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Allen v. Allen - Who's at Fault?

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Allen v. Allen—Who's at Fault?

I. CASE FACTS

In December 1986, after eighteen months of courtship, Mr. Allen married Ms. Neal.[1] The couple enjoyed a harmonious first year of marriage. When the two decided to marry, Ms. Neal was a healthy, forty-two-year-old woman with three grown children. Before the marriage, Ms. Neal had suffered serious financial difficulties and had declared bankruptcy in 1977. She earned less than $17,000 in the first year of the marriage. Mr. Allen, on the other hand, was a highly paid bank executive twenty years Ms. Neal's senior whose gross income had risen from $288,149 in 1986 to $500,000 in 1991. He knew of his fiancée's financial difficulties when the couple married and realized she had "notes scattered all over."[2]

After a year of marriage, the relationship deteriorated. Mrs. Allen fell ill with a severe and debilitating case of irritable bowel syndrome. She also suffered from a breast lump, severe reflux esophagitis, and bladder problems. At the trial, her doctor testified that Mrs. Allen's illness left her unemployable. Simultaneously, problems developed over Mrs. Allen's spending habits, particularly concerning expenses for her daughter's wedding. Suspecting infidelity, Mrs. Allen accused her husband of carrying on extramarital affairs. Mr. Allen left his wife in 1991 and subsequently filed for divorce based on time separate and apart under Louisiana Civil Code article 102.[3] The trial court granted the divorce and Mrs. Allen sought alimony. Mr. Allen defended on the grounds that Mrs. Allen was legally at fault and thus barred from receiving alimony under Louisiana Civil Code article 112.[4] The trial court accepted his claim and held that Mrs. Allen was not free from fault and therefore not entitled to receive alimony in accordance with Article 112. The trial court stated many reasons to support its decision including Mrs. Allen's conflicts with her husband over his charitable donations, thousands of dollars of unauthorized credit card charges against Mr. Allen's account, her criticism of Mr. Allen to his children, mishandling of financial affairs leading to Mrs. Allen's bankruptcy, her

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1. Allen v. Allen, 648 So. 2d 359 (La. 1994).
2. *Id.* at 360.
3. La. Civ. Code art. 102 provides in pertinent part:
   A divorce shall be granted upon motion of a spouse when either spouse has filed a petition for divorce and upon proof that one hundred eighty days have elapsed from the service of the petition, or from the execution of written waiver of the service, and that the spouses have lived separate and apart continuously for at least one hundred eighty days prior to the filing of the rule to show cause.
4. La. Civ. Code art. 112(A)(1) provides in pertinent part:
   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, permanent periodic alimony . . . .

complaints that Mr. Allen "did not do enough" financially for Mrs. Allen's children, and her criticism that Mr. Allen bought her a "'factory' car rather than a new car."[5]

The trial court recognized that any of the "actions taken individually would not constitute 'fault' of a degree to cause the dissolution of the marriage," but went on to decide that taken as a whole the acts were "of a serious nature and r[ose] to that level of 'fault' to constitute a contributory cause of the failure of the marriage."[6] The Second Circuit affirmed the trial court's holding that Mrs. Allen's conduct amounted to legal fault.[7] The Louisiana Supreme Court, however, rejected the trial court's holding, reversed the decision and remanded the case with the order that Mrs. Allen be awarded alimony.[8] *Held:* As a matter of law, Mrs. Allen's conduct did not amount to legal fault under the current codal provisions and the prior jurisprudence.

II. THE DEVELOPMENT OF FAULT IN LOUISIANA

A. Legislative History

Neither Spanish law, the marriage legislation of 1807, the Digest of 1808, nor the Louisiana Civil Code of 1825 contained divorce provisions.[9] Under these regimes, couples could only obtain judgments for separation from bed and board. The separation legislation followed the principles established in Canon and Spanish laws and only granted separation for specified causes. These causes always required a showing that the other spouse's conduct "warranted a termination of conjugal cohabitation," and only a spouse who was free from fault

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5. To support its finding of fault, the court listed the following reasons:
1. Having conflicts with Plaintiff because Plaintiff made donations to non-profit or charitable groups.
2. Making thousands of dollars of unauthorized credit card charges against Plaintiff's account.
3. Criticizing Plaintiff to Plaintiff's children.
4. Mishandling financial affairs, leading to Defendant's personal bankruptcy.
5. Complaining that Plaintiff did not do enough financially for Defendant's children.
6. Complaining that Plaintiff bought Defendant a "factory" car rather than a new car.
7. Categorizing Plaintiff's hometown and home area, to Plaintiff and others, as "the hell hold [sic] of America."
8. Arguing "back and forth" with Plaintiff, for a long period of time.
Allen, 648 So. 2d at 361.

6. Allen v. Allen, 642 So. 2d 202, 203-04 (La. App. 2d Cir. 1993).

7. *Allen*, 642 So. 2d at 202.

8. Allen v. Allen, 648 So. 2d 359 (La. 1994). For subsequent history, see Allen v. Allen, 653 So. 2d 169 (La. App. 2d Cir. 1995).

9. Katherine Shaw Spaht, Family Law in Louisiana, Vol. IV 128 (July 1995). Professor Spaht's work is the basis for the legislative history section of this article. For a complete history, see Family Law in Louisiana 128-31. *See also* Christoper L. Blakesley, Louisiana Family Law § 4.07 (1993).

could bring an action for separation.[10] Thus, divorce was impossible in Louisiana. Separation was allowed, but only for serious violations of marital duties which were limited to:

> adultery, conviction of a felony and sentenced to imprisonment at hard labor or death; cruel treatment or habitual intemperance which rendered the common life together insupportable; public defamation; abandonment; attempt against the life of a spouse; charged with a felony and fled from justice; and intentional non-support of a spouse who is in destitute or necessitous circumstances.[11]

When separation was allowed, the obligation of support always continued.[12] The early legislation indicates the strong public policy that marriage was a lifetime commitment and that spouses always owed one another fidelity, support and assistance.[13]

In 1803, the legislature began passing special acts allowing particular couples to divorce, a practice which continued until it was prohibited by an amendment to the Louisiana Constitution in 1845. New general divorce legislation was passed in 1827. The 1827 legislation provided that a spouse who had obtained a separation judgment could obtain a divorce after a specified time had passed without reconciliation. Until 1898, only the spouse who had originally obtained the separation judgment (the one not at fault) could petition for divorce. After 1898, either spouse was allowed to petition for divorce after two years of separation without reconciliation.

After 1916, Louisiana allowed divorces based solely on time separate and apart without reconciliation.[14] In such divorce proceedings, a party could obtain divorce upon a showing that the spouses had lived "separate and apart" for seven years or more. A showing of fault was not required. Since 1916, the required time apart has been reduced, and today the law only requires six months to obtain a divorce not based on fault.[15] Fault, however, has always been an issue for alimony determinations. Former Louisiana Civil Code article 160 allowed alimony for wives, and later husbands, who proved both need and freedom from fault.[16] Fault operated as a bar to a claim for alimo-

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10. Spaht, *supra* note 9, at 128.

11. Spaht, *supra* note 9, at 335.

12. The marriage continued during the separation, therefore the obligation of support from La. Civ. Code art. 98 continued.

13. La. Civ. Code art. 98.

14. Spaht, *supra* note 9, at 130.

15. La. Civ. Code arts. 102 and 103. For Article 102 see *supra* note 3. Article 103 provides in part: "A divorce shall be granted on the petition of a spouse upon proof that . . . [t]he spouses have been living separate and apart continuously for a period of six months or more on the date the petition is filed. . . ."

16. La. Civ. Code art. 160 (1870):

> If the wife who has obtained the divorce has not sufficient means for her maintenance, the Court may allow her in its discretion . . . alimony . . . provided, however, that in cases

ny.[17] The party seeking alimony bore the burden of proving freedom from fault in order to receive alimony.[18] Just as today, if a spouse did not prove she was free from fault, she was barred forever from recovering alimony.[19]

The articles on alimony did not define fault sufficient to bar alimony, so courts applied by analogy the grounds for fault from the law of divorce and the law of separation from bed and board.[20] The jurisprudence came to require that for conduct to bar alimony, it had to be serious misconduct which was also the proximate cause for separation or divorce.[21] Repealed Louisiana Civil Code article 138[22] provided the fault grounds for a separation judgment and former

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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 . . . alimony . . . . (emphasis added).

17. La. Civ. Code art. 112 and La. Civ. Code art. 160 (1870). Today's Article 112 provides in pertinent part: "When a spouse *has not been at fault* and has not sufficient means for support, the court may allow that spouse . . . permanent periodic alimony . . . ." (emphasis added). The Editor's note explains that "[p]resent Article 112 is Article 160 of the Louisiana Civil Code of 1870, as amended by Acts 1986, No. 229, § 1. Article 160 has been redesignated as Article 112 by the Louisiana State Law Institute." For the text of Article 160 (1870), see *supra* note 16. Fault was not exactly a defense to the obligation to pay alimony, because the burden of proof was on the claimant to prove that she was not at fault. This is still true today, except for cases in which the potential obligor committed adultery. Lagars v. Lagars, 491 So. 2d 5 (La. 1986). *See infra* part II.B.3.

18. Christopher L. Blakesley, Louisiana Family Law § 15.26 n.212 (1993) (citing Kelly v. Kelly, 596 So. 2d 286, 292 (La. App. 3d Cir.), *writ denied*, 600 So. 2d 639 (1992), which cited Vicknair v. Vicknair, 237 La. 1032, 112 So. 2d 702 (La. 1959); McKnight v. Irving, 228 La. 1088, 85 So. 2d 1 (La. 1956); Sachse v. Sachse, 150 So. 2d 772 (La. App. 1st Cir. 1963) (holding to the same effect); Green v. Green, 567 So. 2d 139 (La. App. 2d Cir. 1990); Smith v. Smith, 216 So. 2d 391 (La. App. 3d Cir. 1968) (holding to the same effect); Wheelahan v. Wheelahan, 557 So. 2d 1046 (La. App. 4th Cir.), *writ denied*, 559 So. 2d 1379 (1990); Batiste v. Batiste, 586 So. 2d 643, 645 (La. App. 5th Cir. 1991)). *See infra* text accompanying notes 54-55 and 64 for a discussion of the burden of proof.

19. La. Civ. Code art. 112. *See supra* note 4. Present Article 112 is former Article 160 of the La. Civ. Code of 1870, as amended in 1986. *But see* Lagars v. Lagars, 491 So. 2d 5 (La. 1986).

20. *See infra* discussion in part II.B for the development of this jurisprudential rule.

21. Felgar v. Doty, 217 La. 365, 46 So. 2d 300 (La. 1950). *See infra* part II.B for a complete discussion of the development of this jurisprudential rule.

22. Former Civil Code art. 138 provided the following grounds for separation from bed and board:

Separation from bed and board may be claimed reciprocally for the following causes:

1. In case of adultery on the part of the other spouse;
2. When the other spouse has been condemned to an infamous punishment;
3. On account of habitual intemperance 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;
4. Of a public defamation on the part of one of the married persons towards the other;
5. Of the abandonment of the husband by his wife or the wife by her husband;
6. Of an attempt of one of the married persons against the life of the other;
7. When the husband or wife has been charged with an infamous offense, and shall actually have fled from justice, the wife or husband of such fugitive may claim a

Louisiana Civil Code article 139[23] provided fault grounds for divorce. The jurisprudence came to adopt these fault grounds as the *only* bars to alimony. Thus, the former legislation and the judicial interpretation suggested a strong policy in favor of awarding support to needy spouses unless the spouse committed serious misconduct of the kind which would be grounds for separation or divorce.

Effective in 1991, the Louisiana legislature repealed the articles on separation of bed and board.[24] In doing so, it abrogated Article 138 and removed part of the legislative basis for fault upon which the courts had relied to determine fault in an alimony proceeding. All proximate causes for separation were repealed. Without Article 138's definition of fault for separation, the only legislation left to provide specific grounds for fault which barred alimony was Louisiana Civil Code article 103. Article 103 names three grounds for divorce: (1) living separate and apart for six months; (2) adultery; and (3) commission of a felony and sentencing to death or imprisonment at hard labor.[25] Two of these grounds, adultery and commission of a felony, are fault-based. In abrogating the separation articles, the legislature did not modify the alimony articles or specify if it intended to remove the Article 138 bars to recovery of alimony. Thus, today, there are no proximate causes for separation and only two proximate causes for divorce—adultery and commission of a felony with sentencing.

B. The Jurisprudential History

1. Early Determinations of Fault in Separation Judgments

Early decisions on fault for separation judgments used a method of analysis called "comparative rectitude" to determine fault. First, the court considered whether the conduct of the defending spouse fell under one of the faults named in Article 138. Next, the court looked at the conduct of the plaintiff to determine

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separation from bed and board, on producing proofs to the judge before whom the action for separation is brought, that such husband or wife has actually been guilty of such infamous offense, and has fled from justice;

8. On account of the intentional non-support by the husband of his wife who is in destitute or necessitous circumstances.[sic]

La. Civ. Code art. 138 (1870).

23. Former Article 139 provided grounds for divorce:

Immediate divorce may be claimed receprocably [reciprocally] for one of the following causes:

1. Adultery on the part of the other spouse.

2. Conviction of the other spouse and his sentence to death or imprisonment at hard labor.

Divorce may be granted to either spouse after a separation from bed and board . . . .

La. Civ. Code art. 139 (1870).

24. Articles 138 through 145 were repealed by 1990 La. Acts No. 1009, effective January 1, 1991.

25. La. Civ. Code art. 103.

if she was free from fault. If so, the court granted the separation judgment. If not, the court compared the conduct of both spouses to determine if one party was substantially more to blame for the deterioration of the marital relationship. If the petitioning party proved the other spouse was substantially more to blame, the court would allow the couple to separate legally. Otherwise, the court refused to grant a fault-based separation.[26]

In the 1926 Louisiana Supreme Court decision *Gormley v. Gormley*,[27] the court laid out this method of analyzing fault in a separation action. Mrs. Gormley sought a separation judgment and alleged that her husband was guilty of habitual intemperance and cruel treatment, fault grounds for separation under Article 138. Mr. Gormley answered that Mrs. Gormley, too, was guilty of cruelty. First, the court defined cruelty which amounted to fault as "excesses, outrages, and cruel treatment"[28] and explicitly rejected "disappointment in the marriage relation and mere incompatibility of temper"[29] as sufficient grounds to grant a separation judgment. Next, the court required that "the complainant must be comparatively free from wrong"[30] in order to be awarded the separation judgment. The court reviewed Mrs. Gormley's testimony and found it "very vague and most unsatisfactory."[31] The court recognized that Mrs. Gormley proved the parties "quarrelled [sic] and abused each other a good deal"; however, the court went on to say that "it [was] not so clear who was to blame."[32] The court went through three inquiries in this case. First, the court determined whether the husband was guilty of excesses, outrage, or cruel treatment based on the grounds listed in Article 138. Then, the court looked to see whether the wife substantially contributed to the marital discord or whether she was herself guilty of such conduct. Finally, the court considered whether one party was clearly more blameworthy than the other. In *Gormley*, the court held that neither party proved the other guilty of cruel treatment and thus refused to grant the separation judgment.

The 1929 supreme court in *McKoin v. McKoin*[33] refused to grant a separation judgment because "the spouses [were] chargeable with mutual misconduct towards each other which, because of the defendant's unfortunate physical condition, [was] so nearly proportional that [the court could not] determine which of the parties [was] at greatest fault."[34] Mr. McKoin petitioned for separation on the grounds that Mrs. McKoin abandoned him to live

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26. Separation based on time separate and apart was available after 1956. La. Civ. Code art. 138 (1870). Divorce based on time separate and apart was available after 1919. Spaht, *supra* note 9, at 130.

27. 161 La. 121, 108 So. 307 (La. 1926).

28. *Id.* at 123, 108 So. at 308.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. 168 La. 32, 121 So. 182 (La. 1929).

34. *Id.* at 35, 121 So. at 182.

with her mother, abused morphine, defamed him by telling his father she suspected he was having an affair, and cursed him in public. Mrs. McKoin responded that her ill health and the plaintiff's cruel treatment forced her to leave the matrimonial domicile and seek shelter at her mother's home. Mrs. McKoin also alleged that she was not addicted to morphine and had used it only under her doctor's supervision following two serious operations. The court rejected Mr. McKoin's allegations of defamation because the defendant's statement to plaintiff's father was not public criticism and the alleged cursing was not of a serious nature. The court found no evidence to corroborate either party's allegations of mistreatment at the hands of the other and no evidence to show which party was more at fault. In this situation, the supreme court held that "the courts will not grant relief to either."[35]

Although the court did not reiterate the *Gormley* test of first determining if the defendant's conduct amounted to legal fault and then looking for mutual misconduct on the part of the plaintiff, the court applied that exact analysis. The type of conduct the court considered in determining legal fault was abandonment, physical abuse, cruelty, and defamation. The court first looked to the conduct of the defendant and then to the conduct of the plaintiff. Finally, the court looked for mutual fault which would bar either party from obtaining a separation judgment.

In *Abele v. Barker*,[36] a 1942 decision, the Louisiana Supreme Court again considered whether a spouse proved fault such that she was entitled to a separation judgment. Mrs. Abele sued for a separation judgment and alleged that her husband, Mr. Barker, was guilty of "such excesses, outrages, and cruelty toward her as to render their living together insupportable."[37] Mrs. Abele claimed that her husband severely beat her during six years of the marriage, left home for a week without providing her any funds to support the family, threatened to kill her, cursed her in front of their children, did not provide her with sufficient funds to support the family, and refused to provide her with necessary surgical treatment. In response, Mr. Barker alleged that his wife neglected him, neglected the children, and associated socially with another man. The court found that Mrs. Abele failed to prove the abuses she alleged. She could offer no corroborating evidence since the alleged incidents all occurred in the home. The court offered several additional reasons for rejecting Mrs. Abele's testimony even though Mr. Barker admitted striking his wife in the past. First, the court noted that Mrs. Abele continued to live with her husband despite the alleged violence and found it "not likely that she would have continued to live with him as she did" if her allegations were true.[38] Second, the court

35. *Id.*

36. 200 La. 125, 7 So. 2d 684 (La. 1942).

37. *Id.* at 127, 7 So. 2d at 684.

38. *Id.* at 132, 7 So. 2d at 686. The court explained the interpretation of the situation this way:

> If the wife's version is accepted, it was serious. However, the fact that the wife continued to live with her husband without complaint for more than four years after this incident

found that "she seem[ed] to have condoned the offense."[39] The court pointed out that the wife had slapped her husband for calling her a vile name and provoked him by being argumentative. The court rested on the comparative rectitude notion that even if Mr. Barker's conduct amounted to fault, Mrs. Abele's conduct also amounted to cruelty since the court determined that she provoked his behavior. Therefore, she was as much at fault as he was.

The court went on to find that even if both parties were at fault, Mrs. Abele herself was more guilty of fault for publicly and habitually associating with another man.[40] Mr. Barker proved that Mrs. Abele went to shows and to the beach with him, rode in his car at night, and generally caused gossip about the family. For these offenses, the court granted Mr. Barker a separation judgment and granted him custody of their minor children. The court opined:

> If there was nothing involved in this controversy between husband and wife except the brawls and encounters disclosed by the record, it might be said that each of the parties was at fault and that their wrongs were mutual. However, due to the wife's conduct aside from these altercations, her faults decidedly outweigh the faults of her husband . . . . Her conduct was inexcusable. It was such as to cause her husband to feel embarrassed and humiliated. He had a right to protest . . . .[41]

The *Abele* court carried the *Gormley* test to its extreme. The court considered the conduct of each party as it if it amounted to fault and went on to determine that even if the conduct of both parties amounted to legal fault, Mrs. Abele's conduct was so much worse that her actions entitled Mr. Barker to a separation judgment. By granting the judgment to Mr. Barker, this decision effectively barred Mrs. Abele from ever receiving alimony.

These early determinations of fault for separation required the plaintiff to show serious misconduct by the defendant spouse before the court would grant a separation judgment. Old Article 139 provided two automatic grounds for a separation, adultery and conviction of a felony with sentencing to death or imprisonment at hard labor.[42] Absent that, only old Article 138-type conduct such as excesses, outrages, abandonment, and cruel treatment which made the marital relationship insupportable would be sufficient to obtain a separation

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> indicates that the husband's version of it is probably correct, and that, even if she thought he was guilty of misconduct toward her, she condoned the offense. If he had so violently attacked her and had administered a severe blow, by which she was severely wounded, as she says she was, it its not likely that she would have continued to live with him as she did.

Id. at 131-32, 7 So. 2d at 686.

39. *Id.* at 133, 7 So. 2d at 686.

40. *Id.* at 130, 7 So. 2d at 685. Mr. Barker did not allege that his wife had committed adultery, only that her friendship with another man was inappropriate.

41. *Id.* at 135-36, 7 So. 2d at 687.

42. La. Civ. Code art. 139 (1870). *See supra* note 23.

judgment. Once a spouse proved the other guilty of such treatment, she had to defend the almost certain allegations of mutual fault. If she was able to meet that burden, then she would be entitled to a separation judgment. When a spouse failed to prove freedom from fault, the court compared each spouse's behavior. This analysis was called comparative rectitude. If the parties were guilty of the same types of Article 138 offenses, the court would deny the separation judgment unless one spouse could show the other's conduct was substantially worse. In that case, the court would grant the judgment in favor of the more innocent spouse.

A close look at these early cases reveals the policy concerns the courts had in granting separation judgments. The overriding policy was to maintain marriages unless one party had seriously violated the marital duties. If both were equally guilty of misconduct, the courts refused to dissolve the marriage. This also, obviously, continued the support obligation. The policy behind comparative rectitude was to avoid unleashing the parties on the world. These cases, however, clearly upheld the overriding policy that it was in the best interest of the state that couples remain married.

2. Development of Fault Which Barred Alimony Under Article 160

Former Louisiana Civil Code article 160 required that a wife petitioning for alimony be free from fault.[43] The Civil Code, however, did not define fault for this purpose. Thus, before the repeal of the articles on separation of bed and board, the courts analogized fault which barred alimony to fault which caused a separation or divorce under former Articles 138 and 139. In *Felger v. Doty*,[44] the Louisiana Supreme Court defined fault contemplated by old Article 160 as "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.*"[45] To amount to fault and bar alimony the conduct had to be both a very serious violation of marital duties and legal grounds for separation or divorce. The third circuit, in *Smith v. Smith*, described the essence of the *Felger* definition of fault to be "conduct which constitutes grounds for separation or divorce, other than mere living separate and apart for a specified period of time."[46] Under this definition, to be fault, the conduct had to be conduct which could lead proximately to the judicial dissolution of the marriage. These cases demonstrate the policy that a wife should not be denied alimony except for a grave violation of her marital duties—one which would entitle her husband to a separation or divorce.

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43. Former Article 160 is present La. Civ. Code art. 112. *See supra* note 4.
44. 217 La. 365, 46 So. 2d 300 (La. 1950).
45. *Id.* at 369, 46 So. 2d at 301 (emphasis added).
46. Smith v. Smith, 216 So. 2d 391, 394 (La. App. 3d Cir. 1968).

In *Vicknair v. Johnson*,[47] the Louisiana Supreme Court considered what level of conduct would bar a wife from receiving alimony. The court refused to find Mrs. Vicknair at fault even though she cursed her husband, accused him of infidelity, telephoned him constantly at work, nagged him incessantly, threatened his life, and allowed another woman to sleep with her and her husband in their bed. The court stated that the misconduct was not of "such a serious nature as to constitute fault within the meaning of the statute,"[48] and held that Mrs. Vicknair's conduct did not amount to legal fault. The court used the definition of fault set out in *Felger* and found that Mrs. Vicknair's conduct did not rise to the level of cruelty and therefore was not legal fault.[49] On the issue of the burden of proof, the *Vicknair* court held that in an alimony proceeding, following a divorce granted on the basis of living separate and apart, the wife petitioning for alimony bore the burden of proving she was free from fault.[50]

In *Kendrick v. Duconge*,[51] the supreme court recognized a defense to conduct that would otherwise be fault. The court acknowledged that sometimes a wife could be justified in violating her marital duties. Mrs. Kendrick broke off marital relations with her husband because she believed that he was committing adultery. Mrs. Kendrick first moved into her own room; she later left the marital domicile and took her own apartment. While the court admitted that ordinarily such conduct would amount to fault, the *Kendrick* court stated that to be at fault the conduct had to be more "than a justifiable or natural response to initial fault on the part of the husband."[52] The *Kendrick* court held that "[w]here the husband's fault provoke[d] the wife into terminating the marital relationship, she [was] considered to be herself free from fault . . . ."[53]

To qualify for alimony under old Article 160, the court required the petitioning spouse to prove she was free from fault as defined under former Articles 138 and 139.[54] Merely some contribution to the dissolution of the marriage was not enough to constitute fault and bar alimony.[55] *Vicknair* and *Kendrick* illustrate that

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47. 237 La. 1032, 112 So. 2d 702 (La. 1959).

48. *Id.* at 1037, 112 So. 2d at 703.

49. *Id.* at 1037 n.1, 112 So. 2d at 703 n.1.

50. *Id.* at 1035, 112 So. 2d at 703. The court stated:

> [I]f the husband has obtained a divorce solely on the ground that the parties have been living separate and apart for a certain specified period of time, and the wife has not been at fault, she may claim this pension . . . . In applying this Article [Old Article 160] in cases like this, the court has held that the wife carries the burden of establishing that she was without fault and also that she is in necessitous circumstances.

Id. Also, at this time only wives were entitled to alimony. *See* La. Civ. Code art. 160 (1870). Article 160 was amended by Act 72 of 1979 to provide alimony to husbands as well.

51. 236 La. 34, 106 So. 2d 707 (La. 1958).

52. *Id.* at 39, 106 So. 2d at 709.

53. *Id.* at 38, 106 So. 2d at 708.

54. When La. Civ. Code art. 160 was drafted, only wives were allowed alimony. Act 72 of 1979 amended Article 160 to allow alimony to either spouse.

55. Pearce v. Pearce, 348 So. 2d 75, 77 (La. 1977) (holding that "[a] wife is not deprived of alimony after divorce simply because she was not totally blameless in the marital discord," citing

only grievous misconduct amounted to cruelty, one of the Article 138 faults, and barred alimony. Because the supreme court chose to limit fault barring alimony, these cases indicate a public policy in favor of granting alimony.

3. *Recent Jurisprudence Analogizing Fault Under Former Article 160 to Fault Under Old Article 138*

Three later Louisiana Supreme Court decisions refined the definition of fault which barred alimony under former Article 160.[56] In *Adams v. Adams*,[57] the supreme court reaffirmed their definition of fault from *Pearce v. Pearce*,[58] and accepted this definition of fault:

> "Fault" contemplates conduct or substantial acts of commission or omission by the wife violative of her marital duties and responsibilities. A wife is not deprived of alimony . . . simply because she was not totally blameless in marital discord . . . . To constitute fault, a wife's misconduct must not only be of a serious nature but must also be an independent contributory or proximate cause of the separation.[59]

The *Adams* court went on to hold that "[a]lthough not specifically mentioning C.C. art. 138(1)-(8), or C.C. art. 139 by name, this language clearly indicates that only such conduct as will entitle one spouse to a separation or divorce under these articles is sufficient to deprive the other spouse of alimony after a final divorce."[60] For the first time, the court specifically held that the only conduct which barred alimony under former Article 160 was fault as defined in repealed Articles 138 and 139. Once the *Adams* court made this determination, the court defined the analysis for finding fault which barred alimony. Under the court's test, to bar alimony upon divorce after a judgment of separation, "it need only be decided whether plaintiff's actions would have been sufficient to allow defendant to obtain a judgment against plaintiff under C.C. art. 138."[61]

Vicknair v. Johnson, 237 La. 1032, 112 So. 2d 702 (La. 1959); Davieson v. Trapp, 223 La. 776, 66 So. 2d 804 (La. 1953); Breffeilh v. Breffeilh, 221 La. 843, 60 So. 2d 457 (La. 1952); Adler v. Adler, 239 So. 2d 494 (La. App. 4th Cir. 1970)). Further, *Pearce* held that "[t]o constitute fault, a wife's misconduct must not only be of a serious nature but must also be an independent contributory or proximate cause of the separation." *Id.* (citing Kendrick v. Duconge, 236 La. 34, 106 So. 2d 707 (La. 1958)).

56. For the pertinent part of old Article 160, see *supra* note 16. For the pertinent part of repealed Article 138, see *supra* note 22.

57. 389 So. 2d 381 (La. 1980).

58. 348 So. 2d 75, 77 (La. 1977).

59. *Adams*, 389 So. 2d at 383 (citing Pearce v. Pearce, 348 So. 2d 75, 77 (La. 1977); Vicknair v. Johnson, 237 La. 1032, 112 So. 2d 702 (La. 1959); Kendrick v. Duconge, 236 La. 34, 106 So. 2d 707 (La. 1958); Davieson v. Trapp, 223 La. 776, 66 So. 2d 804 (La. 1953); Breffeilh v. Breffeilh, 221 La. 843, 60 So. 2d 457 (La. 1952); Adler v. Adler, 239 So. 2d 494 (La. App. 4th Cir. 1970)).

60. *Adams*, 389 So. 2d at 383.

61. *Id.* The court began: "Having determined that 'fault' for purposes of permanent alimony

In *Lagars v. Lagars*,[62] the Louisiana Supreme Court extended that same reasoning to an alimony proceeding following a divorce granted on the basis of adultery rather than one following a separation judgment. The court in *Lagars* again specifically limited fault which barred alimony to "[o]nly such conduct as will entitle one spouse to a separation or divorce under La. Civ. Code arts. 138(1)-(8) or 139."[63] The court's ultimate test was whether or not the misconduct would be sufficient to award a separation judgment or a divorce. In addition, the court held that since Mrs. Lagars proved her husband committed adultery and obtained the divorce on that ground, rather than pursuant to a separation judgment based on time separate and apart, the burden shifted to Mr. Lagars to prove his wife was at fault.[64] By shifting the burden of proof, the court made it easier for Mrs. Lagars, and future plaintiffs in similar cases, to receive alimony: she no longer needed to prove herself free from fault. This change again illustrated the court's policy of favoring alimony awards.

Recently, in the 1991 supreme court decision *Brewer v. Brewer*,[65] the court again defined fault sufficient to bar alimony as being limited to fault under old Articles 138 and 139. The *Allen* court relied on *Brewer* when it characterized fault as: (1) adultery; (2) habitual intemperance, excesses, cruel treatment or outrages, making living together insupportable; and (3) abandonment.[66]

The general premises laid out in *Adams*, *Lagars*, and *Brewer* form the basis for determining fault which bars alimony as analyzed under old Articles 138 and 139. These cases established the analysis used to determine fault which bars alimony. Only fault which was an independent contributory or proximate cause of separation or divorce would bar alimony, and only acts rising to level of misconduct under old Articles 138 or 139 met that definition. In addition, the courts emphasized that a spouse could be awarded alimony even when not totally blameless. Finally, in *Lagars*, the court held that when a divorce was granted based on adultery, the defending spouse bore the burden of proving the fault of the petitioning spouse. Again, these decisions suggested a policy in favor of granting support, absent the most serious misconduct. *Lagars* furthered this policy by shifting the burden of proof to the defendant when the defendant had been found guilty of adultery. Thus, the *Adams*, *Lagars*, and *Brewer* decisions set the standard by which the fault of the spouse petitioning for alimony was to be judged.

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preclusion is synonymous with the fault grounds for separation and divorce, it need only be decided . . . ." *Id.*

62. 491 So. 2d 5 (La. 1986).

63. *Id.* at 7 (citing Adams v. Adams, 389 So. 2d 381 (La. 1980)).

64. *Lagars*, 491 So. 2d at 5.

65. 573 So. 2d 467 (La. 1991).

66. Allen v. Allen, 648 So. 2d 359, 362 (La. 1994); *see also* Brewer v. Brewer, 573 So. 2d 467 (La. 1991).

III. THE LOUISIANA SUPREME COURT'S ANALYSIS IN *ALLEN V. ALLEN*

A. The Majority Opinion

In *Allen v. Allen*,[67] the issue of legal fault barring alimony since the repeal of Article 138 came to the supreme court for the first time. The court rejected the lower courts' determination of fault, applied its own analysis, and found Mrs. Allen to be free from legal fault. Remanding the case, the court ordered that alimony be awarded.

The supreme court began its analysis of whether Mrs. Allen was at fault by considering the only remaining statutory fault grounds for divorce—adultery or conviction of a felony and a sentence to death or imprisonment at hard labor. Current Louisiana Civil Code article 103, in subparagraphs (2) and (3), includes these grounds which were previously in old Article 139.[68] Neither party alleged such conduct. The court noted that whereas Mrs. Allen had not committed acts which directly and explicitly fit the current statutory definitions of fault, the "statutory law does not specify fault which would deny permanent alimony."[69] The only statutory fault grounds are in Article 103, a divorce article. No alimony article defines fault.[70] Therefore, legal fault, explained the court, "must be determined according to the prior jurisprudential criteria."[71] In so stating, the court revived legal fault as determined under the jurisprudence prior to the abrogation of Article 138. To support the decision to revive what has been dubbed "Phantom Article 138,"[72] the majority reasoned that, in the past, bills to eliminate fault as a bar to alimony had failed.[73] In addition, the court noted

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67. 648 So. 2d 359 (La. 1994).

68. La. Civ. Code art. 103 provides:

> A divorce shall be granted on the petition of a spouse upon proof that:
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> (1) The spouses have been living separate and apart continuously for a period of six months or more on the date the petition is filed; or
>
> (2) The other spouse has committed adultery; or
>
> (3) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.

Revision comment (b) notes that "[s]ubparagraphs (2) and (3) of this Article reproduce the first two grounds for immediate divorce contained in former La. Civ. Code article 139 (1870) without substantive change." La. Civ. Code art. 103.

69. *Allen*, 648 So. 2d at 362.

70. The alimony provisions have never defined fault. The courts historically have looked to the definition of fault found in the separation and divorce provisions—former Articles 138 and 139. After the repeal of the separation articles, the only remaining faults are found in Article 103. Mrs. Allen had committed neither adultery nor a felony and therefore had not committed a fault under the statutory provisions. Rather than end the inquiry there, the court went on to consider fault as defined in the prior jurisprudence. *See supra* part II.A.

71. *Allen*, 648 So. 2d at 362.

72. Blakesley, *supra* note 18, at 15-43, § 15.27.

73. *Allen*, 648 So. 2d at 362 n.2. Footnote 2 noted that "[b]ills to eliminate fault as an alimony barrier have failed in the Louisiana legislature. See for example, La. H.B. 901, 5th Reg. Sess. (1979), and La. S.B. 268 & 682, 7th Reg. Sess. (1981)."

that efforts to eliminate non-adulterous fault as a bar to alimony had been unsuccessful as well.[74]

The majority opinion cited *Lagars v. Lagars*[75] as the primary source for analyzing legal fault under the old jurisprudence.[76] The *Lagars* decision applied the definition of fault from *Vicknair v. Vicknair*[77] and *Pearce v. Pearce*.[78] The court in *Lagars* reaffirmed the holding in *Adams* that the *Pearce* and *Vicknair* definition of conduct which barred alimony was only misconduct as contemplated under old Articles 138 and 139.[79] In other words, a spouse was only barred from alimony if his conduct amounted to legal fault under either of those articles *and* his conduct could have been a cause for dissolution or separation. Using these cases as support, the *Allen* court stated the definition this way: "[l]egal fault consists of serious misconduct, which is a cause of the marriage's dissolution."[80]

In defining serious misconduct, the majority opinion never explicitly limited such conduct to that which was contemplated under repealed Article 138. The omission of this determination is confusing, and some of the language in the opinion could be interpreted to allow non-Article 138 conduct to bar alimony.[81] This danger probably led Justice Kimball to write a separate concurrence.[82] However, by citing *Lagars* as the primary source for its analysis of fault, the court implicitly endorsed the limits set by that case, which held that serious misconduct was limited to the faults named in repealed Article 138. Under the Article 138 standard, the court concluded that Mrs. Allen's actions did not amount to the serious misconduct contemplated in the article.[83] Although the court did not specify that it analyzed her actions to determine whether or not they amounted to cruelty, an Article 138 ground for separation, the cited cases indicate cruelty was at issue. Relying on *Abele v. Barker*[84] and *Brewer v. Brewer*,[85] the court found that a "quarrelsome or hostile" attitude was a "reasonable reaction" to legitimate suspicions of infidelity and that reasonable

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74. *Id.* at 363 n.3. (stating that "[b]ills have been introduced in the Louisiana legislature to eliminate non-adulterous fault as a barrier to permanent alimony. See, for example, La. H.R. 364, 8th Reg. Sess. (1982), and proposed La. Civ. Code art. 161; La. S.B. 311, 8th Reg. Sess. (1982). The legislation failed to pass.").

75. 491 So. 2d 5 (La. 1986).

76. *Allen*, 648 So. 2d at 363 ("[L]egal fault must be determined according to the prior jurisprudential criteria. See Lagars v. Lagars . . . for an analysis of those criteria." *Id.*).

77. 237 La. 1032, 112 So. 2d 702 (1959).

78. 348 So. 2d 75 (La. 1977).

79. 491 So. 2d at 5. For a complete discussion of the *Lagars* analysis, see *supra* notes 61-63 and the accompanying text.

80. Allen v. Allen, 648 So. 2d 359, 362 (La. 1994).

81. For a complete discussion, see *infra* parts III.B, IV.B, and IV.E.

82. *See supra* part III.B.

83. *Allen*, 648 So. 2d at 363. "The trial court and court of appeal erred as a matter of law in finding Mildred Allen guilty of legal fault which caused the dissolution of the marriage." *Id.*

84. 200 La. 125, 7 So. 2d 684 (La. 1942).

85. 573 So. 2d 467 (La. 1991).

reactions did not amount to fault.[86] Following *Gormley v. Gormley*,[87] the court found that "petty quarrels between husband and wife do not rise to the level of legal fault."[88] Under these principles, the court determined that the couple's problems amounted only to petty quarrels, not cruelty. In addition the court gave Mrs. Allen special consideration in light of her illness, which, according to the court, understandably would make her more disagreeable.[89]

The court suggested that financial irresponsibility might amount to legal fault in some cases. Nevertheless, the court found that because Mrs. Allen's expenditures were not excessive in light of Mr. Allen's income and because Mr. Allen knew of his wife's spending habits and debts before he married her, Mrs. Allen's spending did not rise to the level of legal fault. The majority determined her spending did not amount to cruelty.[90] Additionally, according to the court, Mrs. Allen's criticisms, complaints, and nagging did not constitute conduct sufficient to find legal fault. Again, the court found no cruelty. Relying on *Brewer*, *Pearce*, and *Vicknair*, the court opined that Mrs. Allen's imperfections were isolated incidents which did not make her guilty of "'cruel treatment or excesses which [would] compel a separation because the marriage [was] insupportable.'"[91] Thus, the supreme court held that, based on the prior jurisprudence, none of Mrs. Allen's imperfections amounted to conduct sufficient to preclude alimony.

B. Justice Kimball's Concurrence

Justice Kimball concurred in the judgment in *Allen v. Allen*, accepting the majority's overall reasoning but clarifying several points. Justice Kimball agreed with the majority that a proper inquiry into legal fault required an analysis of both statutory and jurisprudential definitions of legal fault. However, she specified that fault grounds for post divorce alimony were synonymous with the fault grounds from the former law of separation and divorce.[92] By making this distinction, Justice Kimball clarified that she would maintain old Article 138's fault grounds and the jurisprudence interpreting the article as the standard for serious misconduct. Justice Kimball defined fault as the supreme court had in *Pearce*: "'fault' contemplates conduct or substantial acts of commission or omission by the wife violative of her marital duties and responsibilities,"[93] and her concurring opinion

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86. *Allen*, 648 So. 2d at 362.
87. 161 La. 121, 108 So. 307 (La. 1926).
88. *Allen*, 648 So. 2d at 362.
89. *Id.* (following McKoin v. McKoin, 168 La. 32, 121 So. 182. (La. 1929)).
90. *Allen*, 648 So. 2d at 363.
91. *Id.* (quoting Brewer v. Brewer, 573 So. 2d 467, 469 (La. 1991), which cited Pearce v. Pearce, 348 So. 2d 75 (La. 1977), and Vicknair v. Vicknair 237 La. 1032, 112 So. 2d 702 (La. 1959)).
92. *Allen*, 648 So. 2d at 365.
93. *Id.* at 364.

expressly quoted the passage in *Adams* which held that the language in *Pearce* was synonymous with the fault grounds for separation and divorce.[94]

On the issue of causation, Justice Kimball quoted the *Kendrick* court's complete definition of fault. "'To constitute fault, a wife's misconduct must not only be of a serious nature but must also be an *independent contributory or proximate cause* of the separation.'"[95] However, she did not consider the argument that abrogation of the causes for separation left no faults to bar alimony, as those faults could no longer cause dissolution of a marriage.

IV. THE EFFECTS OF *ALLEN* ON THE LAW

A. The Policy Behind Allen

While ambiguous, the policy suggested by the *Allen* decision both breaks with and follows past policy on alimony.[96] The decision continues the policy that a serious violation of one's marital duties precludes an award of alimony. On the other hand, past courts required that the fault barring alimony be that conduct which would be grounds for divorce while the *Allen* court did not. In addition, past decisions suggest a policy in favor of granting alimony to necessitous spouses when possible. The recent Louisiana Supreme Court opinion in *McAlpine v. McAlpine* insisted on the continued importance of alimony to prevent needy spouses from relying upon state sponsored support.[97] Yet, the *Allen* court embraced an analysis limiting the number of alimony awards.

B. Resurrection of Old Article 138 as the Standard for Serious Misconduct

The court in *Allen* certainly resurrected old Article 138(1)-(8) as providing the definition of misconduct which may amount to legal fault to preclude alimony. Ambiguity in the analysis, however, raises the problem of whether other fault might also bar alimony. The court implicitly rejected the idea that the legislative repeal of Article 138 changed the law of fault which barred alimony.[98] Even though the repealed Article 138 bases for determining fault are no longer in the Civil Code, the court chose to revive Article 138 as fault to bar alimony by requiring that legal fault

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94. *Id.* at 365.

95. *Id.* (citing Pearce v. Pearce, 348 So. 2d 75, 77 (La. 1977)) (emphasis added).

96. For a thorough analysis of the policies behind alimony, see Christopher L. Blakesley, Louisiana Family Law §15.03 (1993).

97. McAlpine v. McAlpine, 650 So. 2d 1142 (La. 1995), *withdrawn and reh'g granted.*

> Obviously, the public has a strong interest in seeing that persons in need of support are supported; for otherwise the burden falls upon the public at large through social programs supported by taxpayers. Alimony is on of the ways that the legislature has selected to distribute the societal obligation to support those in need.

See also Holliday v. Holliday, 358 So. 2d 618 (La. 1978) (discussing similar policies concerning alimony pendente lite).

98. *Allen*, 648 So. 2d at 362.

be determined as it was under the prior jurisprudence—jurisprudence which relied on repealed Article 138. The majority reasoned that "[s]ince the statutory law does not specify fault which would deny permanent alimony, legal fault must be determined according to the prior jurisprudential criteria."[99] The court recognized that the prior jurisprudence required a two part analysis—first, whether the spouse's conduct amounted to a serious violation of the marital duties and, second, whether the serious misconduct was a cause of the dissolution of the marriage. While the court did not expressly limit the violations to the conduct contemplated under old Articles 138 and 139, the sources it cited suggest strongly that was the intent.[100] Thus, *Allen* probably did not change the type of conduct which amounts to a serious violation of the marital duties.

C. The Causation Requirement Under Allen

The supreme court opinions in *Felger*, *Vicknair*, *Pearce*, *Kendrick*, *Lagars*, and *Adams*[101] all include a causation element in determining fault. The *Felger*, *Vicknair*, *Pearce*, *Kendrick*, and *Lagars* opinions make it clear that "cause" meant the legal, proximate cause for the dissolution, i.e. conduct which would be grounds for separation or divorce. However, the *Allen* decision suggests a different understanding of causation. "Cause" appears to mean that the misconduct was the reason the marital relationship fell apart. In other words, "cause of the dissolution" refers to the personal reason the spouse decided to end the marriage rather than the judicial basis for granting the divorce. Logically, it seems that the *Allen* court could only have interpreted causation to be the personal reason the spouse left the marriage, since, after the 1990 revisions, old Article 138 conduct can no longer be the judicial cause of a divorce.[102] On the other hand, the court's use of *Lagars*, *Pearce*, and *Vicknair* as authority seems to belie this logic. The language of the majority suggests a change, but the cited authority does not.

The *Lagars* definition of fault required that the misconduct be an independent contributory or proximate cause of separation or dissolution of the marriage.[103] *Lagars* was decided under the pre-1991 revisions when separation of bed and board was still in the Civil Code. Therefore, Article 138 conduct could cause a separation and, eventually, a divorce. One way of applying the *Lagars* analysis would lead to the conclusion that since former Articles 138 and 139 were the only bases for fault

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99. *Id.*

100. *Id.* at 363. The majority named *Lagars* as containing the criteria for determining legal fault. The *Lagars* court followed *Adams* and expressly limited serious misconduct to the conduct defined in Old Article 138(1)-(8). For a more complete analysis of *Lagars* see *supra* notes 61-63 and the accompanying text.

101. Lagars v. Lagars, 491 So. 2d 5 (La. 1986), Pearce v. Pearce, 348 So. 2d 75 (La. 1977), Vicknair v. Johnson, 237 La. 1032, 112 So. 2d 702 (La. 1959), Kendrick v. Duconge, 236 La. 34, 106 So. 2d 707 (La. 1958), and Felger v. Doty, 217 La. 365, 46 So. 2d 300 (La. 1950).

102. *See supra* part II.B.3.

103. *Lagars*, 491 So. 2d at 5.

which would cause a separation or divorce, when the legislature repealed Article 138 and redesignated Article 139 as Article 103, the only remaining grounds for fault that could *cause* the judicial dissolution of the marriage were the two now found in Article 103—adultery and commission of a felony with sentencing. Thus, old Article 138 conduct could no longer bar alimony because it can no longer be the legal, proximate *cause* of separation or divorce, as was required by the *Felger*, *Vicknair*, *Pearce*, and *Lagars* definition of fault.

The *Allen* decision, therefore, may represent a substantial change in the definition of alimony-barring fault. The decision may require that the party prove that the misconduct caused him to leave the marriage and seek a divorce. If a showing that the conduct was the personal reason for the termination of the marriage is the requirement under *Allen*, the unanswered question of what level of causation must a party prove remains.

The *Allen* opinion mentioned causation only once when it stated that the alleged fault must be "a cause of the marriage's dissolution,"[104] citing the earlier decisions of *Vicknair* and *Pearce*. This description of causation is not the same standard the court applied in *Vicknair*, *Pearce*, or *Lagars*. In *Lagars*, the supreme court held that the fault must "'be an independent contributory or proximate cause of the separation'"[105]—the same standard articulated in *Vicknair* and *Pearce*. Setting aside the argument that those decisions contemplated something other than the personal reason that the spouse sought a divorce, the definition of causation in the *Allen* decision and that in the *Lagars* decision suggest different levels of causation. *Allen* required that the misconduct only be "*a cause* of the marriage's dissolution"[106] while *Lagars* referred to the proximate cause. The two standards may be different.

The pre-*Allen* decisions included the causation requirement to limit conduct which barred alimony and to increase alimony awards. However, under *Allen*, if the fault need only be "a cause," the court may have increased the chances of a petitioning spouse's being denied alimony. The petitioning spouse would have to prove the misconduct and that the misconduct was a cause of his decision to leave the marriage. Before, only the conduct had to be proven.

An inquiry into the personal reasons for ending the marriage would be new to the courts. Under the prior jurisprudence, "it need[ed] only [to] be decided whether plaintiff's actions would have been sufficient to allow defendant to obtain a judgment against plaintiff under C.C. art. 138."[107] A determination of the party's state of mind and personal reasons for leaving was not required. Perhaps now

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104. *Allen*, 648 So. 2d at 362.

105. *Lagars*, 491 So. 2d at 6 (quoting Pearce v. Pearce, 348 So. 2d 75, 77 (La. 1977)).

106. *Allen*, 648 So. 2d at 362 (emphasis added). The court cited Vicknair v. Vicknair, 237 La. 1032, 112 So. 2d 702 (La. 1959) and Pearce v. Pearce, 348 So. 2d 75 (La. 1977) to support this proposition. *Id.*

107. Adams v. Adams, 389 So. 2d 381, 383 (La. 1980). *Adams* involved an alimony proceeding following a separation judgment which found that the defendant had abandoned the plaintiff. For a complete discussion, see *supra* notes 56-60 and the accompanying text.

courts will have to decide whether or not the alleged misconduct caused, or was a cause of, the party's decision to end the marriage.

Whether the majority intended to change the causation test is unclear and the ambiguity may lead to serious problems. The opinion did not discuss causation thoroughly since it found no serious misconduct. Because the decision cited *Lagars* as the example for analysis of fault, one might reason that the court did preserve the requirement of independent contributory or proximate cause. Interestingly, Justice Kimball's concurrence specifically includes the definition, while the majority does not. This suggests that Justice Kimball was concerned about the ambiguity and wished to clarify that she favored a stronger causation requirement. Perhaps this difference is evidence that the majority intended a different showing. Importantly, however, the *Allen* court never reached the issue of causation because it found no serious misconduct. Thus, arguably, any reference to causation, indeed even the entire discussion of what is fault, is purely dictum.

D. The Burden of Proof Under Allen

The *Allen* decision did not address the burden of proof, perhaps because neither party raised the issue. *Lagars* held that if a spouse obtained a divorce on the basis of adultery and then sought alimony, the defending spouse bore the burden of proving the petitioning spouse was at fault.[108] The *Lagars* decision implies that if the marriage is dissolved based on a fault ground,[109] the spouse in whose favor the divorce was granted need not bear the burden of proving freedom from fault in an alimony proceeding. This standard applies for a divorce based on adultery and also may apply for a divorce based on the commission of a felony as the only other fault basis for divorce.

The *Vicknair* decision dealt with the burden of proof following a divorce granted on the basis of time separate and apart.[110] In *Vicknair*, the court held that the spouse petitioning for alimony bore the burden of proving herself free from fault.[111] Since *Allen* did not specifically address the burden of proof, the court probably left *Lagars* and *Vicknair* untouched as the law on the burden of proof.

E. Potential Misinterpretations of Allen v. Allen

1. Potentially Encourages Use of a Comparative Fault Method of Analysis

The majority opinion in *Allen* cited many old cases which employed different jurisprudential methods of analyzing fault in granting a separation

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108. *Lagars*, 491 So. 2d at 5.

109. Now the only remaining fault grounds in the Civil Code are adultery or commission of a felony with sentencing to hard labor or death. La. Civ. Code art. 103.

110. Vicknair v. Johnson, 237 La. 1032, 112 So. 2d 702 (La. 1959).

111. *Id.* at 703.

judgment. The *Allen* court used those cases to demonstrate the standard for serious misconduct under Article 138.[112] Yet, the majority neglected to limit expressly its reliance on those cases to their showings of acts which constitute misconduct.[113] While the conduct in those cases amounted to fault under repealed Article 138, the cases also used comparative rectitude.

The court cited three early decisions that used a comparative fault approach, *Gormley v. Gormley*,[114] *McKoin v. McKoin*,[115] and *Abele v. Barker*.[116] An initial reading of *Gormley*, *Abele*, or *McKoin* suggests, in determining fault, a court should compare the conduct of each party to determine fault. These cases balanced each spouse's acts and determined which spouse, if either, was more blameworthy for the deterioration of the marriage. Although the facts of the cases indicate that a party must be guilty of old Article 138-type conduct to be found at fault, the method of analysis involved a balancing of each spouse's conduct to find whether one spouse was more blameworthy than the other. By relying on these early decisions without explaining that the cases were only authoritative to show serious misconduct, the *Allen* decision may encourage courts to employ a subjective, comparative analysis to determine fault in alimony proceedings. While the opinion did rely on more recent cases, particularly *Lagars*, the court also gave authoritative weight to other earlier decisions.[117] By citing early cases, the court confused its own analysis and failed to offer lower courts a clear standard for determining serious misconduct.

2. *Potentially Encourages Misinterpretations of the Standard for Serious Misconduct*

The majority opinion implicitly limited serious misconduct to that conduct defined in old Articles 138 and 139. For its definition of legal fault, the court quoted *Brewer v. Brewer*: "To be legally at fault, a spouse must be guilty of cruel treatment or excesses which compel a separation because the marriage is insupportable."[118] The majority opinion, however, omitted the portion of the *Brewer* decision holding that this language was synonymous with fault under old Article 138.[119] While it is logical that the court intended to adopt the entire *Brewer* definition of fault, its failure to explicitly restate that language may cause

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112. *See supra* notes 75-91 and accompanying text.

113. *Id.*

114. 161 La. 121, 108 So. 2d 307 (La. 1926).

115. 168 La. 32, 121 So. 182 (La. 1929).

116. 200 La. 125, 7 So. 2d 684 (La. 1942).

117. Particularly *Abele*, *Gormley*, and *McKoin*. For a complete discussion of the analysis in these cases, see *supra* part II.B.1.

118. Brewer v. Brewer, 573 So. 2d 467, 469 (La. 1991) (citing Pearce v. Pearce, 348 So. 2d 75 (La. 1977); Vicknair v. Johnson, 237 La. 1032, 112 So. 2d 702 (1959)).

119. *Brewer*, 573 So. 2d at 469. (The court stated that to find Mrs. Brewer legally at fault for nagging "would result in both a misapplication of Civil Code article 138 and an egregious miscarriage of justice." *Id.*).

confusion. Conduct less serious than that contemplated by Article 138 may be used to bar alimony.

In addition, the court's ambiguous application of the repealed Article 138 standard may contribute to the confusion. For example, consider the majority's discussion of Mrs. Allen's spending habits. Justice Watson, writing for the majority, stated two reasons Mrs. Allen's spending did not amount to legal fault. First, Mr. Allen knew of his wife's habits before he married her. Second, the court determined that "[h]er expenditures . . . d[id] not constitute profligacy for the wife of a man with an annual income from $288,000 to $500,000."[120] The majority concluded that Mrs. Allen's spending habits did not amount to legal fault. However, Justice Watson did not link the court's analysis of Mrs. Allen's financial irresponsibility directly to the standard for judging cruelty developed under Article 138. Nevertheless, one would reach the same finding of no legal fault under Article 138 because Mrs. Allen's financial mismanagement did not rise to the level of cruelty. Under Article 138, a spouse would be found at fault for severe financial irresponsibility if the level of mismanagement amounted to cruelty. Cruelty was an independent contributory or proximate cause of the separation because it was grounds for separation under Article 138. The facts would have to show that the mismanagement rose to the level of cruelty. If, for example, the spouse's spending habits were so excessive that the family could no longer afford the basic necessities of life, such conduct would be fault barring alimony. The majority, however, did not clearly explain its analysis by describing each step. Instead the court considered "her monetary irresponsibility and bankruptcy" and said "[t]he evidence does not support this fault factor."[121] This omission may lead lower courts to make unreasoned or unprincipled decisions based on subjective determinations. While the fact intensive analysis requires some level of "gut reaction," the court's imprecise application of the standard has the potential for abuse.

3. Potential Social Problems Resulting From Misinterpretation

These potential misinterpretations may lead to undesired effects. First, the decision may increase the number of needy spouses who are refused alimony at the trial level because courts may use a lesser standard of misconduct or a comparative rectitude approach.[122] Many unjustly denied spouses will not have the resources to appeal such decisions. Also, if the able ex-spouse does not support the petitioning spouse, the state will be left with the burden.[123] Finally, the decision's unclear standard may force divorcing spouses into extended

120. Allen v. Allen, 648 So. 2d 359, 363 (La. 1994).

121. *Id.* at 362-63.

122. *See supra* notes 113-117 and accompanying text.

123. McAlpine v. McAlpine, 650 So. 2d 1142 (La. 1995), *withdrawn and reh'g granted.* (Justice Dennis' opinion focused on the importance of alimony to protect the state from having to support needy spouses.) *See supra* note 94.

litigation at a time when they can least afford to do so. Family resources will be spent litigating alimony decisions when the money would be better spent supporting the family.

F. Suggestions for Practitioners

Practitioners should consider numerous cases establishing fault, including early or overruled decisions on fault. In light of *Allen*, practitioners should be prepared to argue for or against the application of the former Article 138 standard. A practitioner defending a claim for alimony may want to argue that the standard is something less than the Article 138 standard if the petitioning spouse's conduct is not of the level required in *Vicknair* and *Kendrick*.[124] If both spouses are guilty of serious misconduct as contemplated by that standard, a practitioner might argue that his client is not the one most at blame and contend that the comparative fault method should apply. Practitioners also will have to argue or defend any possible grounds for fault, as courts may misinterpret *Allen* and find serious misconduct for less than old Article 138-type grounds.

Likewise, practitioners must anticipate courts applying either standard of causation. Courts may require proof that the misconduct was either the legal, proximate cause of the divorce or a showing that the conduct was the personal reason the spouse sought divorce, as perhaps suggested in *Allen*. Practitioners whose clients may be guilty of cruelty but seek alimony should argue that only conduct which can cause a divorce can bar alimony. For clients in this position, the argument that the jurisprudence required the serious misconduct to be "an independent contributory or proximate cause of the separation"[125] may succeed since, without the doctrine of separation of bed and board, such Article 138 misconduct can no longer *cause* a divorce.[126]

G. Suggestions to Courts Interpreting Allen

To follow the prior jurisprudence as the *Allen* decision ordered, courts must resolve the causation issue. The prior jurisprudence requires that the only conduct which bars alimony is conduct which would be grounds for separation or divorce, and thus be the legal, proximate cause of the divorce. Today, such conduct would only include adultery or commission of a felony with sentencing. A court interpreting *Allen* might consider advancing such reasoning. Technically, the *Allen* decision never reached the causation issue. Since Mrs. Allen's conduct did not amount to cruelty, the court did not consider whether cruelty is a cause for divorce.

If courts choose to follow *Allen*'s implicit suggestion that cause should no longer be limited to legal cause for divorce, the standard for determining what is

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124. *See supra* part II.B.2.

125. Kendrick v. Duconge, 236 La. 34, 106 So. 2d 707 (La. 1958).

126. *See supra* notes 56-62 and accompanying text.

serious misconduct should be the limited standard developed in the jurisprudence which interpreted former Articles 138 and 139. The majority did name *Lagars* as the primary case for determining fault, and *Lagars* used the standard of old Articles 138 and 139. *Lagars* established three essential considerations of fault. First, fault must be "conduct or substantial acts of commission or omission by the wife violative of her marital duties and responsibilities." Second, a "wife is not deprived of alimony after divorce simply because she is not totally blameless in the marital discord." Finally, "a wife's misconduct must also be an independent contributory or proximate cause of the separation" to constitute fault.[127] The third consideration necessarily limited fault to Article 138 and 139 conduct because only such conduct could cause separation. Even if the court is willing to overlook the fact that such conduct no longer will cause a divorce, the court should not change the underlying standard for misconduct.

V. CONCLUSION

While the *Allen* court awarded alimony to Mrs. Allen, the opinion in *Allen* will likely reduce the number of alimony awards in the future. That result goes against the policy of preventing needy spouses from relying on state support, a policy announced as recently as 1995 in *McAlpine v. McAlpine*.[128] Thus, in one sense, the decision breaks with the court's traditional policies of expanding the opportunity for alimony awards. At the same time, the decision maintains the policy of denying alimony to spouses guilty of serious misconduct, and such a policy may be a good one. After all, the state may not wish to endorse a policy which requires support for a spouse who committed the serious misconduct enumerated in Article 138. The court chose to put this policy concern before the former. However, the court stood on thin authority when resurrecting Article 138 conduct as a bar to alimony. The jurisprudence upon which the court relied defined fault which barred alimony as fault which would be the legal, proximate cause of a separation or divorce. Article 138 conduct, other than adultery or commission of a felony with sentencing, no longer can cause a separation or divorce and therefore it no longer meets the definition of fault which bars alimony under the prior jurisprudence. Perhaps the better solution would have been to limit fault which bars alimony to adultery and commission of a felony with sentencing, the two fault factors named in Article 103, and to allow the legislature to reenact the definition of fault from repealed Article 138 if it so chose. This approach would follow the current codal scheme, the prior jurisprudence, and the policy of limiting state support to needy spouses.

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127. Lagars v. Lagars, 491 So. 2d 5, 6 (La. 1986) (quoting Pearce v. Pearce, 348 So. 2d 75, 77 (La. 1977)).

128. McAlpine v. McAlpine, 650 So. 2d 1142 (La. 1995), *withdrawn and reh'g granted.*