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COMMENTS

THE NEW DOCTRINE OF NECESSARIES IN VIRGINIA

Under the traditional common law doctrine of necessities, a husband has the duty to support his wife¹ and is responsible for the cost of necessary goods and services² furnished to his wife by third parties if he has failed to provide the necessities himself.³ However, the recent influx of women into the marketplace and the United States Supreme Court's decisions on gender discrimination⁴ have caused a significant number of courts and state legislatures to modify the doctrine or abolish it altogether.⁵

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1. In summary, 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; it is a duty which is incident to the marriage state and arises from the relation of the marriage; and it is an inherent right which may be asserted in a divorce suit or in an independent suit therefor.

Newport v. Newport, 219 Va. 48, 56, 245 S.E.2d 134, 139 (1978). See also Catlett v. Alsop, 99 Va. 680, 686-87, 40 S.E. 34, 36-37 (1901); Alexander v. Alexander, 85 Va. 353, 368, 7 S.E. 335, 341 (1888); Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L. REV. 823 (1932).

2. See Taylor v. Taylor, 203 Va. 1, 3, 121 S.E.2d 753, 755 (1961); Hawkins v. Hawkins, 187 Va. 595, 600-01, 47 S.E.2d 436, 439 (1948). "Necessaries always include food, drink, shelter, clothing, and medical attention. Some courts have gone beyond these bare essentials and have extended a husband's liability to include any item of a necessary and suitable character, given the social position, earning capacity, and lifestyle of the spouses." Ferry, Balsam & Przybeck, *Litigation of the Necessaries Doctrine: Funding for Battered Women's Shelters*, 17 CLEARINGHOUSE REV. 1192, 1193 (1984). See also 41 AM. JUR. 2D *Husband and Wife* § 365 (1968).

3. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 6.3 (1968).

4. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (workman's compensation statute held unconstitutional because it required husbands but not wives to prove mental or physical incapacity or dependency on a deceased spouse's earnings before a widower or widow could recover compensation for the spouse's death); Orr v. Orr, 440 U.S. 268 (1979) (state statute awarding alimony to a wife but not to a husband held unconstitutional); Califano v. Goldfarb, 430 U.S. 199 (1977) (holding unconstitutional a Social Security Act provision providing survivor's benefits to a widow regardless of dependency but providing such benefits to a widower only if he proved he had been receiving at least half of his support from a deceased wife); Craig v. Boren, 429 U.S. 190 (1976) (holding that a statute imposing a higher age requirement for males than females to buy beer was unconstitutional).

5. See, e.g., Nichol v. Clema, 188 Neb. 74, —, 195 N.W.2d 233, 235 (1972) (holding that a wife is liable for medical services rendered to her husband during the time they were living together); Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum, 84 N.J. 137, —, 417 A.2d 1003, 1009 (1980) (holding that the common law doctrine of necessities which

As time has passed and married women have asserted their legal status in American society, the common law basis for the doctrine has lost credibility. Consequently, states have modified the doctrine of necessities in one of four ways.⁶ The four approaches differ in the extent and nature of the wife's liability for necessities furnished to her husband. Some courts have considered the wife's liability under common law principles and in light of public policy, while other courts have addressed it under statutory or constitutional provisions.⁷

It was not until 1983 that Virginia modified its common law doctrine of necessities. In *Schilling v. Bedford County Memorial Hospital, Inc.*,⁸ the Virginia Supreme Court declared the common law doctrine unconstitutional. The General Assembly subsequently revised Virginia Code section 55-37⁹ to make the doctrine equally applicable to both spouses,¹⁰ thus removing the unconstitutional gender-based element of the doctrine.

This comment will analyze the court's decision in *Schilling* and the impact of section 55-37 on the doctrine of necessities. It will then explore the direction that Virginia should take in applying section 55-37 in light of the doctrine's treatment in other states.

I. THE HISTORY OF THE DOCTRINE OF NECESSARIES IN VIRGINIA

A. *The Common Law Origin*

At common law, the husband and wife were considered one legal entity—their two identities merging upon marriage so that the husband's

protects a wife from liability for her husband's necessary expenses without according similar protection to a husband (constitutes a denial of equal protection of the laws); *Kurpiewski v. Kurpiewski*, 254 Pa. Super. 489, —, 386 A.2d 55, 57 (1978) (noting that the Pennsylvania Equal Rights Amendment imposes a sex-neutral burden of support upon both spouses).

6. See *infra* text accompanying notes 75-113. There are some community property states which represent exceptions to these four basic views. In those states, debts for necessities are chargeable to the marital property but must first be satisfied with community property. If there is insufficient community property to pay the debts, one of the four modifications will then be applied. See ARIZ. REV. STAT. ANN. § 25-215 (1976); NEV. REV. STAT. § 123.090 (1979); N.M. STAT. ANN. § 40-3-11 (1978).

7. See, e.g., *Gilman v. Matthews*, 20 Colo. App. 170, —, 77 P. 366, 366-67 (1904) (holding that under a statutory provision making the expenses of a family a charge upon the property of both husband and wife, a wife was responsible for necessary clothing expenses of her husband); *Condore v. Prince George's County*, 289 Md. 516, 530-32, 425 A.2d 1011, 1018 (1981) (holding the common law doctrine of necessities unconstitutional under the Maryland Equal Rights Amendment); *Estate of Stromsted v. Saint Michael Hosp. of Franciscan Sisters*, 99 Wis. 2d 136, —, 299 N.W.2d 226, 230 (1980) (holding that the husband should be primarily responsible for costs of necessities furnished to either spouse because income of wives tends to be smaller than that earned by their husbands).

8. 225 Va. 539, 303 S.E.2d 905 (1983).

9. VA. CODE ANN. § 55-37 (Repl. Vol. 1981 & Cum. Supp. 1984).

10. *Id.*

identity subsumed that of the wife.¹¹ This merger left the married woman legally incapable of incurring any obligations independent of her husband so that she was completely dependent upon him for providing items necessary to her maintenance.¹² In return, the wife gave her domestic services and consortium to her husband.¹³

The husband's duty of support included the cost of necessities provided to his wife by third parties.¹⁴ Liability was based on the husband's presumed failure to provide the necessities himself, or upon the theory that the wife was acting as his agent when she bought the necessities.¹⁵ A creditor could sell necessities to the wife and rely upon the law to force the husband to pay for them.¹⁶

In Virginia, the traditional common law view of the doctrine of necessities was accepted as the basis for the husband's obligation to support his wife and pay for her necessities.¹⁷ The definition of necessities depended primarily on the husband's financial ability¹⁸ and his wife's needs.¹⁹ Such needs included, among other things, last illness and burial expenses.²⁰

The wife's right to support and maintenance was not a property right in Virginia, but a duty imposed by law that the husband could not con-

11. *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 176, 96 S.E. 315, 321 (1918) (Burks, J., concurring), *overruled*, *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971); *see also* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 859 (4th ed. 1971).

12. *See Manatee Convalescent Center, Inc. v. McDonald*, 392 So. 2d 1356, 1357 (Fla. Dist. Ct. App. 1980); 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 404-05 (2d ed. 1898).

13. It is the duty of husband and wife to live together; each is entitled to the consortium of the other, and that includes the right of companionship, the duty of each to be the helpmeet of the other; each has the right to the society, comfort and affection of the other.

Ballard v. Cox, 191 Va. 654, 662, 62 S.E.2d 1, 5 (1950).

14. Annot., 19 A.L.R.4th 432, 434 (1983) (discussing necessity of proving husband's failure to provide necessities in an action against the husband for necessities furnished to his wife).

15. *Id.*

16. *Id.*

17. *See cases cited supra* note 2; *see also Bundy v. Bundy*, 197 Va. 795, 91 S.E.2d 412 (1956); *Ballard*, 191 Va. 654, 62 S.E.2d 1; *Ring v. Ring*, 185 Va. 269, 28 S.E.2d 471 (1946).

18. *Taylor v. Taylor*, 203 Va. 1, 3, 121 S.E.2d 753, 755 (1961); *Hawkins v. Hawkins*, 187 Va. 595, 600-01, 47 S.E.2d 436, 439 (1948); *Ring*, 185 Va. at 274-75, 38 S.E.2d at 473.

19. *Mihalcoe v. Holub*, 130 Va. 425, 429, 107 S.E. 704, 706 (1921); *see also Floyd v. Miller*, 190 Va. 303, 57 S.E.2d 114 (1950); *Ring*, 185 Va. 269, 38 S.E.2d 471.

20. *Hall v. Stewart*, 135 Va. 384, 392-93, 116 S.E. 469, 472 (1923); *see also Painter v. Lingon*, 193 Va. 840, 71 S.E.2d 355 (1952) (husband obligated to provide his wife with the means for recreation and pleasure); *Montgomery v. Montgomery*, 183 Va. 96, 97, 31 S.E.2d 284, 284 (1944) (requiring husband to "furnish a home wherein the wife is free from abuse, ill treatment, and unwarranted interference from the members of the household.").

tract away.²¹ Moreover, if a separation between spouses was the husband's fault, third party creditors could still hold him liable for necessities furnished to his wife.²² Of course, upon divorce the husband was no longer responsible for his wife's necessities beyond those obligations imposed pursuant to Virginia's alimony statutes.²³

B. *The Married Women's Act*

With the enactment of the Married Women's Acts²⁴ in the mid-nineteenth century, the legal status of married women in the United States began to change dramatically. Virginia's Married Women's Act,²⁵ enacted in 1877, severed the legal unity of spouses to allow married women to separately control and own property, to sue or be sued in their own right, and to make their own contracts independent of their husbands.²⁶ However, prior to 1984, the Virginia Supreme Court did not interpret the Married Women's Act or its modern successors²⁷ as affecting the accepted common law doctrine of necessities.²⁸ Instead the court reasoned that the

21. *Eaton v. Davis*, 176 Va. 330, 340, 10 S.E.2d 893, 898 (1940). *But see McClung v. McClung*, 206 Va. 782, 146 S.E.2d 195 (1966) (wife may lose right to require her husband to provide for her support and maintenance through marital misconduct).

22. It was the third party creditor's burden to prove that the husband was at fault for the separation and thus still liable for necessities furnished to a separated wife. *See Mihalcoe*, 130 Va. at 429-30, 107 S.E. at 706.

23. "In 1975, the General Assembly amended [Virginia] Code §§ 20-61 (the criminal non-support statute) and 20-107 (providing for support of a spouse as part of a divorce suit) to apply equally to husbands and wives." *Schilling v. Bedford County Memorial Hosp., Inc.*, 225 Va. 539, 542-43, 303 S.E.2d 905, 907 (1983).

24. *See generally* 41 AM. JUR. 2D *Husband and Wife* § 17 (1968).

25. 1876-77 Va. Acts ch. 329.

26. *See Comment, The Legislative Abrogation of Interspousal Immunity in Virginia*, 15 U. RICH. L. REV. 939, 940 (1981).

27. The modern successors to the Married Women's Act are at VA. CODE ANN. §§ 55-35 to -37 (Repl. Vol. 1981 & Cum. Supp. 1984). Section 55-35 reads in part:

A married woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried But neither her husband's right to curtesy nor his marital rights shall entitle him to the possession or use, or to the rents, issues and profits of such real estate during the coverture; nor shall the property of the wife be subject to the debts or liabilities of the husband.

Id. § 55-35.

Section 55-36 provides in part: "A married woman may contract and be contracted with and sue and be sued in the same manner and with the same consequences as if she were unmarried" *Id.* § 55-36. Prior to 1984, section 55-37 provided: "A husband shall not be responsible for any contract, liability, or tort of his wife, whether the contract or liability was incurred or the tort was committed before or after marriage." *Id.* § 55-37.

28. *Schilling v. Bedford County Memorial Hosp., Inc.*, 225 Va. 539, 542, 303 S.E.2d 905, 907 (1983); *see also Floyd v. Miller*, 190 Va. 303, 306-09, 57 S.E.2d 114, 116-17 (1950) (construing predecessor of Virginia Code Section 55-37 as not affecting the application of the common law doctrine of necessities). The Married Women's Statutes do not affect the common law doctrine of necessities because "the doctrine creates an obligation directly between the husband and the third party who provided services. This being so, the husband is liable

doctrine created an obligation directly between the husband and the creditor as a matter of personal indebtedness, and thus was not affected by contracts between the wife and the creditor.²⁹

C. *The Effect of the United States Supreme Court's Gender-Discrimination Decisions*

Before 1971, the United States Supreme Court upheld the constitutionality of any law containing gender-based classifications whenever the law was reasonably related to a legitimate governmental purpose.³⁰ Under this test, broad deference was given to the legislative determination that the law was in fact reasonably related to such a purpose.³¹ Consequently, most laws challenged under this early standard were upheld as constitutional.³² These decisions reflected the "romantic paternalism" firmly rooted in society that females were destined to be mothers and wives who needed special protection under the laws.³³

As women made gains in terms of income level and entrance into the job market, the Supreme Court recognized that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."³⁴ In *Craig v. Boren*,³⁵ the Court established an intermediate scrutiny test to apply to laws that are challenged as being gender-discriminatory. The Court held that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."³⁶ Under this new and more stringent standard, the law must relate to an "important" governmental purpose, as opposed to a "legitimate" purpose, and must have a "substantial" relation, rather than a mere "reasonable" relation, to the achievement of that governmental objective.

The heightened scrutiny accorded gender-based laws led many state legislatures and courts to reject or modify the common law doctrine of necessities as it then existed in their jurisdictions.³⁷ Although it is clear that the United States Supreme Court considered support of a needy

on his personal indebtedness, not on a contract between the wife and the service provider." *Id.*

29. *Schilling*, 225 Va. at 542, 303 S.E.2d at 907.

30. See Note, *Inequity in Marital Liabilities: The Need for Equal Protection When Modifying the Necessaries Doctrine*, 17 U. MICH. J.L. REF. 43, 48 (1983).

31. *Id.*

32. *Id.*

33. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

34. *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975).

35. 429 U.S. 190 (1976).

36. *Id.* at 197.

37. See cases cited *supra* note 5.

spouse to be an important governmental objective,³⁸ most states that have considered the constitutional question have decided that placing upon the husband the responsibility for a wife's necessities is not an act substantially related to achievement of that important objective.³⁹

By allowing the wife to escape liability for the cost of necessities she has purchased for herself, the common law doctrine discriminates against the husband under the Equal Protection Clause of the fourteenth amendment.⁴⁰ The means employed by the doctrine are not substantially related to the goal of providing for needy spouses because the doctrine fails to include needy husbands (underinclusive), it benefits non-needy wives (overinclusive), and there are at least three gender-neutral alternatives to achieving that goal.⁴¹

Although most of the gender-discrimination decisions were handed down by the United States Supreme Court in the 1970's,⁴² it was not until 1983 that the Virginia Supreme Court dealt with the common law doctrine of necessities in light of those decisions. The opportunity presented itself in *Schilling v. Bedford County Memorial Hospital, Inc.*⁴³

II. THE ROOTS OF THE NEW DOCTRINE OF NECESSARIES IN *Schilling v. Bedford County Memorial Hospital, Inc.*

A. *Facts*

Mrs. Schilling received necessary medical services from Bedford County Memorial Hospital on four occasions in 1977 and 1978. Upon each admission to the hospital, she signed a promissory note which, upon discharge, was filled in by the hospital in the amount of its charges. At the time, Mrs. Schilling was living with her husband and both were unemployed. Mr. Schilling's only significant asset was the real estate where he and his wife lived. Mrs. Schilling had no assets. When requested to do so, Mr. Schilling refused to guarantee payment of his wife's expenses, although he testified at trial that his wife had always paid her medical bills with money he provided. Nevertheless, the hospital followed its general policy and listed Mr. Schilling as "guarantor" of his wife's account. Mrs. Schilling later died and the hospital sued Mr. Schilling for the cost of services rendered to his wife.⁴⁴

38. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr v. Orr*, 440 U.S. 268, 280 (1979).

39. See, e.g., cases cited *supra* note 5.

40. U.S. CONST. amend. XIV, § 1; see generally cases cited *supra* note 4.

41. Note, *supra* note 30, at 52-56.

42. See cases cited *supra* note 4.

43. 225 Va. 539, 303 S.E.2d 905 (1983).

44. *Schilling v. Bedford County Memorial Hosp., Inc.*, 225 Va. 539, 541, 303 S.E.2d 905, 906 (1983).

The trial court granted judgment for the hospital in the amount claimed, holding that Mr. Schilling was liable for his wife's bills under the doctrine of necessities.⁴⁵ On appeal, the Virginia Supreme Court reversed the circuit court's decision and held that the common law doctrine of necessities was unconstitutional.⁴⁶

B. *Analysis*

After deciding that the doctrine of necessities was applicable to the case,⁴⁷ the Virginia Supreme Court addressed the issue of whether the common law doctrine violated article I, section 11 of the Virginia Constitution⁴⁸ and the Equal Protection Clause of the fourteenth amendment to the United States Constitution.⁴⁹ Mr. Schilling contended that the doctrine was unconstitutional as applied at common law because it contained a discriminatory gender-based classification that did not serve an important governmental objective and was not substantially related to the achievement of that objective.⁵⁰

As previously noted,⁵¹ the United States Supreme Court had established that, in order for a gender-based classification to be constitutional, the classification must serve an important governmental objective and be substantially related to the achievement of that objective.⁵² Utilizing this test, the Virginia Supreme Court reasoned that, although prompt and efficient medical service is a legitimate and important state concern, the gender-based classification does not substantially relate to the promotion of this interest and is, therefore, unconstitutional.⁵³ By imposing financial

45. *Id.* at 541, 303 S.E.2d at 906. The trial court held as an alternative ruling that Schilling was liable under an agency theory, in that his wife pledged his credit with the apparent authority to do so. The Virginia Supreme Court said that this holding was not supported by credible evidence and therefore could not stand. *Id.*

46. *Id.* at 544, 303 S.E.2d at 908.

47. *Schilling v. Bedford County Memorial Hosp., Inc.*, 225 Va. 539, 544, 303 S.E.2d 905, 908 (1983); see also *supra* text accompanying notes 25-29. The court rejected the hospital's contention that by amending Virginia Code sections 20-61 (criminal nonsupport statute) and 20-107 (providing for support of a spouse as part of a divorce suit) to apply equally to husbands and wives, the General Assembly had by implication also amended the necessities doctrine to be gender-neutral. *Schilling*, 225 Va. at 542-43, 303 S.E.2d at 907. See also VA. CODE ANN. § 20-61 (Repl. Vol. 1983 & Cum. Supp. 1984); VA. CODE ANN. § 20-107.1 (Repl. Vol. 1980 & Cum. Supp. 1984).

48. VA. CONST. art. I, § 11. "[A]nd that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination." *Id.*

49. U.S. CONST. amend. XIV, § 1. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

50. *Schilling*, 225 Va. at 543, 303 S.E.2d at 907.

51. See *supra* text accompanying notes 30-36.

52. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

53. *Schilling*, 225 Va. at 544, 303 S.E.2d at 908.

liability on the husband for necessary expenses, the doctrine only benefits the wife and does nothing to encourage the prompt and efficient treatment of a hospital's married male patients.⁵⁴

The court noted that the United States Supreme Court has struck down a number of statutes which provided unequal benefits to men and women on the assumption that women were financially dependent upon men.⁵⁵ In those cases, the United States Supreme Court explained that gender-based classifications cannot be justified on the bases of "archaic and overbroad generalizations,"⁵⁶ "old notions,"⁵⁷ and "role-typing,"⁵⁸ which conclude that the wife plays a dependent role, while the husband's primary responsibility is to provide for the family.⁵⁹ The Virginia Supreme Court concluded that the common law doctrine of necessities has its roots in the same outdated assumptions concerning proper male and female roles in society, and declared the doctrine unconstitutional.⁶⁰ The judgment of the trial court was reversed and final judgment entered for Mr. Schilling.⁶¹

Rather than declare the doctrine unconstitutional, the hospital urged the court to simply extend the doctrine to apply to wives as well as to husbands. The court refused to do so, noting that extension of the doctrine, if advisable, was a task for the General Assembly.⁶² This decision paved the way for the 1984 amendment to Virginia Code section 55-37 which extended the doctrine to both spouses, and thus created a new doctrine of necessities in Virginia.

54. *Id.*

55. *Id.* See also cases cited *supra* note 4.

56. *Califano v. Goldfarb*, 430 U.S. 199, 211-12 (1977) (striking down a statute providing unequal benefits to men and women on the assumption that women were more financially dependent).

57. *Stanton v. Stanton*, 421 U.S. 7, 10 (1975) (striking down a statute providing for child support to males for a longer period of time than females).

58. *Id.* at 14-15.

59. *Id.*

60. *Schilling*, 225 Va. at 544, 303 S.E.2d at 908.

61. *Id.*

62. *Id.* Although the court had held in the past that, where possible, it would rely on Virginia's Constitution rather than referring to that of the United States, its analysis was the same under both Constitutions in this case because article I, section 11 of the Virginia Constitution is no broader than the Equal Protection Clause of the U.S. Constitution. *Id.* at 543, 303 S.E.2d at 907. See also *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 588, 281 S.E.2d 915, 922-23 (1981); *Archer v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

III. THE STATUTORY CREATION OF THE NEW DOCTRINE OF NECESSARIES IN VIRGINIA

In April 1984, through revision of Virginia Code section 55-37,⁶³ the Virginia General Assembly extended the common law doctrine of necessities to apply equally to both spouses. This extension removed the unconstitutional gender-based element of the doctrine which the Virginia Supreme Court attacked in *Schilling*. The General Assembly gave the doctrine a new life in a constitutionally gender-neutral form.

Prior to 1984, section 55-37 of the Virginia Code stated: "A husband shall not be responsible for any contract, liability or tort of his wife, whether the contract or liability was incurred or the tort committed before or after marriage."⁶⁴ As discussed previously,⁶⁵ this statute had no effect on the old common law doctrine of necessities.

The 1984 amendment added the following language to the existing statute:

The doctrine of necessities as it existed at common law shall apply equally to both spouses, except where they are permanently living separate and apart. No lien arising out of a judgment under this section shall attach to the judgment debtors' principal residence held by them as tenants by the entireties.⁶⁶

The language used by the General Assembly in Virginia Code section 55-37 creates a problem when one attempts to interpret the precise meaning of the statute. The statute states that the doctrine "shall apply equally to both spouses."⁶⁷ However, this wording is ambiguous because it simply declares that the doctrine of necessities itself shall be applied to male and female spouses alike, but leaves unaddressed the specific nature and degree of liability to be borne by each spouse for the cost of necessities incurred by one spouse. To respond to this ambiguity it will be necessary for the Virginia courts to adopt one of the four existing approaches to the new doctrine of necessities.⁶⁸ The approach selected

63. VA. CODE ANN. § 55-37 (Repl. Vol. 1981 & Cum. Supp. 1984).

64. *Id.*

65. See *supra* text accompanying notes 25-29. Under the Married Women's Acts, it has been generally recognized that a wife may bind her separate estate by contract for necessities although these statutes do not specifically touch on the liability of a wife for necessities absent an express contractual understanding or agreement. Annot., 20 A.L.R.4th § 2, at 196 (1983).

66. VA. CODE ANN. § 55-37 (Cum. Supp. 1984).

67. *Id.*

68. At least a handful of states appear to adhere to the doctrine of necessities as it existed at common law. See, e.g., *Memorial Hosp. of Alamance County, Inc. v. Brown*, 50 N.C. App. 526, ___, 274 S.E.2d 277, 280 (1981) (holding a separated husband liable for his wife's medical expenses); *Bowes v. Bowes*, 43 N.C. App. 586, ___, 259 S.E.2d 389, 392 (1979) (citing the common law doctrine), *cert. denied*, 299 N.C. 120, 262 S.E.2d 5 (1980); *Banker v. Dodge*,

should serve the needs of both the family and the creditor.

In analyzing which approach Virginia should take, it is helpful to examine the four approaches other states have taken to either modify or abolish the common law doctrine of necessities.⁶⁹ The first and most common approach is to hold both spouses jointly and severally liable for the necessities of either spouse. This view is most often adopted in states through "family expense" statutes, by equal rights amendments, or by statutes enacted to deal specifically with the question of necessities.⁷⁰ The second approach is to hold neither spouse liable for necessities furnished to the other spouse in the absence of an express or implied contract.⁷¹ The third approach is to hold the husband primarily responsible and the wife secondarily responsible for payment of necessities furnished to either spouse.⁷² The fourth approach is to hold a spouse responsible for the necessities of the other spouse only if the resources of the spouse incurring the debt are insufficient to pay it.⁷³

A. *Joint and Several Liability*

The joint and several liability approach has been the subject of criticism since its adoption.⁷⁴ In *Cooke v. Adams*,⁷⁵ the Mississippi Supreme

126 Vt. 534, ___, 237 A.2d 121, 123 (1967) (indicating in dictum that a husband may be primarily liable for his wife's medical expenses); KY. REV. STAT. ANN. § 404.040 (Baldwin 1983) (codifying common law doctrine).

69. For a summary of the current legal status of the doctrine of necessities in every state, see Ferry, Balsam & Przybeck, *supra* note 2, at 1195-1200.

70. See ILL. ANN. STAT. ch. 40, § 1015 (Smith-Hurd 1983) (Equal Rights Amendment); IOWA CODE ANN. § 597.14 (West 1981) (no Equal Rights Amendment). For a more complete discussion of this approach, see *infra* text accompanying notes 75-87.

71. See, e.g., *Condore v. Prince George's County*, 289 Md. 516, 425 A.2d 1011 (1981). For a more complete discussion, see *infra* text accompanying notes 102-104.

72. See, e.g., *Page v. Welfare Comm'r*, 170 Conn. 258, 365 A.2d 1118 (1976) (interpreting CONN. GEN. STAT. § 46-10 (1981)); *Schalk v. Schalk*, 168 Neb. 229, 95 N.W.2d 545 (1959); *Klump v. Klump*, 96 Ohio App. 93, 121 N.E.2d 273 (1954); *Marshfield Clinic v. Discher*, 105 Wis. 2d 506, 314 N.W.2d 326 (1982) (upholding the constitutionality of holding the husband primarily liable for either spouse's necessities); W. VA. CODE § 48-3-22 (1980). For a more complete discussion, see *infra* text accompanying notes 88-101.

73. See, e.g., *Memorial Hosp. v. Hahaj*, 430 N.E.2d 412 (Ind. App. 1982) (married woman held liable for own debts in her own behalf, then her husband secondarily liable if the wife is unable to pay); *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); see also *Manatee Convalescent Center, Inc. v. McDonald*, 392 So. 2d 1356 (Fla. Dist. Ct. App. 1980) (holding the doctrine of necessities unconstitutional as an invalid gender based classification but expressly leaving open the question of whether the spouse not incurring the debt is liable only if the spouse incurring the debt is unable to pay); Note, *Equal Protection and Spousal Debt: Novel Application of Necessaries Doctrine*, 11 STETSON L. REV. 173 (1981). For a more complete discussion, see *infra* text accompanying notes 105-13.

74. See *Jersey Shore Medical Center-Fitkin Hosp.*, 84 N.J. at ___, 417 A.2d at 1009 (stating that joint and several liability would result in the immediate exposure of one spouse's property for a debt incurred by the other spouse, thus giving a creditor the same benefits as

Court held that, in the absence of an express agreement, a married woman should be held jointly and severally liable with her husband for necessities obtained for her own personal use or benefit under circumstances which would imply a contract on her part for such goods and services.⁷⁶ The court reasoned that women today are often the "breadwinners" and have incomes and estates equal to those of their husbands.⁷⁷ As a result, the court ruled that a physician could seek recovery for medical expenses from a deceased wife's estate.⁷⁸

Another theory used to justify joint and several liability is that a wife's contract is personal and independent of the refusal or inability of her husband to supply her and her children with necessities.⁷⁹ Regardless of the noncontracting spouse's reason for inability or refusal to pay for necessities, the contracting spouse is deemed to act for the benefit of both spouses, who are considered to be one economic unit. Therefore, both spouses should be held jointly and severally liable for necessities.⁸⁰

Although joint and several liability would certainly treat both spouses equally, it would be "equality with a vengeance."⁸¹ It would result in the immediate exposure of one spouse's property for a debt incurred by the other spouse, giving the creditor the same benefits as if both spouses had agreed to joint liability.⁸² As one court has noted, "[n]either equity nor reality justifies imposing unqualified liability on one spouse for the debts of the other or exempting one spouse from liability for the necessary expenses of the other."⁸³

Should Virginia choose the joint and several liability approach, it would result in a hard and fast rule that does not take into consideration the financial circumstances and abilities of the individual spouses.⁸⁴ This approach strikes a great imbalance in favor of creditors by giving creditors equal access to the dependent spouse, who may have few or no assets, even though the independent spouse incurred the debt for the necessities.⁸⁵ This imbalance tends to ignore the reality that spouses differ in their ability to pay for necessities and does not take into account which spouse actually incurred the debt.⁸⁶ Joint and several liability reduces the

if both spouses had agreed to joint and several liability).

75. 183 So. 2d 925 (Miss. 1966).

76. *Id.* at 926-27.

77. *Id.* at 927.

78. *Id.*

79. See *Daggett v. Neiman-Marcus Co.*, 348 S.W.2d 796 (Tex. Civ. App. 1961).

80. *Id.* at 800.

81. *Jersey Shore Medical Center-Fitkin Hosp.*, 84 N.J. at ___, 417 A.2d at 1009.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

new doctrine of necessities to a creditor's remedy, losing the support purpose of the doctrine in the process.⁸⁷

B. *Primary Liability on the Husband*

Other jurisdictions have held the husband primarily responsible and the wife secondarily responsible for necessities regardless of which spouse incurred the debt.⁸⁸ In *Estate of Stromsted v. St. Michael Hospital of Franciscan Sisters*,⁸⁹ the Wisconsin Supreme Court refused to hold the wife primarily liable for the cost of necessities, even though it agreed with the hospital that, in modern society, "women have become familiar components of the business and professional world."⁹⁰ The court was not convinced that a husband and wife should bear this liability as a joint and several obligation because statistics showed that married women remained behind their husbands as an income-producing element of the family.⁹¹ The court decided that the husband, typically the principal income-producer of the family, must continue to be viewed as having primary liability for the necessities of his household and, to the extent that the husband is unable to satisfy his obligation, the creditor may seek satisfaction from the wife.⁹² Accordingly, the court ruled that a hospital could not prevail against a decedent's wife because it was not alleged that the hospital first attempted unsuccessfully to obtain satisfaction from the decedent's estate for his medical bills.⁹³

Two years later, the same court, in *Marshfield Clinic v. Discher*,⁹⁴ held that the ruling in *Stromsted* was constitutional because the necessities doctrine benefits families by making it more likely that they will obtain important and appropriate goods and services.⁹⁵ Moreover, the court reasoned that this approach protects wives who are not economically equal to their husbands, and enables wives to obtain credit more easily.⁹⁶ The court believed that placing primary liability on the husband for neces-

87. *Estate of Stromsted v. St. Michael Hosp. of Franciscan Sisters*, 99 Wis. 2d 136, ___, 299 N.W.2d 226, 232-33 (1980) (Abrahamson, J., dissenting).

88. See *supra* note 71.

89. 99 Wis. 2d 136, 299 N.W.2d 226 (1980).

90. *Id.* at ___, 299 N.W.2d at 229-30.

91. *Id.* at ___, 299 N.W.2d at 230-31. The court relied on 1978 labor statistics from the Office of Special Labor Force Studies, Bureau of Labor Statistics, Department of Labor, in Washington, D.C. which indicated wives earned only 26% of family income on the average. *Id.* at ___n.7, 299 N.W.2d at 230-31 n.7. But see Note, *supra* note 30, at 55 (stating that in 52% of all families, the wife is at most only partially dependent on the husband and that in 3.5% of all married couple families, the wife is the only wage earner. This means that potentially 1,707,000 husbands are totally dependent on their wives).

92. *Estate of Stromsted*, 99 Wis. 2d at ___, 299 N.W.2d at 230.

93. *Id.* at ___, 299 N.W.2d at 231.

94. 105 Wis. 2d 506, 314 N.W.2d 326 (1982).

95. *Id.* at ___, 314 N.W.2d at 328-29.

96. *Id.*

saries is substantially related to the achievement of important goals because creditors will be more willing to extend their services if either spouse can be held liable for them.⁹⁷

If Virginia were to adopt this view, it would ignore dependent husbands and "demean the efforts of working wives by perpetuating the stereotypic view that the wife is the dependent spouse."⁹⁸ Although women, as a class, do tend to earn less than men, it does not follow that the wife is always dependent on her husband and thus needy.⁹⁹

Since Virginia has already decided that the common law doctrine of necessities is to apply equally to both spouses, it is highly unlikely that the Virginia Supreme Court would construe Virginia Code section 55-37 as placing primary liability on the husband for necessities. It is clear that the General Assembly wanted to create a sex-neutral scheme to remove the element of unconstitutional gender-based discrimination found to exist in the common law doctrine of necessities in *Schilling*.

The approach holding the husband primarily responsible is the only approach that continues to use gender as a factor in determining liability for necessities, and it would be contradictory for the court to adopt the approach in light of its language concerning the financial dependency of spouses in relation to gender-based classifications.¹⁰⁰ The other three approaches have the advantage of being gender-neutral, at least on their face, and thus less susceptible to constitutional challenge.¹⁰¹

C. *Neither Spouse Liable*

The neither spouse liable approach states that, absent an express or implied contract, each spouse is responsible for only his or her individual debt, regardless of the other spouse's ability to pay. Though each spouse may enjoy the benefits of necessities contracted for, only the contracting spouse is liable for the cost of those necessities.

It is unlikely that the Virginia Supreme Court would adopt an approach holding neither spouse liable for necessities furnished to the other spouse in the absence of express or implied contract. Section 55-37 makes the doctrine of necessities equally applicable to both spouses, a task the Virginia Supreme Court specifically left to the General Assembly.¹⁰² Moreover, if neither spouse were ever liable for necessities furnished to

97. *Id.*

98. Note, *supra* note 30, at 56.

99. *Id.* at 55.

100. See *Schilling v. Bedford County Memorial Hosp., Inc.*, 225 Va. 539, 543-44, 303 S.E.2d 905, 908 (1983).

101. See *supra* accompanying notes 30-42.

102. *Schilling v. Bedford County Memorial Hosp., Inc.* 225 Va. 539, 544, 303 S.E.2d 905, 908 (1983).

the other, creditors would have no recourse because they could not collect from a financially independent spouse the cost of necessities sold to a financially dependent spouse.¹⁰³ This view, though certainly gender-neutral, also overlooks the fact that husbands and wives, whether they contribute income or domestic services, are a financial unit.¹⁰⁴

D. *Debt-Incurring Spouse Primarily Liable*

This final approach embraces the view that, while both spouses are liable for the necessary expenses incurred by either spouse in the course of a marriage, a judgment creditor must first seek satisfaction from the spouse who incurred the debt. In *Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*,¹⁰⁵ the New Jersey Supreme Court adopted this approach and held that, unless there was an agreement otherwise, the income and property of one spouse will not be exposed to satisfy a debt incurred by the other spouse unless the assets of the spouse who incurred the debt are insufficient to pay the debt.¹⁰⁶ The court reasoned that, in a viable marriage, the marital partners can decide between themselves how to pay their own debts, and a creditor providing necessities to one spouse should not be able to assume that the financial resources of both spouses are automatically available for payment to the same degree.¹⁰⁷

This view is fair to creditors in that they can at least assume that, in some combination, the resources of both spouses can be used to pay the debt incurred by one spouse if the assets of that spouse alone are insufficient to cover the full amount of the debt.¹⁰⁸ While normally a person is not liable for the debt of another in the absence of an agreement, the marriage relationship provides an exception in that both spouses' incomes benefit that partnership.¹⁰⁹

If Virginia were to adopt this view, it would strike a fair balance between the rights of creditors and the spouses' economic circumstances. This approach protects creditors because they know that they will be able to collect from the financially independent spouse in the event that the

103. See *Jersey Shore Medical Center-Fitkin Hosp. v. Estate of Baum*, 84 N.J. 137, ___, 417 A.2d 1003, 1009 (1980).

104. *Id.*

105. 84 N.J. 137, 417 A.2d 1003 (1980). In this case, a hospital brought an action against a wife for the last illness expenses of her deceased husband. After deciding that the doctrine of necessities was an unconstitutional gender-based classification, the court ruled that the spouse who incurs the necessary expense should be primarily liable for the debt and the other spouse only secondarily liable. However, the court affirmed the lower court's judgment in favor of the widow because she had a right to rely on the traditional application of the doctrine as it existed prior to this decision. *Id.* at ___, 417 A.2d at 1010-11.

106. *Id.* at ___, 417 A.2d at 1005.

107. *Id.* at ___, 417 A.2d at 1010.

108. *Id.*

109. *Id.*

financially dependent spouse cannot pay. Creditors will be more likely to extend credit for necessities to dependent spouses under these circumstances, and a substantial degree of protection will be afforded to the dependent spouse who did not incur the debts of a financially independent spouse.¹¹⁰

Marshalling the marital resources in this way grants some protection to a spouse who has not expressly consented to a debt. Furthermore, this approach does not unfairly accord the same rights to a creditor who has an agreement with only one spouse as it does to a creditor who has an agreement with both spouses.¹¹¹ More importantly, this approach is a gender-neutral plan that comports with the Virginia Supreme Court's decision in *Schilling*¹¹² and still makes the common law doctrine of necessities equally applicable to both spouses under Virginia Code section 55-37¹¹³ while taking into account which spouse incurred the debt.

IV. CONCLUSION

Virginia should adopt the approach to the new doctrine of necessities which holds that one spouse will be liable for the necessities of the other spouse only if the resources of the spouse who incurred the debt are insufficient to pay for the necessities. This is the only existing view that takes into account both the creditor's rights and the economic circumstances of the spouses involved while at the same time providing for a gender-neutral, constitutional application of the doctrine. It serves the needs of creditors by establishing a procedure by which they can collect from spouses for necessities provided to one spouse while protecting those most in need of support—the dependent spouses.¹¹⁴

Under any of the views, there is always the unfortunate possibility that the spouse who has contributed domestic services to the family and who has few or no assets may be converted into a guarantor of payment for necessities provided to the other spouse and the children. However, under the circumstances, this last approach strikes the most equitable balance between the competing interests.

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110. *Id.*

111. *Id.*

112. *Schilling*, 225 Va. 539, 303 S.E.2d 905.

113. VA. CODE ANN. § 55-37 (Repl. Vol. 1981 & Cum. Supp. 1984).

114. *Id.* Virginia's modification of the doctrine also affords a significant degree of protection to the spouses in that it protects their tenancy by the entireties from the grasp of judgment creditors. Moreover, the modification also alters application of the common law doctrine of necessities so that neither spouse will be liable for the necessities of the other spouse if they are permanently living apart, regardless of which spouse was at fault in the separation. *Id.* § 55-37 (Cum. Supp. 1984).

