, this practice has long been adopted by the courts.[52]

In the 1898 decision of *Stuart v. Ellis*,[53] the wife's right to post-separation alimony was questioned for the first time with the supreme court noting that "spouses separated from bed and board owe aid to each other during the marriage, and consequently until the decree of divorce is pronounced."[54] This obligation to aid was specifically identified in later cases[55] as arising from Civil Code article 120 which imposes on the husband the obligation to supply the wife with "whatever is required for the convenience of life, in proportion to [the husband's] means and condition."[56] Other cases have stated that the obligation to provide alimony after separation arose from the husband's status as head and master of the community, a status which could prove to be a barrier to the wife's access to community funds.[57] It has also been said, though not thereafter followed, that "a decree of separation from bed and board is only an

50. See supra note 22.

51. See supra text accompanying notes 23-24.

52. See generally Lazarus, What Price Alimony, 11 La. L. Rev. 401 (1950); see also Pascal, The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Private Law, 27 La. L. Rev. 423 (1967) (arguing that Civil Code article 160 would be better to apply in determinations of alimony after separation than article 148).

53. 50 La. Ann. 559 (1898).

54. 50 La. Ann. at 562.

55. Ward v. Ward, 339 So. 2d 839 (La. 1976); Bilello v. Bilello, 240 La. 158, 121 So. 2d 728 (1960); Smith v. Smith, 217 La. 646, 47 So. 2d 32 (1950); Huber v. King, 49 La. Ann. 1503 (1897).

56. La. Civ. Code art. 120.

57. Williams v. Williams, 331 So. 2d 438 (La. 1976); Hillard v. Hillard, 225 La. 507,

interlocutory decree, which does not dissolve the bonds of matrimony unless or until it leads to a decree of divorce."[58]

The well-established practice of the courts to award post-separation alimony under the criteria of article 148 has been severely criticized as being "the very point which brings about the inequities and abnormal results complained of"[59] with respect to post-separation awards.[60] Accordingly, future restrictions by the courts of application of article 148 to considerations of alimony pending the suit for separation would require neither revision of the code article nor overruling the jurisprudence under article 148 prior to its amendment, but would require an extensive reexamination of the purposes of present Civil Code authority.

In a typical situation, a claimant spouse would file a rule for alimony *pendente lite* simultaneously with or shortly after the petition for separation.[61] A hearing on the rule would occur two to three weeks after the rule was filed and a determination would be made at that time.[62] Under present jurisprudence and absent any change of circumstances, this determination would remain in effect until a final judgment of divorce (six months to one year after the separation). The trial court would consider

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73 So. 2d 442 (1954); LeBeau v. Trudeau, 1 Mart. (n.s.) 93 (La. 1823). In Note, Louisiana's Forbidden Antenuptial Waiver of Alimony Pendente Lite, 39 La. L. Rev. 1161 (1979), the author suggested that this basis for post separation alimony had been abandoned by the supreme court in Holliday v. Holliday, 358 So. 2d 618 (1978), which used Civil Code article 120 as the basis of its decision. The author maintained that the abandonment was a recognition of the infirmity inherent in finding the husband's status as head and master as the basis for awards inasmuch as awards were given in cases such as *Holliday* where there was no community.

58. Arnold v. Arnold, 186 La. 323, 328, 172 So. 172, 174 (1937). In Hillard v. Hillard, 225 La. 507, 73 So. 2d 442 (1954), the supreme court stated that it was not necessary for the court either to affirm or deny the *Arnold* conclusion. Justice McCaleb, in his dissent in *Hillard*, stated:

> The reasoning in the Arnold case cannot withstand critical analysis. Imprimis, a judgment of separation from bed and board is not an interlocutory decree. It is a final disposition of the matter in controversy, carrying with it a separation of the goods and effects . . . . On the other hand, an interlocutory decree is defined by Article 538 of the Code of Practice to be a judgment which pronounces on preliminary matters during the course of the proceedings and does not decide on the merits.

225 La. at 519-20, 73 So. 2d at 446 (citations omitted).

59. Lazarus, supra note 52, at 421.

60. The "inequities and abnormal results" to which the author refers are those arising from the courts' application of alimony *pendente lite* standards to determine entitlement to awards of alimony after separation. While he would have preferred application of standards for permanent alimony, the author notes that "in view of innumerable decisions upholding this rule it could not be seriously contested." Id. at 422.

61. Article 148 provides for awards of alimony pending both suits for separation and divorce. For purposes of this illustration, all references to article 148 are meant to apply to alimony pending suit for separation.

62. Fixing of alimony through a summary proceeding is authorized by Louisiana Code

only the needs of the claimant spouse and the ability of the non-claimant spouse to pay—proved by sworn income and expense statements submitted by the parties and supported by testimony subject to cross-examination. The amount of the award would be that amount necessary to maintain the claimant spouse in a manner consistent with the style of living enjoyed during the marriage or in a manner as close to that style as the non-claimant could afford. The discretion which has been granted to the trial court in *pendente lite* awards since the 1979 amendment to article 148[63] would be exercised only to the extent of the credibility be given to evidence adduced by the parties when determining eligibility for and the amount of the award.[64] This award would be abated by the judgment of separation.

Later, at the trial for the separation, the trial court would consider all relevant factors necessary to determine whether a claimant spouse is unable to support himself, and is thus entitled to a post-separation alimony award under article 119. The factors to be considered would be those enumerated in article 160,[65] which includes earning capacity.[66] This award would, of course, be subject to modification upon a showing of a change of circumstances such as a partition of community property or present and future inapplicability of factors which had previously shown the applicant to be entitled to support.[67]

By postponing the consideration of post-separation alimony to the trial for separation, the claimant spouse would be allowed an adequate amount of time in which to prepare to meet his burden of proving lack

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of Civil Procedure article 2592 which states that "[s]ummary proceedings may be used for trial or disposition of the following matters only: (1) An incidental question arising in the course of litigation. . . . (8) The original granting of, subsequent change in, or termination of, child custody, alimony, child support in behalf of minor children, and support between ascendants and descendants . . . ."

63. Before its amendment, article 148 stated that alimony *pendente lite shall* be awarded; it now states that it *may* be awarded. See supra note 27.

64. An example of the manner in which the trial court may use its discretion in fixing the amount of the award is when the paying spouse does not have sufficient means to support the claimant in the style enjoyed during the marriage. The court would then decide, in its discretion, what amount the non-claimant spouse is able to pay to support the claimant spouse in a style as close as possible to that enjoyed during the marriage.

65. See supra note 27.

66. See supra note 27. The difference between awards of post-separation alimony under article 119 and permanent alimony under 160 would then be only that fault is not a factor under article 119.

67. Factors which would constitute a change of circumstances are: (1) young children beginning school and either no longer incurring daycare expenses or freeing the custodial parent to work during those hours; (2) graduation from college or technical school by claimant spouse; and (3) termination of any physical disability which may have kept claimant from seeking employment.

of earning capacity[68] or proving other factors which bear on employability.[69] At this point, the trial court would also be able to make a more accurate determination of what amount is necessary for the deserving claimant, since the parties themselves would be in a better position to show exactly what their separate living costs would be and what additional costs (such as day care) would be incurred by the custodial parent returning to work. For those circuits which presently consider earning capacity inapplicable under article 148, this proposal would prevent a spouse who is perfectly able to support himself from collecting alimony for an extended period of time. For those circuits which consider earning capacity applicable, a claimant spouse who is temporarily unemployed and in necessitous circumstances will get immediate relief at the hearing on the rule along with a sufficient amount of time to explore his employment possibilities.

*Conclusion*

As noted earlier, those circuits which have held that earning capacity is not a proper consideration have, nevertheless, recognized that there are some situations in which equity would call for such a consideration.[70] Close scrutiny of the jurisprudence reveals that the only real divergence concerns where the burden of proof is to be placed.[71]

Additionally, in those circuits in which earning capacity is not considered, a nonclaimant spouse could nevertheless force the court to consider the claimant spouse's earning capacity by reconvening for alimony *pendente lite*. This would put the nonclaimant spouse in the position of a *claimant* spouse, requiring a consideration of all resources of the other party regardless of the merits of the claim.[72] Certainly it is more desirable to consider all factors concerning *both* parties at the trial for separation than to invite meritless and time consuming claims at the hearing on the rule to fix support payments prior to that trial. It is equally unfair to

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68. Claimant would meet his burden by showing prolonged absence from the job market, lack of training, or unavailability of employment suited to his education, training, and previous employment experience.

69. Other factors which bear on employability are age, poor health, and custody of small children.

70. See supra text accompanying note 29.

71.. See Clayton v. Clayton, 431 So. 2d 1082 (La. App. 2d Cir. 1983) (following the *Arrendell* line of cases by refusing to consider earning capacity thus indicating that the payor spouse bears the burden of proving that the *Arrendell* exceptions are applicable); see also supra text accompanying notes 22-25; Smith v. Smith, 382 So. 2d 972 (La. App. 1st Cir. 1980) (placing the burden on the claimant spouse to prove that he is unable to find employment).

72. See supra text accompanying notes 3-7 (seting forth factors considered by courts as to nonclaimant's ability to pay prior to the 1979 amendment to article 148, including consideration of the nonclaimant's earning capacity).

charge paying spouses with the burden of supporting spouses who are perfectly capable of supporting themselves or at least contributing to their own support.

The proposed solution would provide expeditious relief to a deserving claimant at the hearing on the rule to fix alimony *pendente lite* under article 148, and it would preclude prolonged support payments by requiring the claimant to prove eligibility for a post-separation award under article 120 at the trial for separation. This solution would confine application of article 148 to that stage of the divorce process for which it was designed—that period between petition and final judgment, or "*pendente lite.*"[73] Finally, this proposal would allow the trial court to avoid considering the abundance of evidence necessary to make a fair determination of the issue at a hearing which is not designed to handle complex matters except where exigency so requires.[74]

Separation is a traumatic experience for all parties under the best of circumstances. Failure by the courts to consider all factors when ordering one spouse to pay the other for an extended period of time could only serve to foster resentment in the paying spouse who feels that he is not being treated fairly. Refusal to consider these factors could cause difficulties in the child custody, support, or community partition aspects of the proceeding, since the paying spouse who feels unjustly slighted by the rule setting support payments could use these collateral issues to "get even" by causing controversy that would not otherwise exist. It is suggested that the proposed treatment of alimony *pendente lite* and post-separation alimony is sufficiently flexible to (1) allow courts to provide for those extreme circumstances when the claimant spouse has no ability whatsoever to support himself and (2) allow courts to provide for circumstances at the other extreme when the claimant is perfectly able to support himself, but chooses not to.

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73. "*Pendente Lite*" is defined as "[p]ending the suit; during the actual progress of a suit; during litigation." Black's Law Dictionary 1020 (5th ed. 1979).

74. "Summary proceedings are those which are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings." La. Code Civ. P. art. 2591. "Generally summary proceedings are allowed in instances where the issue to be resolved is narrow and/or the need for rapid adjudication is great." Clay v. Clay 389 So. 2d 31, 35 (La. 1979).