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Domestic Relations--Married Woman's Domicile

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defendant intended to extort ransom; (2) the restraint of the victim lasted more than twelve hours and was for the purpose of physically injuring him, or terrifying him, or of advancing the commission of a felony or of interfering with a governmental function; or (3) the victim died during the restraint. N.Y. REV. PENAL LAW § 135.25.

The Model Penal Code published by the American Law Institute foreshadowed the changes recently made by the New York legislature. The Institute urged legislatures to reform their kidnapping statutes to prevent abusive prosecution for kidnapping. MODEL PENAL CODE § 212.1, comment (Tent. Draft No. 11, 1960). The model kidnapping statute requires that the victim be held for a substantial period of time for the purpose of either (1) ransom, (2) furthering the commission of a felony, (3) injuring or terrorizing the victim or (4) interfering with a governmental function. It is further provided that kidnapping is a first degree felony only when the victim is not released alive in a safe place prior to trial. MODEL PENAL CODE, § 212.1 (Tent. Draft No. 11, 1960).

These statutes eliminate the difficult problem encountered in the *Knowles*, *Jacobs* and principal cases. Whether courts in other states will have to wrestle with this problem must be answered by the legislators or prosecutors in the respective states. As Justice Carter pointed out in the *Knowles* case, the question should not be answered by the prosecutors.

Forrest Hansbury Roles

Domestic Relations—Married Woman's Domicile

H, a resident of Texas, married *W*, a resident of West Virginia. After four years of marriage, *W* returned to West Virginia on December 26 and seven days later brought suit for divorce on grounds of cruelty. *H* moved that the action be dismissed for lack of jurisdiction. *H* contended that neither he nor *W* met the residence requirements of the West Virginia Code. The trial court overruled *H*'s motion and granted the divorce. *H* appealed. Held, reversed. According to the West Virginia Code, when a suit for divorce is not based on adultery, one of the parties must have been a bona fide resident of the state for at least one year prior to the institution of the suit. When a woman marries, the domicile of

her husband automatically becomes her legal domicile. A party can have but one domicile; therefore, *W* lost her domicile in West Virginia when she married. When *W* returned to West Virginia she was here seven days; therefore, she could not meet the one year requirement of the West Virginia Code. The Circuit Court of Lincoln County did not have jurisdiction to grant her a divorce. *Tate v. Tate*, 142 S.E.2d 751 (W. Va. 1965).

According to a general common law rule a married woman's domicile is the same as her husband's. At common law this rule was based on the theory that when a woman married she and her husband became one in the eyes of the law. Her legal existence was suspended during marriage or at least incorporated into that of her husband. *Shute v. Sargent*, 67 N.H. 305, 36 Atl. 282 (1893).

An exception to this general rule has developed in most jurisdictions; for purposes of divorce a wife may establish a domicile separate from her husband's. By 1869 the United States Supreme Court recognized this divorce exception. *Cheever v. Wilson*, 76 U.S. (9 Wall.) 108 (1870). In *Carty v. Carty*, 70 W. Va. 146, 73 S.E. 310 (1911), the West Virginia Supreme Court recognized this divorce exception when it held that a wife could establish a separate domicile in West Virginia for purposes of obtaining a divorce although her husband was domiciled in Ohio. This exception to the common law rule is now so well settled as to be assumed without discussion in many cases. Annot., 39 A.L.R. 710 (1925). See also Colson, *West Virginia Divorce Law*, 43 W. VA. L. REV. 120 (1936).

In the principal case it was not disputed that *W* had once been domiciled in West Virginia; therefore to determine that she could not maintain her suit it was first necessary to demonstrate that she had lost that domicile. *W* contended that because *H* had moved from place to place, he had failed to establish any matrimonial domicile and she retained her West Virginia domicile. This contention is reminiscent of *Berlingieri v. Berlingieri*, 372 Ill. 60, 22 N.E.2d 675 (1939). In that case the wife had been domiciled in Illinois prior to her marriage to a man described by the Illinois Supreme Court as an international itinerant. The husband had failed to establish a permanent domicile; therefore, the wife's domicile could not shift to that of her husband. In the principal case the general common law rule was emphasized in order to

dispose of *W's* contention that her marriage had not affected her West Virginia domicile. The essential points were that *H* was not domiciled in West Virginia and *W's* domicile had followed his. Concerning *W's* contention that no marital domicile had been established, apparently the West Virginia Supreme Court accepted the evidence that *H* was, "a citizen of Texas. . . ."

After determining that *W* had lost her prior domicile in West Virginia, it was necessary to determine whether her seven day return was sufficient to confer divorce jurisdiction on the West Virginia courts.

WEST VIRGINIA CODE ch. 48, art. 2, § 8(b) (Michie 1961) sets out two requirements concerning jurisdiction in divorce suits. No such suit shall be brought unless (1) one of the parties at the institution of the suit is a bona fide resident of West Virginia, and (2) that residence has continued for at least one year preceding institution of the suit. As pointed out in the principal case, residence and domicile are synonymous as used in divorce statutes. Both of these code requirements must be met to confer jurisdiction. It was apparent that *W's* seven day return did not fulfill the one year time requirement; therefore, it was unnecessary to consider whether that return satisfied the first requirement of section eight (b). In order words, it was unnecessary to determine whether a married woman could establish a separate domicile in West Virginia for divorce purposes.

Persons not familiar with this area of the law must be careful not to confuse the reasoning in the principal case. One not aware of the divorce exception could make the mistake of thinking *W* failed to meet the first requirement of section eight (b), *i.e.*, that she was without the power to establish a separate domicile. This is not the law; the divorce exception was recognized in West Virginia in 1911. *Carty v. Carty, supra*.

In the principal case why was the general rule discussed so thoroughly and the divorce exception not mentioned? The reason the general rule was discussed was to dispose of *W's* contention that the marriage had not affected her West Virginia domicile. The reason the divorce exception was not discussed was that the case could be decided without applying that exception.

W probably did establish a domicile by virtue of her seven day return. In fact the West Virginia Supreme Court assumed this

arguendo. "[S]he left the place where she and her husband were living . . . and again became a resident of Lincoln County. . . ." No basis for this assumption was expressed.

Lynne Ward Rexroad

Estate Tax—The Marital Deduction and Powers of Appointment

The decedent devised property in trust to pay the income to his wife and son for their lives with a power in the wife to consume the corpus if necessary for their combined support and maintenance. The will provided for a remainder over after the death of the wife and son. The estate took the devised property as a marital deduction. The Commissioner of Internal Revenue ruled that the wife's interest was not a life estate with a power of appointment that would qualify for the marital deduction. *Held*, ruling affirmed.

The court held that the interest passing under the will did not qualify for the marital deduction because the wife did not have a power of appointment over a specific portion of the property and the wife's power was not exercisable by her in all events. Even if the wife had a life estate with a power of disposal as allowed by West Virginia statute, her interest was something less than a life estate with a power to appoint to herself or to her estate and thus would not qualify for the marital deduction. *Flesher v. United States*, 238 F.Supp. 119 (N.D. W. Va. 1965).

The marital deduction of the Federal Estate Tax law allows a testator to devise up to 50% of his adjusted gross estate to a surviving spouse without incurring estate tax liability on that amount. INT. REV. CODE OF 1954, § 2056. One type of devise which will qualify for the marital deduction is a gift of a life estate with a general power of appointment to the surviving spouse. INT. REV. CODE OF 1954, § 2056(b) (5). A marital deduction is allowed if the surviving spouse's life estate contains the following features: the surviving spouse must be entitled to the entire income from her interest in the corpus for life; the income must be payable annually or at more frequent intervals; the power must be exercised by the surviving spouse alone and in all events; the interest cannot be subject to a power of appointment in anyone else but the surviving spouse; and the surviving spouse must have the power