Limiting The "Family Necessaries" Doctrine as a Means of Imposing Third Party Liability for Utility Bills

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Low-income households seeking protection from the disconnection of utility service often are faced with allegations of liability for service for third parties. One of the most troubling such allegations involves the claim by a public utility that one separated spouse is responsible for the bills of the other spouse under a state's "family necessaries" doctrine.[1] Under such a claim, a creditor seeks to impose liability on both spouses for the "necessities of the family."[2] While judicially overturned in some jurisdictions,[3] family necessaries

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[1] There are also "family expense" statutes. A "family expense" is defined much more broadly than a "family necessity." A "family expense" may include: books, pictures and ornaments for the home; a piano or other musical instruments; and clothing for one member, because it preserves health for the benefit of all, HUSBAND AND WIFE, AM. JUR. 2D §373 What Constitutes Family Expenses and Household Supplies) (1968). *See also*, 45, *infra*, and accompanying text.

[2] *See generally*, Karol Williams, *The Doctrine of Necessaries: Contemporary Application as a Support Remedy*, 19 STETSON L.REV. 661 (1990); Comment*, The New Doctrine of Necessaries in Virginia*, 19 U.RICH. L.REV. 317 (1985); Note*, The Unnecessary Doctrine of Necessaries*, 82 MICH. L.REV. 1767 (1984); Comment*, The Doctrine of Necessaries & Wisconsin's Attempt to Modify The Doctrine to Conform to the Equal Protection Clause*, 1 LAW AND INEQ. 407 (1983).

[3] *See e.g.*, *Condore v. Prince George County*, 425 A.2d 1011, 1019 (Md. App. 1981); *Schilling v. Bedford County Memorial Hospital*, 225 Va. 539, 303 S.E.2d 905, 908 (1983); *Kilbourne v. Hanzelik*, 648 S.W.2d 932 (Tenn. 1983).

statutes have survived constitutional challenge in other states.[4]

Given the continuing viability of this doctrine as a general rule of liability in many jurisdictions,[5] the purpose of this memo is to introduce the limits of the doctrine.[6] A public utility does not have *carte blanch* approval to impose the debts of one spouse upon the other spouse, even in those jurisdictions where the family necessaries doctrine is alive and well. Several defenses exist for the low-income advocate even in those instances where a utility seeks to impose liability under a family necessaries doctrine of continuing validity. In such an instance, the utility may not simply rely upon the doctrine, but must show also:

1. That a "family" exists in fact on whose behalf the doctrine is invoked;

2. That the expense is one on behalf of the family and not a personal expense;

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[4] *See e.g.*, *Jersey Shore Medical Center--Fitkin Hospital v. Estate of Sidney Baum*, 417 A.2d 1003 (N.J. 1980); *Marshfield Clinic v. Discher*, 105 Wis.2d 506, 314 N.W.2d 326 (1982). The most common response has been simply to expand the doctrine to include both spouses. *See e.g.*, *Borgess Medical Center v. Smith*, 190 Mich. App. 796, 386 N.W.2d 684 (1986); *North Carolina Baptist Hospital v. Harris*, 319 N.C. 347, 354 S.E.2d 471 (1987); *In Re. Rauscher*, 40 Ohio App. 3d 106, 531 N.E.2d 745 (1971); *Richland Memorial Hospital v. English*, 295 S.C. 511, 369 S.E.2d 395 (1984).

[5] *See generally*, Ian Freeman nd M. Todd Haynie, *Creditors' Rights: Court Examines the Application of the Necessaries Doctrine and the Preconditions of a Person's Liability for the Debts of a Spouse*, 48 S.C.L.REV. 53 (1996); Elizabeth Heaney, *Pennsylvania's Doctrine of Necessities: An Anachronism Demand Abolishment*, 101 DICK. L.REV. 233 (1996); *see also*, Jay Zitter, *Modern status of rule that husband is primarily or solely liable for necessaries furnished wife*, 20 A.L.R.4TH 196 (1983); Jay Zitter, *Necessity, in action against husband for necessaries furnished wife, of proving husband's failure to provide necessities*, 19 A.L.R.4TH 432 (1983); Jay Zitter, *Wife's liability for necessaries furnished husband*, 11 A.L.R.4th 1160 (1982).

[6] This memo is not intended to be a comprehensive treatment. The law in this area is very state-specific.

3. That the expense is for a "necessity" of life;

4. That the utility relied upon the credit of the noncontracting spouse in extending the credit; and

5. That the obligation has not been satisfied, or in some other fashion limited, by a court order of a specified sum of child support.

These limits need not be raised in the alternative. A utility must demonstrate *each* in order to rely upon the family necessaries doctrine to impose liability on a non-contracting spouse as a matter of law. Each of these potential limits is discussed in more detail below.

The purpose of this memo, in short, is to explore the defenses an advocate may raise when a public utility relies upon the family necessaries doctrine (a.k.a., family expense doctrine) as a basis to impose third party liability for utility bills, accepting the validity of the doctrine as a starting point for analysis.[7] First, however, an overview of the necessaries doctrine in general is in order.

I. OVERVIEW OF FAMILY NECESSARIES DOCTRINE.

"Under the traditional common law doctrine of necessaries, a husband has the duty to support his wife and is responsible for the cost of necessary goods and services furnished to his wife by third parties if he has failed to provide the necessaries himself."[8] Under the common law doctrine of necessaries, if a husband neglects to furnish necessities to his wife,

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[7] This is a strategic decision, as opposed to a decision as to the merits of the doctrine. If the controversy is litigated in an administrative forum, before the state public utilities commission (PUC), it seems unlikely that an advocate would succeed in convincing the PUC that the agency had authority to declare the family necessaries doctrine unconstitutional.

[8] Comment, *The New Doctrine of Necessaries in Virginia*, 19 U. RICH. L. REV. 317 (1985).

she may purchase them herself on his credit.[9] According to one commentator, "this doctrine was once widely accepted as necessary to protect dependent wives and is based on the husband's general duty to support his family."[10]

The doctrine of necessaries should not be applied blindly in this respect. The doctrine does not flow from a finding of joint liability on the part of both parties to a marriage. Rather, it historically has been a doctrine of protection. One review summarizes:

> Prior to legislative enactments occurring in the twentieth century, married women had no right under traditional common law to own property or otherwise control their financial affairs. The extension of credit to a wife was only in her husband's name, because a married woman had no legal status to contract in her own right.[11]

The commentary then notes:

> Due to this legal impediment, the common law placed the burden of providing support to a wife and children solely on the husband. The common law doctrine of necessaries developed as a protective remedy for the hapless wife and children facing economic abandonment by the husband. The doctrine of necessaries imposes liability on the husband to third parties who provide essential goods or services to the wife and children, when the husband abandons his duty to family support.[12]

Importantly, as this commentator notes, the doctrine of necessaries is *not* intended to

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[9] Note, *Inequality in Marital Liabilities: The Need for Equal Protection When Modifying the Necessaries Doctrine*, 17 U. MICH. J. L. REFORM. 43, 43 - 44 (1983).

[10] Id.

[11] Monrad Paulsen, *Support Duties Between Husbands and Wives*, 9 VAND. L.REV. 709 (1956). (notes omitted).

[12] Id., at 709.

be a creditor's remedy.[13] Rather, it is a "protective device" for the spouse needing support. One case summarizing the doctrine of necessaries as recently as 1978 observed that "the duty of a husband to support his wife is a moral as well as a legal obligation; it is a marital duty, in the performance of which the public as well as the parties are interested."[14] The duty, the case concludes, is a "duty which is incident to the marriage and arises from the relation of marriage."[15] While some progressive thinking has gone into the usefulness of this doctrine,[16] in a utility shutoff situation, the doctrine often redounds to the detriment of low-income households, with a utility seeking to impose liability for a separated (but not divorced) spouse's utility bills incurred at a separate address.

Before turning to the common law and statutory law regarding family expenses in general, however, and the defenses that may be raised, it is instructive first to look at how the unique law of utility credit liability has treated the issue of spousal responsibility.

II. UTILITY COMMON LAW AND THIRD PARTY SPOUSAL LIABILITY.

The courts have repeatedly, and correctly, held that a spousal relationship between customers does not create a special exception to the general rule at common law designed to

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[13] *See e.g.*, *Holliday Hosp. Ass'n v. Schwarz*, 166 So. 493, 495 (Fla. 1964).

[14] *Newport v. Newport*, 219 Va. 48, 56, 245 S.E. 134, 139 (1978); see generally, Robert Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L.REV. 823 (1932).

[15] Id.

[16] *See*, Michael Ferry, Nina Balsam & Ruth Przybeck, *Litigation of the Necessaries Doctrine: Funding for Battered Women's Shelters*, 17 CLEARINGHOUSE REV.1192, 1193 (1984).

protect vulnerable customers in disputes with monopoly utilities.[17] In *Cumberland Telephone and Telegraph Co. v. Hobart*,[18] the husband had arranged for a phone to be installed in his wife's business. When she sold the business, but left an overdue balance, the utility terminated the husband's residential account (which was also overdue at the time). Relying on *Burk v. City of Water Valley*,[19] *Wood v. Auburn*,[20] and other common law pronouncements, the *Hobart* court held that a husband is not liable for a wife's utility bills insofar as the two accounts at issue were separate and independent of each other.[21]

Other courts have reached this same result under the common law. In *Sulkin v. Brooklyn Edison Company*,[22] the New York courts disallowed the utility's termination of a residential account because of the wife's delinquent business account. So, too, in *DePass v. Broad River Power Company*,[23] did the court disallow a consumer's spouse's unpaid utility

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[17] *Southwestern Bell Telephone Company v. Bateman*, 223 Ark. 432, 266 S.W.2d 289, 292 (1954). ("We agree that service could not be denied for the sole reason that her husband owed the company for a phone rental, which he had refused to pay* * *.")

[18] *Telephone and Telegraph Co. v. Hobart*, 89 Miss. 252, 42 So. 349 (1906).

[19] *Burk v. City of Water Valley,* 40 So. 819, 820 (Miss. 1906).

[20] *Wood v. Auburn,* 87 Me. 287, 32 A. 906 (1895).

[21] ***Hobart***, *supra* note 18..

[22] *Sulkin v. Brooklyn Edison Company,* 145 Misc. 484, 261 N.Y.S. 245, *aff'd*, 237 App. Div. 850, 261 N.Y.S. 929 (1932).

[23] *DePass v. Broad River Power Company,* 173 S.C. 387, 176 S.E. 325, 95 A.L.R. 545 (1934).

debt over a year old to be a basis for denying service to the consumer.[24]

Likewise, a wife is not responsible for a husband's utility bill. In *Vanderberg v. Kansas City Missouri Gas Co.*,[25] the wife, who resided with her husband and children, opened a boarding house, but was refused utility service due to a debt from a previous family residence, as well as a debt in the husband's name from his previous business. The wife agreed to pay the "family debt," but steadfastly refused to pay her spouse's obligation to the utility. The *Vanderberg* court held that a utility must enter a contract with a consumer despite nonpayment of the consumer's spouse's utility bill and reasoned as follows:

> * * *there is no more reason for compelling a married woman to pay her husband's debt, for the payment of which she is not legally bound, than there would be for compelling her to pay the debt of a stranger. The attempt made by [the utility] to coerce her into paying such debt was unreasonable and her refusal to submit to such coercion afforded no lawful excuse for* * *refusal to enter into a contract with her.[26]

So, too, the Illinois Commerce Commission ruled in two separate cases that two complainants were not responsible for outstanding utility bills incurred by their husbands at residences where the complainants had never lived.[27] The Illinois Commission held that a utility could not refuse to provide service to the complainants under a "family expenses

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[24] Rather than as a spousal liability case, however, *DePass* is most often cited as authority for the proposition that collection of a utility debt may be barred by estoppel to a creditor who abandons collection of a claim and later seeks to resurrect it after permitting it to become stale.

[25] *Vanderberg v. Kansas City Missouri Gas Co.*,126 Mo. App. 600, 105 S.W. 17 (1907).

[26] *Id.*, at 20.

[27] *Burnside v. Central Illinois Light Co*., Docket 89-0196 (Nov. 29, 1989); *Petty v. Central Illinois Light Co.*, Docket No. 89-0198 (November 29, 1989), *Public Utilities Fortnightly*, at 48 (Feb. 1, 1990) (abstract only).

statute" since there was "no family in fact" where the complainants and their husbands were separated and maintained separate residences.

As can be seen, the treatment of whether one spouse may legitimately be held responsible for the other spouse's bill is intermeshed with a number of independent limits on utility collection activity. It is generally held that the utility service at one address may not be disconnected for nonpayment of service at a different address.[28] A utility may not disconnect one service for the nonpayment of another, unrelated, service,[29] or due to a collateral matter.[30] A utility may not disconnect service for a third party's bill.[31] The fact that a spouse may be the third party involved does not change these basic common law principles.

III. THE EXISTENCE OF A "FAMILY" IN FACT

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[28] William Danne, Jr., *Denial of service: Right of public utility to deny service at one address because of failure to pay past service rendered at another*, 73 A.L.R.3d 1292 (1976); *see also*, Annotation, *Right of public utility to discontinue or refuse service at one address because of refusal to pay for past service rendered at another*, 95 A.L.R. 556 (1935).

[29] Maurice Brunner, *Unrelated service, right of municipality to refuse services provided by it to a resident for failure of resident to pay for other unrelated services*, 60 A.L.R.3d 714 (1974); *see also*, Annotation, *Right of municipal utility to cutoff water supply for nonpayment of charges for unrelated service*, 26 A.L.R.2d 1359 (1952).

[30] Annotation, *Right of public utility corporation to refuse its service because of collateral matter not related to that service*, 55 A.L.R. 771 (1928).

[31] Annotation, *Making payment for water or light (or gas) a charge upon the property or against the present owner or occupant irrespective of the person who enjoyed the service*, 13 A.L.R. 346 (1921), *supplemented* 55 A.L.R. 789 (1928), *superseded*, 19 A.L.R.3d 1227 (1968); *see also*, Roger Colton, *Utility Services for Tenants with Delinquent Landlords*, 20 CLEARINGHOUSE REV. 554 (1986).

The power of the state to create economic liability chargeable to either spouse for each other's purchases is said to be found in its authority to regulate the duty to support the families of its citizens.[32] It must be emphasized, however, that it is essential to recovery that a "family" exists in fact.

What is a "family"? In *Neasham v. McNair*,[33] the Iowa state supreme court found that "family is defined as a collective body of persons who live in one home, under one head or manager."[34] Similarly, in *Gilman v. Matthews*,[35] the court refused to impose liability on a wife for her husband's tuxedo and other suits because they had separated several months prior to his purchases and, accordingly, no "family" existed. Citing *Webster's Dictionary*, the *Gilman* court stated in terms nearly identical to Iowa's: "a family is defined to be a collective body of persons who live in one house and under one management."[36]

Cohabitation under one roof, however, is not an *absolute* prerequisite to the presence of a "family." A family relationship can be found to exist for purposes of applying the statute, imposing liability upon a spouse, despite the fact that husband and wife live apart. The family relationship may be found to exist even if spouses live in separate states.

In *Hudson v. King Bros.*,[37] the wife was found liable for her husband's purchases of clothing despite the husband having left the marital home to drift and travel around the

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[32] 41, *Husband and Wife*, AM.JUR.2D §§ 371 *et seq*. (1968), *citing*, *Mandell Bros. v. Fogg*, 182 Mass. 582, 66 N.E. 198 (1903).

[33] *Neasham v. McNair*,103 Iowa 695, 72 N.W. 773 (1897).

[34] Id., *citing*, *Menefee v. Chesley*, 66 N.W. 1038 (Iowa 1896). *Menefee* stated quite explicitly that "at law, [the word `family'] has a well-defined meaning." Id.

[35] *Gilman v. Matthews,* 20 Colo. App. 170, 77 P. 366 (1904).

[36] Id., at 369.

[37] *Hudson v. King Bros,* 23 Ill. App. 118 (1887).

country. In *Hudson*, the couple had settled their marital differences and had divided all real estate and personality. The court imposed liability because the separation was amicable and relations remained cordial. The husband visited his wife and children and was allowed to remain when he became ill. The court observed: "* * *he was treated as one of the family, ate at the same table, and occupied the same bed with his wife, a part of the time"[38] Thus, there was no marital separation sufficient to avoid liability for "family expenses."

In *Russell v. Graumann*,[39] the Washington hospital where the husband died was allowed to recover medical care costs from the widow despite the fact she resided across country in Pennsylvania. The court held that whether a family relationship was severed to make the family expense statute inapplicable was a question of intent. The court reasoned:

> * * *It is not necessary that the husband and wife shall at all times reside together under the same roof, in order that the legal status of the family may be preserved. It is a matter of common knowledge that many husbands in their struggles for a livelihood are often required to be far from home and for long periods of time* * *. Such absence may be strong evidence of affection and regard for the family* * *.[40]

In *Russell*, the court was presented with the wife's letters to her husband's nurses evidencing affection towards him and definite intent that the family bonds not be severed.

In contrast, in *Featherstone v. Chapin*,[41] the husband was a violent alcoholic whose dangerous behavior forced the wife and children to reside elsewhere. A former police officer was hired to supervise the husband in his long periods of intoxication. The court disallowed application of the family expense law to require the wife to pay for the husband's

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[38]Id., at 123.

[39] *Russell v. Graumann,* 40 Wash. 667, 82 P. 998 (1905).

[40]Id., at 990.

[41] *Featherstone v. Chapin,* 93 Ill. App. 223 (1901).

"supervision." The court found that the husband's alcoholism and attendant misconduct had scattered his "family," so that the "family expense" doctrine was inoperative. A family separated by one adult member's inability to support the rest would not be charged with his expenses, as a family did not exist.[42]

As can be seen, the best argument against a creditor's attempt to charge one spouse for goods and services furnished to the other is some objective demonstration of a decision to no longer live together as a family.

IV. EXISTENCE OF A "FAMILY EXPENSE."

A closely related, but nevertheless separate, test that expenses must meet is that goods or services purchased must be expenses for the "family," as opposed to those "* * *individual, personal, or business expenses of a member of the family which do not contribute to family convenience, enjoyment or comfort."[43]

Although the definition of "family expense" is more liberal than that of "family necessity" under the common law, the term would include the same essentials, including water, heat, light and telecommunications.[44] When comparing these two distinct doctrines, there are, in general, fewer qualifications of need and frugality when charging spouses with "family expenses" than with "necessities."[45]

V. THE EXISTENCE OF “FAMILY NECESSITIES."

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[42] Id., at 226 - 227.

[43] AM. JUR. 2D., supra note 1.

[44] Id., at §§ 373 - 374.

[45] Id., at §§ 371 *et seq.*; *see*, *Hyman v. Harding*, 162 Ill. 357, 44 N.E. 754, *aff'g* 54 Ill. App. 434 (1896), defining "family expenses" as those articles that "conduce in a substantial manner to the welfare of the family generally and tend to maintain its integrity," *cited in*, *Carson Pirie Scott & Co. v. Hyde*, 235 N.E.2d 643, 645 (Ill. 1968).

In addition to other elements of a family expenses statute, a creditor must plead and prove that the expenses sought to be collected are, in fact, family "necessities." To date, no cases have been reported which specifically focused on whether utility service is a "necessity." It is safe to assume, however, that the courts would include heat, water and light as a family necessity.[46] Presumably, the courts would find telephone service[47] to be a family necessity as well.[48]

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[46] The availability of public utility services has been judicially recognized as essential not only to modern convenience, but to modern health and welfare as well. The U.S. Supreme Court noted in *Craft v. Memphis Gas, Light and Water Divisio*n, 436 U.S. 1 (1978), that "utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health or safety." 436 U.S. at 18. Similarly, an Ohio federal district court has stated that "the lack of heat in the winter time has very serious effects upon the physical health of human beings, and can easily be fatal." *Palmer v. Columbia Gas Co. of Ohio*, 342 F.Supp. 241, 244 (N.D. Ohio 1972) (citations omitted); *see also*, *Stanford v. Gas Service Company*, 346 F.Supp. 717, 721 (D.Kan. 1972). An excellent canvass of cases is found in *Montalvo v. Consolidated Edison Company of New York*, 110 Misc.2d 24, 441 N.Y.S.2d 768, 776 (N.Y. 1981).

[47] One exception to this finding for telephone service is a bill rendered for the use of 900 or 976 audiotext services.

[48] But see, *Hochheim v. Cortland Tele. Co*., 1933E P.U.R. 449 (Neb. 1933). *See generally*, NATIONAL CONSUMER LAW CENTER, A CALIFORNIA ADVOCATE'S GUIDE TO TELEPHONE CUSTOMER SERVICE REGULATIONS (July 1991). According to that Manual:

"Inability to obtain affordable, accessible telephone service can create life threatening situations for the poor. The most frequently cited danger that results from lack of telephone service involves access to timely medical attention. The elderly, in addition, suffer more acutely from problems compounded by their physical isolation. In one Connecticut study, three groups were found to be `at greater-than-normal risk' because of the lack of telephone service, including `persons over 60 and living alone.' The study found that of 59 `no-telephone households' with elderly members, 30 were senior citizens living alone, 23 had a disability or serious medical problem, and 10 of those disabled seniors lived alone. More

than half of the seniors living alone (17 of 30) lived more than three minutes away from the telephone they would need to rely upon in an emergency. RPM SYSTEMS, AN EXPLORATORY STUDY OF LOW-INCOME TELEPHONE SUBSCRIBERS AND NON-SUBSCRIBERS IN CONNECTICUT (May 1988).

"Findings from a Michigan study on telephone usage among the elderly indicate that the elderly were far more likely to consider the reason for their telephone calls to be essential than were non-elderly callers. Medical calls were cited by 22 percent (compared to one percent of non-elderly); social service calls were mentioned first by 10 percent (as compared to zero percent of non-elderly); and maintaining communication was cited by 25 percent (as compared to 15 percent of non-elderly). COOPER, LOW-INCOME HOUSEHOLDS IN THE POST-DIVESTITURE ERA: A STUDY OF TELEPHONE SUBSCRIBERSHIP AND USE IN MICHIGAN (October 1988).

"The loss of telephone service also impedes the ability of the poor to seek and to obtain employment. In Montana, the lack of telephone service was recently found to be a significant barrier to employment for low-income households. The types of employment low-income households generally obtain, the court found, involve jobs offered and accepted via telephone. *Butte Community Union v. Lewis*, 745 P.2d 1128, 1131 (Mont. 1987). If a person is unavailable to a potential employer because the household lacks access to a phone, the jobs are simply offered to persons who *are* available. After all, there is no law requiring employers to seek personal contact with potential employees.

"The loss of telephone service finally impedes the ability of the poor to obtain public benefits. This lack of telephone service, for example, has direct implications for obtaining Social Security. Less than 70 percent (66.5%) of all telephone calls to Social Security Telephone Service Centers (TSCs) and less than 60 percent (58.2%) of all telephone calls to statewide Social Security offices were done with easy accessibility, according to a 1988 General Accounting Office (GAO) study. U.S. GENERAL ACCOUNTING OFFICE, SOCIAL SECURITY: LITTLE OVERALL CHANGE IN TELEPHONE ACCESSIBILITY BETWEEN 1985 AND 1988, GAO/HRD-88-129 (Sept. 1988). Busy signals, unanswered calls, disconnected calls and calls placed on hold for longer than two (2) minutes were all difficulties experienced by households seeking to contact the Social Security Administration. Overall, for example, more than one-in-seven phone calls to a Social Security office received a busy signal; a repeat call made within one minute generated a busy signal in 60 percent of the cases. For a

It has been stated that "whatever naturally and reasonably tends to relieve distress, or materially and in some essential particular, promote comfort of either body or mind, may be deemed a necessity."[49]

VI. RELIANCE ON COMBINED CREDIT.

Even in those states where the family necessaries doctrine (or family expense doctrine) has continuing validity, in order for a creditor to hold the husband liable for the bills of his wife (or *vice versa*), the creditor must show a reliance upon the husband's credit prior to entering the transaction with the wife. According to one legal commentary, "the rule appears to be well settled both at common law and under modern statutes, that if the credit for necessaries furnished to the wife is given exclusively to her, the husband is not ordinarily liable therefor."[50] Indeed, the wife and creditors must understand that the husband's credit is being used for the husband to be held liable.[51]

A rather dated annotation reports: "If one, in selling an article, gives credit for the purchase price exclusively to the person with whom he deals, it seems that he cannot afterwards* * *shift this credit to some other person, and hold the latter liable;* * *. And the

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household using a telephone in the home, this difficulty is a nuisance. For a household that lacks telephone service in the home, and lacks easy access to a pay telephone, this difficulty may lead to the denial or loss of Social Security benefits."

[49] *See generally*, *Husband and Wife*, 41 AM.JUR.2D §365 (What Are Necessities) (1968).

[50] Annotation, *Liability of husband for necessaries as affected by question of whether or not they were purchased on his credit*, 27 A.L.R. 554 (1923). (citations omitted).

[51] *See e.g.*, *Alexander v. Duffee-Freeman Furniture*, 52 Ga. App. 244, 183 S.E. 86 (1935); *Matthews Furniture v. La Bella*, 44 So.2d 160 (La. Ct. App. 1950); *Pritchard v. Bigger*, 288 Mich. 447, 285 N.W. 17 (1939); *Saks & Co. v. Barrett*, 109 N.J.L. 42, 160 A. 405 (1932); *Wickstrom v. Peck*, 179 A.D. 855, 165 N.Y.S. 408 (N.Y. App. Div. 1917); *Tille v. Finley*, 126 Ohio St. 578, 186 N.E. 448 (1933); *Heym v. Juhasz*, 68 N.E.2d 119 (Ohio Ct. App. 1943); *see also*, Annotation, *Husband's liability to third person for necessaries furnished to wife separated from him*, 60 A.L.R.2D 7 (1958).

fact that the parties are husband and wife does not apparently affect this doctrine."[52]

A separate, but earlier, annotation reports the law to be less certain:

> There is considerable uncertainty as to whether goods must be supplied on the credit of the husband in order to render him liable where the spouses are separated. It has been held that a husband is not liable for necessaries furnished during a separation where credit was given solely to the wife. A few cases extend this rule by holding that it must appear that the husband's credit was in fact pledged.[53]

Many courts have held that there simply is a priority in seeking to collect bills, a priority not based upon spousal relationship or earning capacity. "Generally reasoning that a spouse who incurs a necessary expense is primarily liable and the other spouse is secondarily liable therefore, the courts in* * *(many) cases held or recognized that the wife is primarily liable for her necessaries, while her husband is secondarily liable."[54] Note that under this rule, the primary liability is imposed upon the person incurring the debt with which to begin. The priority is established by the relationship between the debtor and creditor, not by the relationship between the husband and wife.

At least one state has held that a creditor may not hold one spouse liable without taking into consideration the responsibility of the contracting spouse. In *Jersey Shore*

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[52] Annotation, *Liability of husband for necessaries as affected by question whether or not they were purchased on his credit*, 27 A.L.R. 554 (1923).

[53] Annotation, *Husband's liability to third person for necessaries furnished to wife separated from him*, 60 A.L.R.2D 7, 23 (1958).

[54] *See e.g.*, *Memorial Hospital v. Hahaj*, 430 N.E.2d 412 (Ind. App. 1982); *Busch v. Busch Constr. Inc.*, 262 N.W.2d 377 (Minn. 1977); *Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum*, 84 N.J. 137, 417 A.2d 1003 (1980); *Surgical and Medical Neurology Associates v. Levan*, 7 Ohio Misc.2d 11, 454 N.E.2d 604 (1982).

Medical Center -- Fitken Hospital v. Estate of Sidney Baum,[55] the decedent died after a long illness which exhausted his medicaid benefits and left a balance due. The hospital successfully persuaded the lower court to expand the necessaries doctrine to hold the wife liable for the husband's debts. The rule in *Jersey Shore* operates as follows: While both spouses are liable for necessary expenses incurred by either spouse in the course of the marriage, and as long as the marriage exists, the financial resources of both spouses should be available to pay a creditor who provides necessary goods and services to either spouse. A judgment creditor must first seek satisfaction from the income and property of the spouse who incurs the debt for necessaries. Only if those financial resources are insufficient may a creditor then seek satisfaction from the income and property of the non-contracting spouse.[56]

VII. COURT ORDERED CHILD SUPPORT AS A LIMIT ON NECESSARIES.

Even in those instances where the doctrine of necessaries clearly applies, and holds one spouse liable for the bills of the other spouse, there may be some defense if the non-contracting spouse has been judicially ordered to pay child support. There is a "sharp conflict of authority" on this issue.[57] An annotation observes:

> On the one hand, the view is taken that a judicial decree or court order obligating a father to pay a certain sum for the support of his child constitutes the absolute limit of his liability, until and unless the decree or

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[55] *Jersey Shore Medical Center -- Fitken Hospital v. Estate of Sidney Baum*, 417 A.2d 1003 (N.J. 1980).

[56] *See generally*, Jay Zitter, "*Modern Status of Rule That Husband is Primarily or Solely Liable for Necessaries Furnished Wife*," 20 A.L.R.4TH 196, 204 (1983).

[57] *See*, Annotation, *Support provisions of judicial decree or order as limit of father's liability for expenses of child*, 7 A.L.R.2D 491 (1949); *see generally*, Note, *Alamance County Hospital v. Neighbors: North Carolina Rejects Child Support Provisions as a Limit on The Doctrine of Necessaries*, 65 N.C.L. REV. 1308 (1987).

order is modified.* * *on the other hand, in a number of jurisdictions, the rule is sharply different* * *and recovery is permitted, the courts holding that the financial liability is not limited by the support provisions of a judicial decree or order.[58]

any further comments or brief explanation of the split in analysis?

VIII. COMMUNITY PROPERTY STATES.

The fact that a state may be a community property state substantially changes the analysis when viewing spousal responsibilities under a family necessaries or family expense doctrine. Even in community property states, however, the doctrine is not uniform. "In cases involving debts for products or services, the courts have generally held that the mass of community property, including that set aside to the noncontracting spouse, is subject to a judgment for the community debt, or have held that specific community property set aside to the noncontracting spouse is subject to a judgment for the debt."[59]

However, and it is a huge however, "in the cases involving debts for products and services where a noncontracting spouse's *personal* liability was discussed, the courts have generally held that the noncontracting spouse could *not* be held liable." (emphasis added).[60]

In sum, spousal responsibility might be imposed in community property states. Even in these instances, however, liability is not open-ended. Liability is not a *personal* liability. Rather, it is bounded by the extent of the community property "set aside for the noncontracting spouse." Once that property has been exhausted, even if in only partial satisfaction of the debt, liability ceases.

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[58] *Support provisions of judicial decree or order as limit of father's liability for expenses of child*, *supra* note 57, at 492.

[59] Sonja Soehnel, *Spouse's liability, after divorce, for community debt contracted by other spouse during marriage*, 20 A.L.R.4TH 211, 213 - 214 (1981; supp. 1998).

[60] Id., at 214.

SUMMARY

Low-income households facing the disconnection of utility service often are faced with allegations of liability for the service of a third party. One form of this claimed third party liability occurs when a utility seeks to collect the debts of a separated, but not divorced, spouse, under a state's "family necessaries" doctrine. Under such a claim, the utility seeks to impose liability on both spouses for utility service as a "necessity of the family." While judicially overturned in some jurisdictions, the family necessaries doctrine has survived constitutional challenge in one form or another in other states.

Even when of continuing validity, however, this doctrine can face significant limits. Such limits can be raised as defenses[61] to alleged liability under the doctrine, even where the advocate may not wish to challenge the doctrine itself. A utility does not establish liability under a family necessaries doctrine by demonstrating a spousal relationship alone. In addition, the utility must show: (1) that there is a "family" in fact; (2) that the expense is one on behalf of the family and not a personal expense; (3) that the expense is for a "necessity" of life; (4) that the utility relied upon the credit of the noncontracting spouse in extending the credit; and (5) that the obligation has not been satisfied, or in some other fashion limited, by a court order of a specified sum of child support.

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[61] Whether the points raised in this memo are affirmative defenses, to be pleaded and proved by the defendant, or whether they are necessary elements of the utility's initial case, is an issue *not* addressed by this memo. On the face of the matter, it would appear that use of the court ordered child support limitation, or the exhaustion of community property, would be affirmative defenses, while each of the other issues would need to be pleaded and proved by the utility seeking to invoke the family necessaries doctrine.