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Family Law - Alimony - Effect of Fault When Wife Obtains Divorce Under La. R.S. 9:301

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case clearly indicates a void in the present Louisiana narcotics law. It is submitted that, since rehabilitation should be the state's primary motive in confining addicts, this void should be filled by a statute utilizing the state's police power to confine addicts for rehabilitative treatment.²⁰ Louisiana would then possess a modern and constitutionally tested narcotics law imposing criminal sanctions for unauthorized use and providing compulsory treatment without criminal conviction for those afflicted with addiction.

James S. Holliday, Jr.

FAMILY LAW — ALIMONY — EFFECT OF FAULT WHEN WIFE
OBTAINS DIVORCE UNDER LA. R.S. 9:301

Plaintiff wife instituted suit in 1958 for separation from bed and board on the grounds of abandonment and cruelty.¹ The trial court rejected, on the ground of mutual fault, the demand of the wife; she appealed. While the cause was pending, both parties filed for judicial separation on the ground of living separate and apart for one year.² Separation was granted in the husband's suit which was served first.³ In 1960 both parties filed suit for absolute divorce on the ground they had remained

under the addict provision without a clear showing that he committed some act in Louisiana contributing to his addiction. Without conviction as an addict, there could be no compulsory confinement for treatment under LA. R.S. 40:981 (1950), as amended (Supp. 1962).

29. In the *Robinson* case the court affirmed the states' power to impose compulsory treatment and involuntary confinement for those addicted to the use of narcotics with criminal sanctions attached for noncompliance. In a footnote it was mentioned that California had a civil program for treatment in sections 5350-5361 of its Welfare and Institutions Code. See *In re DeLa O*, 28 Cal. Repr. 489, 378 P.2d 793 (1963) (upheld compulsory treatment and rehabilitation procedures for narcotics addicts).

1. LA. CIVIL CODE art. 138 (1870): "Separation from bed and board may be claimed reciprocally for the following causes: . . .

"(3) On account of habitual intemperances of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill treatment is of such a nature as to render their living together insupportable . . .

"(5) Of the abandonment of the husband by his wife or the wife by her husband . . ."

2. LA. CIVIL CODE art. 138 (1870): "Separation from bed and board may be claimed reciprocally for the following causes: . . .

"(9) When the husband and wife have voluntarily lived separate and apart for one year and no reconciliation has taken place during that time."

3. This case has a very interesting custody issue that is beyond the scope of this Note.

separate and apart for two years.⁴ The wife was granted a divorce in her suit which was served first, but her claim for alimony was rejected. On appeal the First Circuit Court of Appeal affirmed. *Held*, under Civil Code article 160⁵ the wife who obtains a divorce on the ground of living separate and apart for two years⁶ is entitled to alimony only if she is free of fault. *Sachse v. Sachse*, 150 So. 2d 772 (La. App. 1st Cir. 1963).

Civil Code article 160 is the sole provision allowing an award of alimony to a wife after divorce. As originally enacted, alimony was permitted only to the wife who obtained the divorce.⁷ Since divorce at that time could only be granted for cause to the party not at fault,⁸ it necessarily followed that alimony was

4. LA. R.S. 9:301 (1950): "When married persons have been living separate and apart for a period of two years or more, either party to the marriage contract may sue . . . for an absolute divorce, which shall be granted on proof of continuous living separate and apart of the spouses, during the period of two years or more."

5. LA. CIVIL CODE art. 160 (1870), as amended, La. Acts 1934, 2d E.S., No. 27: "If the wife who has obtained the divorce has not sufficient means for her maintenance, the court may allow her in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income; provided, however, that in cases where, under the laws of this State a divorce is granted solely on the ground that the married persons have been living separate and apart for a certain specified period of time, and the husband has obtained a divorce upon the ground of such living separate and apart, and the wife has not been at fault, then the court may allow the wife in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income."

"This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage."

6. See note 4 *supra*.

7. LA. CIVIL CODE art. 160 (1870) prior to amendment read: "If the wife who has obtained the divorce has not sufficient means for her maintenance, the court may allow her in its discretion, out of the property of her husband, alimony which shall not exceed one-third of his income."

"This alimony shall be revocable in case it should become unnecessary and in case the wife should contract a second marriage."

8. LA. CIVIL CODE art. 139 (1870), prior to amendment, set forth the following causes for immediate divorce: (1) where a husband or wife has been adjudged guilty of adultery; (2) where a husband or wife has been sentenced to an infamous punishment; (3) where one year has expired from date of judgment of separation from bed and board and no reconciliation has taken place.

In *Johnston v. Johnston*, 32 La. Ann. 1139 (1880) the application of article 139 was restricted so that a divorce based upon the one-year separation after judgment could only be obtained by the successful party to the separation judgment.

The grounds for separation from bed and board are found in LA. CIVIL CODE art. 138 (1870). Until amendment of article 138 in 1954 a judicial separation could not be obtained merely on the ground of living separate and apart for a period of time.

The present article 139 maintains adultery and infamous punishment as immediate causes for divorce and by La. Acts 1954, No. 618, § 1, adds that: "Divorce may be granted to either spouse after a separation from bed and board in accordance with the provisions of Section 302 of Title 9 of the Louisiana Revised Statutes of 1950."

granted only to a wife not at fault in causing the termination of the marriage.⁹ Subsequent legislation permitting divorce merely for living separate and apart for specified periods without regard to fault confused the alimony issue. The first complication was in 1898 when it became possible for a spouse to obtain a divorce after the lapse of two years¹⁰ from a separation from bed and board granted to the other spouse. The courts have apparently never been called upon to decide if the wife who obtained a divorce after her husband's judgment of separation for cause can get alimony.¹¹ A further complication arose in 1916 when the legislature adopted the present R.S. 9:301 which established the right of a party to an absolute divorce upon a showing that the parties had voluntarily lived separate and apart for a specified period.¹² Since a divorce could now be obtained without

9. *Ibid.*

10. La. Acts 1898, No. 25, § 1, read: "Be it enacted by the General Assembly of the State of Louisiana, That whenever a judgment of separation from bed and board shall have been rendered and no reconciliation between the spouses shall have taken place the married person in whose favor the judgment of separation from bed and board shall have been rendered, may, at the expiration of one year from the date that the said judgment shall have become final, apply to and obtain from the court that rendered the judgment of separation from bed and board, a judgment of final divorce from the other spouse; and the married person against whom the judgment of separation from bed and board shall have been rendered may, at the expiration of two years from the date that the said judgment shall have become final, apply to and obtain from the court that rendered the judgment of separation from bed and board a judgment of final divorce from the spouse; provided, that whenever a judgment of final divorce shall be obtained under the provisions of this act, by the husband against whom the judgment of separation from bed and board shall have been rendered the wife shall have the same rights for recovering alimony from the said husband as are now provided by law for cases in which the wife is plaintiff, and provided further, that the provisions of this act shall in no way interfere with the rights of the spouse, who shall have obtained the judgment of separation from bed and board to retain the custody and care of the children as now provided by law."

The time period has been reduced from two years to one year and sixty days. See LA. R.S. 9:302 (1950).

This act of 1898 was suggested by the case of *Mazerat v. Virginia Godefroy, His Wife*, 48 La. Ann. 824, 19 So. 756 (1896), in which the Supreme Court of Louisiana suggested that the spouse against whom the judgment of separation had been decreed should be allowed to obtain a divorce upon a showing that two years had passed since the separation judgment and that the successful litigant had refused a reconciliation.

11. The husband's separation judgment would establish the wife's fault since no-fault separation was not provided for until 1954. See note 8 *supra*. It seems in such situation that the wife without sufficient means for her maintenance would have met the requirements for alimony as set forth by article 160—that is, she obtained the divorce. See *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Separation and Divorce—Proof of Adultery*, 17 LA. L. REV. 306, 308-09 (1957). It is submitted, however, that the court could avoid such a result by holding that freedom from fault is a prerequisite to alimony. This view is consistent with that espoused in *Sachse v. Sachse*.

12. Originally La. Acts 1916, No. 169, provided for a seven-year period of voluntary separation before a divorce could be sought on this ground. La. Acts 1932, No. 31, amended La. Acts 1916, No. 269. No. 31 was amended by La. Acts

any showing of fault on the part of either spouse, a husband at fault could obtain the divorce and thus preclude his faultless wife from obtaining alimony under article 160. This hiatus¹³ was remedied in 1928¹⁴ when article 160 was amended to provide that where "the wife has not been at fault,"¹⁵ she may still receive alimony when the husband obtained the divorce on the ground of living separate and apart.¹⁶ The courts have consistently declared that the wife has the burden of proving lack of fault¹⁷ in this situation.¹⁸ She is considered free from fault for the purpose of alimony when the husband's conduct was sufficient to justify termination of the marital relationship by her.¹⁹ It has been determined that alimony may be awarded when the evidence clearly showed that the parties had separated by mutual consent.²⁰

1938, No. 430 to reduce the separation period to two years. See La. R.S. 9:30 (1950).

13. In *North v. North*, 164 La. 293, 113 So. 852 (1927) the Supreme Court denied the wife alimony, since the divorce was obtained by the husband.

14. La. Acts 1928, No. 21. See note 15 *infra*.

15. By La. Acts 1928, No. 21, the following provision was added to article 160: ". . . provided, however, that in cases where the husband has obtained judgment of divorce on the ground that the married persons have been living separate and apart for a period of seven years or more, and the wife has not been at fault, then the court may allow the wife in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income. This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage."

In November the legislature by La. Acts 1934, 2d E.S., No. 27 amended La. Acts 1928, No. 21, to change "for a period of seven years or more" to "for a certain specified time."

16. La. R.S. 9:301 (1950).

17. "Fault" as defined in *Felger v. Doty*, 217 La. 365, 369, 46 So.2d 300, 301 (1950) "contemplates conduct or substantial acts of commission or omission on the part of the wife, violative of her marital duties and responsibilities, which constitute a contributing or a proximate cause of the separation and continuous living apart, the ground for the divorce."

This definition has been accepted into the jurisprudence of our state. *Rogers v. Rogers*, 239 La. 877, 120 So.2d 462 (1960); *Vinot v. Vinot*, 239 La. 587, 119 So.2d 474 (1960); *Davieson v. Trapp*, 223 La. 776, 66 So.2d 804 (1953); *Richard v. Garth*, 223 La. 117, 65 So.2d 109 (1953); *Chapman v. Chapman*, 130 So.2d 811 (La. App. 3d Cir. 1961).

18. *E.g.*, *Vicknair v. Johnson*, 237 La. 1032, 112 So.2d 702 (1959); *Davieson v. Trapp*, 223 La. 776, 66 So.2d 804 (1953); *Creel v. Creel*, 218 La. 382, 49 So.2d 617 (1950); *Hawthorne v. Hawthorne*, 214 La. 905, 39 So.2d 338 (1949); *Primus v. Primus*, 129 So.2d 925 (La. App. 1st Cir. 1961); *Lyles v. Lyles*, 126 So.2d 859 (La. App. 2d Cir. 1961).

19. *E.g.*, *Vinot v. Vinot*, 239 La. 587, 119 So.2d 474 (1960); *Kendrick v. Kendrick*, 236 La. 34, 106 So.2d 707 (1958); *Creel v. Creel*, 218 La. 382, 49 So.2d 617 (1950); *Felger v. Doty*, 217 La. 365, 46 So.2d 300 (1950); *Scott v. Scott*, 197 La. 726, 2 So.2d 193 (1941); *Lyles v. Lyles*, 126 So.2d 859 (La. App. 2d Cir. 1961).

20. *Bienvenue v. Bienvenue*, 192 La. 395, 188 So. 41 (1939). The court reasoned that since the parties had separated by mutual consent, this was an admission by the husband that the wife was not at fault.

The soundness of this reasoning is questionable; it is submitted that the wife should be required to establish her lack of fault to obtain alimony after divorce.

Article 160 still makes no special provision for the situation in which the wife obtains a divorce on the basis of two years' separation. Consequently, in such circumstances it is uncertain whether the wife must be free of fault to obtain alimony, or is entitled to it under the general provision for alimony to "the wife who has obtained the divorce."²¹ In *McKnight v. Irving*,²² the Supreme Court indicated in dictum²³ that when the wife obtained the divorce on the ground of two years' separation, she still had the burden of proving her freedom from fault. In *Moreau v. Moreau*,²⁴ however, the Third Circuit Court of Appeal expressed the view that the portion of article 160²⁵ requiring the wife to be free from fault to receive alimony was not applicable when the wife obtained the divorce on the ground of two years' separation.²⁶ The court declared that "under those circumstances, therefore, it is not necessary for her to establish that she is free from fault."²⁷ Under this view, the trial judge would not have discretion to deny alimony to the wife at fault if she obtained the divorce.

The court in the instant case, in arriving at a decision contrary to *Moreau*, traced the history of Article 160 and R.S. 9:301, determining that absence of fault has always been a pre-

21. LA. CIVIL CODE art. 160 (1870). See note 5 *supra*.

22. 228 La. 1088, 85 So. 2d 1 (1956).

23. Here the husband appealed from a divorce judgment given to the wife, asking that the trial court determine whether the wife was at fault even though the wife was not presently asking for alimony. The husband wished an immediate determination of the fault issue so that if the wife was judged to be at fault, she would be forever precluded from demanding alimony. The Supreme Court held that fault was not an issue since there had been no claim for alimony. See *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Separation and Divorce—Proof of Adultery*, 17 LA. L. REV. 306, 308-09 (1957).

24. 142 So. 2d 423 (La. App. 3d Cir. 1962).

25. See note 15 *supra*.

26. See concurring opinion by Justice McCaleb in *McKnight v. Irving*, 228 La. 1088, 85 So. 2d 1 (1956) in which he said (with reference to the husband's contention that though the wife had obtained the divorce without claiming alimony, fault should be determined): "I think the short answer to the proposition advanced by appellant is that, since the wife obtained the divorce in this case, the question of her fault is not material as the clear provisions of Article 160 of the Civil Code accord her the absolute right to permanent alimony if she has not sufficient means for her maintenance. It is only when the husband has obtained a divorce upon the ground that the parties have been living separate and apart for two years that the question of the wife's fault may be made an issue in determining her right to alimony.

"It may be that Article 160 of the Civil Code, as written, operates unfairly in cases where the divorce is granted solely on the ground of the parties living separate and apart for two years. That, however, is a matter which should be addressed to the Legislature for correction; this court is obviously without authority to re-write the article."

27. *Moreau v. Moreau*, 142 So. 2d 423, 426 (La. App. 3d Cir. 1962).

requisite to the award of alimony to the wife after divorce.²⁸ The court rejected the wife's contention that article 160 required a showing of lack of fault only when the husband obtained the divorce; it observed that the wife was the successful party in the litigation only because she filed first, since both parties have an absolute right to divorce on the basis of two years' separation irrespective of fault. Emphasizing the grave policy considerations underlying this alimony provision, the court asserted that "rules governing such vital phases of society should not be predicated upon the accidental turn of events such as the relative alacrity with which estranged parties may prepare and institute their respective suits for divorce."²⁹ The court then held that the wife, regardless of whether she obtained the divorce, must establish her lack of fault to obtain alimony.

It is submitted that the *Sachse* determination that freedom from fault is a prerequisite to an award of alimony is correct; the legislature, by the imperfect language of article 160, should be held to have intended only to protect the alimony rights of the innocent wife — not to have afforded the wife at fault a means of obtaining alimony. *Moreau* pitched the right of the wife at fault to obtain alimony on the mere expedient of her being the first to file suit at the end of the two year separation period. *Sachse* soundly suggests that the right to alimony, with its concomitant policy considerations, should not be determined by a "foot race to the courthouse."³⁰

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28. The court recognized that the trial judge has discretion in assessing the fault of the parties and that his award or denial of alimony should not be reversed unless manifestly erroneous. This view is consistent with prior jurisprudence. *E.g.*, *Rogers v. Rogers*, 239 La. 877, 120 So.2d 462 (1960); *Vinot v. Vinot*, 239 La. 587, 119 So.2d 474 (1960); *Jones v. Jones*, 232 La. 102, 93 So.2d 917 (1957); *Oliver v. Abunza*, 226 La. 456, 76 So.2d 528 (1954); *Williams v. Williams*, 215 La. 839, 41 So.2d 736 (1949); *Fletcher v. Fletcher*, 212 La. 917, 34 So.2d 43 (1948); *Harris v. Harris*, 127 So.2d 747 (La. App. 3d Cir. 1961). The court concluded there was no error by the trial judge, since the record of the prior separation suit showed the existence of mutual fault.

The court in *Sachse v. Sachse* indicated that no-fault divorces were unavailable until the adoption of the present R.S. 9:301 in 1916. This is technically incorrect since the present R.S. 9:302 was adopted in 1898 permitting one against whom a judicial separation had been decreed to obtain a divorce after a certain period of separation. This oversight would not seem to detract from the merit of the *Sachse* decision since there was no jurisprudence relating that statute to the alimony provision of article 160. See text accompanying note 8 *supra*.

29. *Sachse v. Sachse*, 150 So.2d 772, 778 (La. App. 1st Cir. 1963).

30. *Id.* at 776.