Louisiana Law Review

Volume 35 | Number 2
The Work of the Louisiana Appellate Courts for the 1973-1974 Term: A Symposium
Winter 1975

Private Law: Persons

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A Symposium

[*Editor's Note.* The articles in this symposium discuss selected decisions of Louisiana appellate courts reported in the advance sheets dated July 1, 1973 to July 1, 1974.]

PRIVATE LAW

PERSONS

*Katherine Shaw Spaht**

GENERAL

In *Phillpott v. Phillpott*,[1] the court held that unjustified, persistent denial of sexual intercourse constitutes cruel treatment within the meaning of Civil Code article 138. Apparently, a deciding factor in the court's conclusion was that the husband had refused sexual intercourse, which has been held to be a marital obligation,[2] for a period of almost ten years, clearly satisfying the "persistent" requirement. The court indicated that a justified refusal might occur when the spouse was suffering from an illness or the other spouse was guilty of some grave fault.[3] Citing the *Phillpott* decision, the Third Circuit Court of Appeal in *Bourque v. Landry*[4] stated in dicta that the wife's refusal of sexual intercourse under the circumstances might be justified[5] and affirmed the trial judge's finding of fact that the husband abandoned his wife without just cause, though the trial judge had not

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This survey of decisions does not include discussion of *Warren v. Richard*, 296 So. 2d 813 (La. 1974); *Wood v. Beard*, 290 So. 2d 675 (La. 1974); *Taylor v. Taylor*, 295 So. 2d 494 (La. App. 3d Cir. 1974); *McConkey v. Pinto*, 289 So. 2d 540 (La. App. 4th Cir. 1973), *writs granted*, 293 So. 2d 166 (La. 1974). These decisions are considered in student casenotes to be published.

1. 285 So. 2d 570 (La. App. 4th Cir. 1973).

2. Mudd v. Mudd, 206 La. 1055, 20 So. 2d 311 (1944); Bourque v. Landry, 293 So. 2d 218 (La. App. 3d Cir. 1974).

3. "Furthermore, persistent refusal of sexual union, *in the absence of consent or sickness or grave fault* on the other spouse's part, is perhaps the basest of marital cruelty and outrage." (Emphasis added.) 285 So. 2d 570, 571 (La. App. 4th Cir. 1973).

4. 293 So. 2d 218 (La. App. 3d Cir. 1974).

5. The wife had given birth to six children in rapid succession and a seventh after a complicated pregnancy.

placed much credence in the testimony of either husband or wife.

Generally, under R.S. 9:291[6] a married woman may not during the existence of the marriage sue her husband to enforce any substantive right. Although the husband by virtue of article 120 of the Civil Code is required to furnish his wife "with whatever is required for the convenience of life,"[7] the wife may not enforce this obligation civilly during the existence of the marriage. In *Lyons v. Landry*,[8] the father of the defendant's wife from whom the defendant was living separate and apart (not judicially) sought to recover sums expended for the support of his daughter. Reversing the trial court's decision sustaining an exception of no cause of action, the First Circuit Court of Appeal held the obligation of the husband under article 120 "is paramount to any obligation of the parent created by LSA-C.C. article 229 in this case."[9] The case was remanded to the trial court to determine if in fact the action of the father against the husband was within the purview of articles 120 and 1786.[10] Thus, the wife may successfully circumvent the prohibition against suing her husband by requesting expenses for "necessaries" from her parents who may in turn recover from her husband — perhaps a desirable result.

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6. LA. R.S. 9:291 (Supp. 1960): "As long as the marriage continues and the spouses are not separated judicially a married woman may not sue her husband except for:

(1) A separation of property;

(2) The restitution and enjoyment of her paraphernal property;

(3) A separation from bed and board; or

(4) A divorce."

7. LA. CIV. CODE art. 120: "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."

8. 293 So. 2d 674 (La. App. 1st Cir. 1974).

9. *Id.* at 675. LA. CIV. CODE art. 229: "Children are bound to maintain their father and mother and other ascendants, who are in need; and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal."

10. "After all, whether the wife was in necessitous circumstances thus making her an agent of the defendant to contract for the payment or repayment of these expenditures is a fact matter to be considered from the evidence presented in the trial of the case." 293 So. 2d 674, 675 (La. App. 1st Cir. 1974). LA. CIV. CODE art. 1786: "The incapacity of the wife is removed by the authorization of the husband, or, in cases provided by law, by that of the judge.

"The authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name; to her contracts for necessaries for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them.

"The unauthorized contracts made by married women, like the acts of minors, may be made valid after the marriage is dissolved, either by express or implied ratification."

USE OF BLOOD TESTS IN ACTION EN DESAVEU

In 1972, the Louisiana Legislature enacted the Uniform Act on Blood Tests to Determine Paternity,[11] which authorizes the use of blood tests in any civil action in which paternity is an issue, sets out certain procedural rules, and prescribes the effect to be given test results. Although it is characterized as ancillary to the Civil Code, the Uniform Act does not expressly refer to any particular provision thereof, nor has the Legislature made any subsequent attempt to amend relevant Civil Code articles. The Uniform Act clearly affects to some degree those articles which set forth and restrict the right of a husband to bring an action en desaveu,[12] but, since passage, its precise effect thereon has been a source of speculation.[13]

Two cases recently decided by the Third Circuit Court of Appeal raised for the first time judicially the question of the interrelationship of the Uniform Act and the existing structure of the disavowal action. In *Brugman v. Prejean*,[14] husband had married wife with full knowledge that she was then pregnant; the child was born within 180 days of the marriage; husband had signed as father at the registering of the birth. More than sixteen months after birth, husband filed suit to disavow paternity, apparently on the basis that blood tests would show that he could not be the biological father of the child. The court held that the Uniform Act does not create a new cause of action for disavowing paternity, and that, consequently, the six month prescriptive period of Civil Code articles 191 and 192 barred husband's suit.[15]

The court went out of its way, however, to discuss the effect of Civil Code article 190, which by its terms prohibits a husband from contesting the legitimacy of a child born within 180 days of the mar-

11. LA. R.S. 9:396-98 (Supp. 1972).

12. LA. R.S. 9:397.3: "The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts . . . show that the husband is not the father of the child."

13. *See* R. PASCAL, LOUISIANA FAMILY LAW COURSE 258 (1973); Comment, 33 LA. L. REV. 646 (1973).

14. 288 So. 2d 702 (La. App. 3d Cir. 1974).

15. LA. CIV. CODE art. 191: "In all the cases above enumerated, where the presumption of paternity ceases, the husband of the mother, if he intends to dispute the legitimacy of the child, must do it within six months from the birth of the child, if he be in the parish where the child is born, or within six months after his return, if he be absent at that time, or within six months after the discovery of the fraud, if the birth of the child was concealed from him; or he shall be barred from making any objection to the legitimacy of such child." *Id.* art. 192 preserves for the husband's heirs a six month period if the husband should die before the expiration of the term specified by article 191.

riage, when he either knew of the pregnancy of his wife prior to the marriage or signed as father at the registering of the birth or baptism.[16] The court declared that husband in the instant case had stated no cause of action, because he had alleged in his petition just those facts which would bar his action under article 190.

The facts of *Smith v. Smith*[17] are essentially the same as those in *Brugman*, except that suit for disavowal had been instituted timely. The court held, consistently with its *Brugman* opinion, that husband had no cause of action where the child had been born within 180 days of marriage and where husband had signed as father at the registering of the birth. The court concerned itself with whether the Uniform Act repealed or conflicted with article 190. The writer believes, however, that the court should have first analyzed the codal structure of the action en desaveu and then determined the proper scope of article 190.

Until the presumption of paternity ceases, a cause of action does not exist. Before 1972, Civil Code articles 185 through 189 provided the exclusive instances in which the presumption of paternity ceased. By declaring that the "presumption of legitimacy" ceases where the experts conclude non-paternity on the basis of blood tests, the Uniform Act created an additional ground to support the cause of action. Thus, *Brugman* correctly held that an action based on the evidence of blood tests must be brought within the time limits of articles 191 and 192.

The presumption of paternity under article 184 extends only to those children *conceived* during the marriage.[18] The child born capable of living within 180 days of the marriage is not presumed to be the child of the husband, because it is presumed in such a case that conception occurred outside the marriage.[19] Nonetheless, as Professor Pascal has pointed out, the law is structured in such a manner as to

16. LA. CIV. CODE art. 190: "The husband can not contest the legitimacy of the child born previous to the one hundred and eightieth day of marriage, in the following cases:

"1. If he was acquainted with the circumstances of his wife being pregnant previously to the marriage.

"2. If he was present at the registering of the birth or baptism of the child and signed the same, or if not knowing how to sign, he put his ordinary mark to it, in presence of two witnesses."

17. 300 So. 2d 205 (La. App. 3d Cir. 1974).

18. LA. CIV. CODE art. 184: "The law considers the husband of the mother as the father of all children conceived during the marriage."

19. LA. CIV. CODE art. 186: "The child capable of living, which is born before the one hundred and eightieth day after the marriage, is not presumed to be the child of the husband. . . ."

protect the child so born.[20] First, the husband is required to take affirmative action to disavow the child and must do so within the six month period of articles 191 and 192. Second, article 190 prevents the husband from contesting the legitimacy of the child if he married the mother knowing that she was pregnant or if he signed either the birth or baptismal registration as father.

Viewed in relation to the total structure of the disavowal action, article 190 is intended to effect quickly and quietly the legitimation of an illegitimate child whose illegitimacy rests on conception prior to marriage. There is a real question in the writer's mind whether its provisions should bar an action which is based upon the evidence of blood tests rather than upon the presumption that conception occurred outside marriage. The result of *Smith* can be defended on the basis of the unconditional language of article 190, but it can be criticized as ignoring the legislative intent and as promoting inconsistency in the application of the laws.

One distinction becomes very important as a result of the *Smith* decision. A child born 181 days after the marriage is presumed to be legitimate; his legitimacy is nonetheless subject to attack under the Uniform Act by the husband and presumed father, even though the husband may have married his wife knowing that she was pregnant and even though the husband may have signed as father at the registering of the birth. On the other hand, a child born 179 days after the marriage, presumed illegitimate, is absolutely protected from such an attack under the aforementioned circumstances. It is very doubtful that the Legislature even foresaw such a result. This anomaly illustrates the perils of adopting a "uniform law" without paying proper attention to the existing structure of the law. The resolution of the problem must be referred to the Legislature, whose task it is to restructure the law in order to evince clearly a legislative intent.

Effect of Prior Adjudication of Fault upon Alimony Incidental to Divorce

It is usual for a judgment of separation to be based on the fault of one of the spouses.[21] Alimony incidental to divorce may be granted, under the terms of Civil Code article 160, only to the wife who "has

20. R. Pascal, Louisiana Family Law Course 213-14 (1973).

21. La. Civ. Code art. 138 lists nine grounds for obtaining a separation from bed and board. Only the last may be classified as no-fault: "When the husband and wife have voluntarily lived separate and apart for one year and no reconciliation has taken place during that time."

not been at fault."[22] A question of recurring interest[23] is what effect, if any, in a subsequent action for alimony incidental to divorce, should a court give to a prior adjudication of fault in a separation proceeding.

In *Fulmer v. Fulmer*,[24] the Louisiana supreme court attempted a definitive resolution of the problem. In that case, wife had obtained a contested separation on the ground of abandonment. After a lapse of one year and sixty days, husband filed suit for final divorce and wife demanded alimony incidental to the divorce. The Louisiana supreme court held that the determination of "fault" in the separation proceeding barred re-litigation of the "fault" issue for purposes of article 160 so that husband was prevented from introducing evidence of wife's fault.

Factually, the *Fulmer* case could be distinguished from those cases where the wife had obtained a separation based on fault other than abandonment or where the action for separation had not been contested.[25] However, the significance of *Fulmer* lies in its attempt to go beyond the instant facts and to lay down authoritative rules governing the application of article 160. The court concluded that "fault," in the context of article 160, had reference to the traditional concept of fault, on which an action for separation or divorce might be founded. In arriving at its decision, the court carefully reasoned its way through the legislative history of article 160, and its interpretation of that article is plausible and well supported. It is now clear that, whenever one spouse's fault has been adjudicated in a separa-

22. LA. CIV. CODE art. 160: "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when: 1. The wife obtains a divorce; 2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after a judgment of separation from bed and board, for a specified period of time; or 3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person. This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries."

23. *See The Work of the Louisiana Appellate Courts for 1972-1973 Term—Persons*, 34 LA. L. REV. 201 (1974). Recent cases which have appeared since that article include Frederic v. Frederic, 295 So. 2d 52 (La. App. 4th Cir. 1974); Nethken v. Nethken, 292 So. 2d 923 (La. App. 1st Cir. 1974); *In re* Williams, 288 So. 2d 401 (La. App. 4th Cir. 1974); Kratzberg v. Kratzberg, 286 So. 2d 174 (La. App. 4th Cir. 1973).

24. 301 So. 2d 622 (La. 1974).

25. *See The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Persons*, 34 LA. L. REV. 201 (1974). Such distinctions had emerged from the welter of decisions handed down by the courts of appeal.

tion proceeding, the effect of the determination is to forever preclude re-litigation of wife's fault for purposes of article 160.[26]

As was noted in the opinion, the decision promotes judicial economy and consistency. However, it will also work injustice on those spouses who choose not to contest the action for separation in order to avoid the unseemliness of a public trial. The power to resolve this problem resides with the Legislature and not with the courts. Once again,[27] this writer suggests that a spouse be permitted to obtain a separation on the basis of living separate and apart for a period of thirty days in order to make more accessible a no-fault ground.

SUPPORT FOR EIGHTEEN-YEAR-OLD CHILDREN

The obligation of a parent to his children is, of course, far greater during their minority than after they have attained the age of majority.[28] In 1972, the Louisiana Legislature lowered the age of majority to eighteen.[29] The consequences of this change are now being felt by children who had looked to their parents for financial assistance in obtaining college educations.

In *Demarie v. Demarie*[30] and *Dubroc v. Dubroc*,[31] two courts of appeal both held that an adult child, *i.e.*, one who has attained the age of eighteen, has no right to obtain support from his parents in order to secure a college education. It is clear that these decisions correctly interpret the existing legislation, since Civil Code article 230 expressly limits to minors the right to the expenses of an education.[32]

It is equally clear, however, that the result breeds hardship for children of divorced parents. Remedial legislation is urgently needed to give adults under the age of twenty-one a right to support from their parents for purposes of obtaining an education.

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26. It is now clear that even where the wife had obtained a separation based on fault other than abandonment, the adjudication of the husband's fault necessarily implies her own freedom from fault.

27. *See The Work of the Louisiana Appellate Court for the 1972-1973 Term—Persons*, 34 LA. L. REV. 201, 203-04 (1974).

28. *See id.* at 204.

29. La. Acts 1972, No. 98 § 1, amending LA. CIV. CODE art. 37.

30. 295 So. 2d 229 (La. App. 3d Cir. 1974).

31. 284 So. 2d 869 (La. App. 4th Cir. 1973).

32. LA. CIV. CODE art. 230: "By *alimony* we understand what is necessary for the nourishment, lodging and support of the person who claims it.

"It includes the education, when the person to whom the alimony is due, is a minor."