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# Rights Of Creditors Against Husband For Payment Of Wife'S Bills

New York Legislature amended the existing law on the subject.[47] *In re Hollywood Commissary Inc.*,[48] wherein a union attempted to establish a welfare fund claim as a preferred claim in an assignment for the benefit of creditors proceeding, is the case which necessitated the statutory amendment. The *Hollywood* case prompted the New York Legislature to express legislative intent concerning welfare plans, and it would certainly seem that the *Embassy* case should prompt Congress to act in a similar manner.

Congress has recognized that "in little more than a decade private employee welfare and pension plans have grown from relatively small significance to a position where approximately 84 million persons are depending in some manner upon the benefits which they promise."[49] In view of this recognition Congress should afford the persons relying upon the plans the protection they are denied by the majority in the *Embassy* case; therefore, the dissent of Mr. Justice Black offers the approach[50] which appears to be more in accord with congressional intent in affording priority in bankruptcy proceedings to claims for contributions to union welfare funds.

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## RIGHTS OF CREDITORS AGAINST HUSBAND FOR PAYMENT OF WIFE'S BILLS

When confronted with the problem of enforcing the duty of a husband to support his wife,[1] courts have sometimes found it difficult to define the nature of this duty.[2] This is especially true when a third

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[47]N.Y.Debt. & Cred. Laws § 22.

[48]87 N.Y. Supp. 2d 625 (Sup. Ct. 1949).

[49]See note 30 supra.

[50]"The Bankruptcy Act is remedial, should be interpreted reasonably, according to the fair import of its terms, and technicalities should not be indulged in, wherever a liberal procedure is consistent with the substantial rights of the parties in interest." In re Reliable Furniture Mfg. Co., 32 F.2d 805, 806 (D. Md. 1929), aff'd sub nom. Manly v. Hood, 37 F.2d 212 (4th Cir. 1930).

[1]D. H. Holmes Co. v. Huth, 49 So. 2d 875 (La. App. 1951); Ewell v. State, 207 Md. 288, 114 A.2d 66 (1955); McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107, 108 (1921); Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939); Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135, 136 (1903); Bostick v. Brower, 22 Misc. 709, 49 N.Y. Supp. 1046 (Sup. Ct. 1898); Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704 (1921); 26 Am. Jur. Husband and Wife § 337 (1940); 41 C.J.S. Husband and Wife § 15 (1944).

[2]See Brown, The Duty of the Husband to Support the Wife, 18 Va. L. Rev. 823, 824 (1932).

party who has furnished goods and services to a wife seeks to hold the husband liable. In such cases there are two principal theories upon which the third party may hold the husband liable: (1) agency, when the husband has made the wife his *agent* to act of him,[3] or (2) restitution, when the husband has failed to provide the wife with necessaries.[4]

In *Barnes Furniture Store v. Young*,[5] a recent Louisiana case, the court relied on the agency theory in holding the husband liable. The plaintiff brought an action against the husband for furniture purchased by his wife. Since the husband had gone to the store, made part payment, and promised to keep up the account, the Louisiana Court of Appeal held the husband liable under the doctrine of ratification.[6]

Under an agency theory a wife may have either actual or apparent authority to pledge her husband's credit.[7] *Actual authority* exists when the husband expressly authorizes his wife to act as his agent,[8] or does so by implication, as when he pays bills and thereby consents to the transactions. These acts will bind him in subsequent similar transactions with the same merchant, and the huband will be liable notwithstanding the fact that he may have previously supplied her with similar goods.[9] Furthermore, a wife's authority as agent,[10] once established, continues after separation of the parties, and the husband's liability for purchases on his credit continues until notice of termination of

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[3]"A husband or wife can be authorized to act for the other party to the marital relation." Restatement (Second), Agency § 22 (1958).

[4]"A person who has performed the noncontractual duty of another by supplying a third person with necessaries which in violation of such duty the other had failed to supply, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if he acted unofficiously and with intent to charge therefor." Restatement, Restitution § 113 (1937). See Restatement (Second), Agency § 14(I) (1958).

[5]111 So. 2d 549 (La. App. 1959).

[6]Id. at 552.

[7]Cooper v. Haseltine, 50 Ind. App. 400, 98 N.E. 437 (1912); Smedley v. Sweeten, 11 N.J. Super. 39, 77 A.2d 489 (1950); Martin v. Oakes, 42 Misc. 201, 85 N.Y. Supp. 387 (Sup. Ct .1903).

[8]Actual authority is to be distinguished from apparent authority when there has been a previous course of dealing. If the husband has expressly authorized the wife to act or if he subsequently ratifies her act, actual authority will exist. See Metler v. Snow, 90 Conn. 690, 98 Atl. 322 (1916). Apparent authority will exist, however, when the husband has not given the wife express authority to act, but has in some way held out to the merchant that the wife is authorized and the merchant has relied thereon. See Restatement (Second), Agency § 22, illustration 2 (1958).

[9]Metler v. Snow, 90 Conn. 690, 98 Atl. 322 (1916).

[10]The agency is a question of fact, Martin v. Oakes, 42 Misc. 201, 85 N.Y. Supp. 387 (Sup. Ct. 1903), and the creditor has the burden of proving the authority. McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107 (1921).

the authority has been communicated to creditors who knew of the agency.[11]

Although the husband has not previously authorized the wife to pledge his credit, he may ratify her act and thereby become liable under well-established principles of agency.[12] Ratification[13] may be found if the husband, with knowledge[14] that goods were purchased on his credit, uses the goods or permits his wife to retain them.[15] In utilizing the theory of ratification in the *Barnes* case, the court relied on the earlier Louisiana case of *Montgomery v. Gremillion*.[16] In that case ratification was found, notwithstanding the husband's original silence and inaction, because the husband sought adjustments and more time to pay the account.

A wife may have *apparent authority*[17] when the husband has held out to the merchant that she is authorized to act as his agent and subsequently forbids her to act for him, but fails to give notice[18] of this revocation to the creditor.[19] In a recent District of Columbia case, *Ottenstein v. Julius Garfiinckel & Co.*,[20] creditors sought judgment against a husband for goods purchased by his wife. The wife's prior authority which had been created by an earlier ratification was terminated by the husband on separation, but he failed to give creditors notice of this termination until several months later. The husband

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[11]Ford v. S. Kann Sons Co., 76 A.2d 358 (D.C. Munic. Ct. App. 1950); McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107 (1921).

[12]"Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Restatement (Second), Agency § 82 (1958).

[13]Landgraf v. Tanner, 152 Ala. 511, 44 So. 397 (1907) (subsequent promise); Ventress v. Gunn, 6 Ala. App. 226, 60 So. 560 (1912) (furnishing wife with money to pay bill).

[14]Knowledge is an essential element in ratification. Restatement (Second), Agency § 91 (1958); Mechem, Agency § 206 (4th ed. 1952). But if goods are sold to the wife upon her credit solely, the husband will not be liable although the sale may have been made with his knowledge. Noel v. O'Neill, 128 Md. 202, 97 Atl. 513 (1916).

[15]Walling v. Hannig, 73 Texas 580, 11 S.W. 547 (1889).

[16]69 So. 2d 618 (La. App. 1953).

[17]"[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second), Agency § 27 (1958).

[18]Apparent authority will continue after separation of the parties in absence of notice otherwise. Ford v. S. Kann Sons Co., 76 A.2d 358 (D.C. Munic Ct. App. 1950).

[19]As to a merchant dealing with the wife for the first time, there can be no apparent authority. James McCreery & Co. v. Martin, 84 N.J.L. 626, 87 Atl. 433 (1913); Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903).

[20]151 A.2d 925 (1959).

contended "that he did nothing which would justify the stores in believing that his wife had authority to pledge his credit." However, the court held that during the intervening period between separation and notification he was liable because the wife had apparent authority.[21]

The marital relationship per se does not make the wife the agent of her husband.[22] On the contrary, the agency of the wife for the husband is governed by the same principles as control the usual principal-agent relationship.[23] Thus, when the creditor is unable to establish the existence of actual or apparent authority, the sole basis for holding the husband liable is the theory of restitution.[24]

Marriage imposes a duty upon the husband to make adequate provision for his wife's necessaries[25] commensurate with his station and position in life.[26] When the husband fails to perform this duty and a third party furnishes the necessaries, the husband is liable to the third party on the theory of restitution,[27] which is predicated upon the principle of unjust enrichment.[28]

Restitution does not apply when the husband has supplied the necessaries, for in this instance there is no unjust enrichment because the husband has already fulfilled his obligation. In order to receive payment in such case the creditor must prove the existence of a true

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[21]In the Ottenstein case the husband was held liable for the entire period on the basis of apparent authority. Id. at 927. However, it would seem that until the husband forbade the wife to pledge his credit there was actual authority, for the husband ratified her acts by giving her money with which to make payments and by permitting her to maintain the accounts.

[22]Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891); Smedley v. Sweeten, 11 N.J. Super. 39, 77 A.2d 489 (1950); Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903); Harrah v. Home Furniture, Inc., 67 Nev. 114, 214 P.2d 1016 (1950). See Martz v. Selig Dry Goods Co., 76 Ind. App. 135, 131 N.E. 528 (1921).

[23]Goldfield v. Brewbaker Motors, Inc., 36 Ala. App. 152, 54 So. 2d 797 (1951); Lazarus v. Hall, 287 Ky. 199, 152 S.W.2d 592 (1941).

[24]See note 4 supra.

[25]See cases cited note 1 supra.

[26]Ewell v. State, 207 Md. 283, 114 A.2d 66, 69 (1955). In referring to the common law duty of support the court said, "The meaning of the term necessaries was relative, elastic and dependent upon circumstances, that is, the means and station in life of the couple. The liability of a husband was not limited merely to articles necessary to sustain life or to preserve decency but extended to things which would be desirable and suitable in view of the rank, fortune, earning capacity of the husband and the mode of living of the couple."

[27]It is also said that when one furnishes necessaries, upon the husband's failure to pay, there arises an implied obligation in law on a quasi-contractual basis. Carr v. Anderson, 154 Minn. 162, 191 N.W. 407 (1923). Cf. Adler v. Adler, 171 Pa. Super. 508, 90 A.2d 389 (1952).

[28]"A person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restatement, Restitution § 1 (1937).

agency.[29] Furthermore, restitution cannot be invoked when it conclusively appears that the credit was extended solely to the wife,[30] or when the parties are separated through fault of the wife.[31]

In dealing with the liability created by the husband's failure to provide necessaries, some courts have referred to this liability in terms of agency rather than restitution. This agency is characterized either as an *agency implied in law* or as a *presumption of agency*. In some cases the courts say that there is an implied agency in law in the wife to pledge her husband's credit[32] on the theory that the husband's assent is conclusively presumed.[33] In other cases[34] the courts assert that there is a prima facie presumption of agency in the wife to purchase necessaries for herself and the household,[35] which presumption arises from the fact of cohabitation.[36] This presumption is one of fact, not of law,[37]

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[29]James McCreery & Co. v. Martin, 84 N.J.L. 626, 87 Atl. 433 (1913); Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903).

[30]Herring v. Holden, 88 Ga. App. 212, 76 S.E.2d 515 (1953); Mathews Furniture Co. v. La Bella, 44 So. 2d 160 (La. App. 1950).

[31]Allen v. Selig Dry Goods Co., 90 Ind. App. 290, 165 N.E. 338 (1929); Kerner v. Eastern Dispensary & Cas. Hosp., 210 Md. 375, 123 A.2d 333 (1956); Mihalcoe v. Holub, 130 Va. 425, 107 S.E. 704 (1921).

[32]McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107 (1921); Fisher v. Drew, 247 Mass. 178, 141 N.E. 875 (1924); Bergh v. Warner, 47 Minn. 250, 50 N.W. 77, 78 (1891); East v. King, 77 Miss. 738, 27 So. 608 (1900); McQuay v. McQuay, 86 Mont. 535, 284 Pac. 532 (1930); Bostick v. Brower, 22 Misc. 709, 49 N.Y. Supp. 1046, 1047 (Sup. Ct. 1898).

[33]Fisher v. Drew, 247 Mass. 178, 141 N.E. 875 (1924).

[34]The same courts may use both agency implied in law and presumption of agency arising from the fact of cohabitation in slightly different factual situations. For example, when the goods are necessaries which the husband has failed to supply, a court may reason that there is an agency implied in law in the wife to pledge her husband's credit. However, when a third party has furnished necessaries and the husband alleges that he has previously supplied the goods, a court may say that there is a presumption of agency arising from the fact of cohabitation. See Bergh v. Warner, 47 Minn. 250, 50 N.W. 77, 78 (1891); McFerren v. Goldsmith-Stern Co., 137 Md. 573, 113 Atl. 107 (1921).

[35]Cooper v. Haseltine, 50 Ind. App. 400, 98 N.E. 437 (1912); Adkins v. Hastings, 138 Md. 454, 114 Atl. 288 (1921); Johnson v. Briscoe, 104 Mo. App. 493, 79 S.W. 498 (1904); James McCreery & Co. v. Martin, 84 N.J.L. 626, 87 Atl. 433 (1913);Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903).

[36]This presumption is founded upon the fact that in modern society the wife is the manager of the household and is clothed with authority to pledge her husband's credit for articles of ordinary household use. The presumption appears to be confined to purchases of necessaries. Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891). The courts apparently reason that it is easy for a third party to conclude that on the basis of the marital relationship the wife is the agent of the husband. However, this conclusion is patently inconsistent with the Restatement of Agency § 22 and authorities on agency, Mechem, Agency §§ 49-50 (4th ed. 1952). In view of this, the writer prefers to relate this presumption from the fact of cohabitation more closely to restitution rather than to apparent authority.

[37]Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135, 137 (1903).

and it can be rebutted by proof that the credit was extended solely to the wife,[38] that the husband gave notice to the merchant not to allow his wife to purchase on his credit,[39] that the wife had been amply supplied with articles of the same character as those furnished,[40] or that she had been furnished with money with which to purchase them.[41]

Courts that refer to this restitutionary liability in terms of agency recognize that this agency is to be distinguished from a true agency[42] because none of the incidents of a true agency are present.[43] But under this questionable use of agency terminology the wife is permitted to impose liability upon her husband against his will[44] and in spite of the fact that he may have terminated her authority and given notice of this termination to those who have previously extended credit.[45] Such predication of liability on the theory of agency is in direct conflict with the *Restatement of Agency,* which provides that the marital relationship by its own force does not give rise to the existence of agency.[46]

However, the courts apparently reach the same result in this area regardless of the terminology used—restitution or agency. Nevertheless, there are practical problems which may arise from the use of this agency terminology, *e.g.,* when a court has reasoned that a presumption of agency arises from the fact of cohabitation. What should be the logical conclusion when the parties cease to cohabit? The presumption of agency implies that when the parties separate, even through fault of the husband, the wife no longer has authority to pledge her husband's credit for necessaries. However, the majority rule appears to be that when the husband is at fault in the separation the wife is still entitled to his support for necessaries.[47] The fallacy in the use of agency terminology in this situation becomes evident when cohabitation ceases to exist, for then these courts no longer have any basis for applying the agency theory. The obvious solution is to rely on restitution from the outset as a basis for this liability.

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[38]Noel v. O'Neill, 128 Md. 202, 97 Atl. 513 (1916).

[39]Wickstrom v. Peck, 155 App. Div. 523, 140 N.Y. Supp. 570 (Sup. Ct. 1913).

[40]Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903).

[41]Guthrie v. Bobo, 32 Ala. App. 355, 26 So. 2d 203 (1946).

[42]Bergh v. Warner, 47 Minn. 250, 50 N.W. 77 (1891); Johnson v. Briscoe, 104 Mo. App. 493, 79 S.W. 498 (1904); Wanamaker v. Weaver, 176 N.Y. 75, 68 N.E. 135 (1903).

[43]Mechem, Agency § 49 (4th ed. 1952).

[44]Bostick v. Brower, 22 Misc. 709, 49 N.Y. Supp. 1046, 1047 (Sup. Ct. 1898).

[45] La Mode Ready to Wear, Inc. v. Wallace, 52 S.W.2d 276 (Tex. App. 1932).

[46]Restatement (Second), Agency § 22, comment b (1958).

[47]Allen v. Selig Dry Goods Co., 90 Ind. App. 260, 165 N.E. 338 (1929); East v. King, 77 Miss. 738, 27 So. 608 (1900).