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Robert Berkshire

University of Nebraska College of Law

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Husband and Wife—Covenants Not To Compete—Married Women’s Right To Contract In Nebraska

Partners in a mortuary business made a contract containing a clause to the effect that if the second party to the agreement quit the partnership, he could not “set up or establish” a competing business either directly for himself or in association with others in the vicinity of North Platte for a period of ten years. This partner’s wife set up a competing business in partnership with a complete stranger to the original contract. The husband quit the old business and worked for the new business, but received no pay. The wife, while apparently doing little to aid the business, took a partner’s share of the profits. *Held:* although this was a valid covenant not to compete, the court will not grant equitable relief by specifically enforcing the contract against the business, the wife, or the former partner (the husband).¹

The common law developed the theory that the wife did not have capacity to make contracts in her own name,² basing the rule upon the concept of the unity of husband and wife. It was a “man’s world,” and because the wife’s sole responsibility was to take care of the home and family, she did not need these rights. She could, however, act through her husband. With the entry of women into business fields this situation became impractical, and through “married women’s statutes,”³ which were liberally construed, some of the common law disabilities were removed. The result is that today the law recognizes that unity exists partially between the husband and wife in that they in fact live together and their possessions are largely mingled. To consider the husband and wife completely independent before the law would be to ignore basic economic, sociological, and psychological facts. The problem in the instant case is how far should the law go in recognizing the independence of the wife?⁴

When considering the legal status of the married woman, the courts and legislatures must weigh the merits of two conflicting considerations: (1) allowing the wife to contract, thereby giving her greater freedom in the business world; and (2) protecting third parties from injury due to possible collusion between the husband and wife.⁵

sequent proceeding to claim the privilege is strong because of the great number of such investigations currently being conducted. The logical application of the rule of the instant case would require that the waiver have no effect in the later criminal prosecution.

¹ Adams v. Adams, 156 Neb. 778, 58 N.W. 2d 172 (1953).
² 1 Bl. Comm. *442.
⁵ See Ginsberg, Contractual Liability of the Married Woman in Nebraska, 20 Neb. L. Rev. 191 (1941).
Describing the effect of the Nebraska “married woman’s statutes,” an early decision assumed that the statutes did away completely with the technical common law unity of the husband and wife. However, this has not been the case in practice, and the Court recently recognized this when it observed that the common law disabilities of the married woman to contract exist in Nebraska except in so far as they have been abrogated by statute.

The right of the wife to contract independently has been recognized in these situations: contracts made by the wife as surety for the husband where there is a specific intention to bind her separate estate; a contract made independently by the wife in the engagement or learning of a specific skill; specific contracts in which the husband agrees to pay the wife for extra or unusual services rendered outside the scope of domestic duties.

The close relationship in fact between husband and wife has been recognized in other contract situations. When the wife acts as surety for her husband, but a specific intention to bind her separate estate is not included in the contract, the court will admit evidence that the wife did not intend to bind her separate estate and thus protect her separate estate. An implied contract for the husband to pay the wife for services, even services which were rendered outside the home, will not be recognized, though express contracts of this type in some cases may be. The wife is liable by statute to third persons for family necessities if satisfaction is not obtained from the husband.

In other fields of the law, a close husband-wife relationship is recognized. A suit under the “wrongful death statute” is available for the benefit of the surviving spouse. Though dower and curtesy have been abolished, statutory substitutes still provide the survivor with a substantial interest in a deceased spouse’s estate. The husband

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6 May v. May, 9 Neb. 16, 2 N.W. 221 (1879).
7 Smith v. Johnson, 144 Neb. 769, 14 N.W.2d 424 (1944).
9 Still College v. Morris, 93 Neb. 328, 140 N.W. 272 (1913).
10 Yost v. Yost, 124 Neb. 608, 247 N.W. 583 (1933).
15 See, e.g., discussion of husband-wife relationship in the tort field, Comment, 28 Neb. L. Rev. 442 (1946).
17 Neb. Rev. Stat. § 25-1201 (Reissue 1948) (the “dead man” statute). Whether the husband has an interest in the outcome of the trial sufficient to bar him from testifying as to transactions between his wife and the deceased was said by the court to depend upon the answer to the question, “will the husband gain or lose by a direct legal operation of a judgment in this case?” Oft v. Ohrt, 128 Neb. 848, 851, 260 N.W. 571, 572 (1935).
has been denied the right to testify in a civil action between a representative of the deceased's estate and his spouse, concerning a transaction between the wife and the deceased. A wife cannot be a purchaser of property her husband holds as executor. However, coverture does not prevent the husband from being a valid witness to a will in which his wife is the devisee.

These cases indicate that the Nebraska Court generally restricts the wife's ability to contract in cases in which her husband is involved, but where the husband is not a party, the Court adopts a more liberal attitude toward the wife's contractual rights. In the instant case, if the husband had not "gratuitously" aided the partnership set up by the wife, thus not being involved in the wife's contract, the decision of the Court would have been more in line with these previous cases.

Two primary considerations in the instant case favor the third person in his action for equitable relief. First, the husband is obviously profiting when his wife takes her share of profits from the partnership. Second, the contract upon which the suit was brought was between partners, would seem to involve a fiduciary relationship and require a high standard of conduct. The fact that despite these considerations relief was not granted indicates that the Nebraska Supreme Court is giving greater freedom to the right of the wife to contract independently, even at the risk of failing to protect third persons who deal with either or both members of the husband-wife team.

Robert Berkshire, '55

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18 In re Estate of Jurgensmeier, 142 Neb. 188, 5 N.W.2d 233 (1942).
20 Chief Justice Cardozo explained the fiduciary concept by saying, "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of honor the most sensitive, is then the standard of behavior." Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).