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Estate Tax--Ascertainable Standard Exception to General Power of Appointment Inclusion

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ABSTRACTS

Divorce—Sale of Property by Court Order

The circuit court, having granted a divorce sought by wife, *W*, directed the sale of *W*'s property at public sale under the authority of W. VA. CODE ch. 48, art. 2, § 13, 19 (Michie 1966). *W* instituted this prohibition proceeding contending that the circuit court lacked jurisdiction to order the sale even with the consent, approval, and agreement of both parties to the divorce. *Held*, writ awarded. The circuit court lacked jurisdiction to direct the sale and order the proceeds divided between *H* and *W*, even if their consent had been given. *Collins v. Muntzing*, 157 S.E.2d 16 (W. Va. 1967).

The court, relying on its decisions in *Hammond v. Worrell*, 144 W. Va. 83, 106 S.E.2d 521 (1958) and *Farley v. Farley*, 149 W. Va. 352, 141 S.E.2d 63 (1965), held inapplicable W. VA. CODE ch. 48, art. 2, § 15 (Michie 1966) which gives the court the power to make an order concerning the estate of the parties or either of them in cases relating to the maintenance of the parties and or custody of their children. The court also held inapplicable W. VA. CODE ch. 48, art. 2, § 19 (Michie 1966) which relates to the power of the court to require one party to a divorce proceeding to convey real estate to the other. The court did, however, indicate that the authority granted under W. VA. CODE ch. 48, art. 2, § 19 (Michie 1966) coupled with a written agreement between the husband and wife could bring about a different result than that in the principal case. *Farley v. Farley*, 149 W. Va. 352, 359, 141 S.E.2d 63, 68 (1965).

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H received property from his deceased wife under the terms of a mutual will giving him the property for life with the power to "use, utilize, and dispose of the same," with the remainder over to their seven children. Upon *H*'s death, his executor argues that this power is limited by an ascertainable standard and is therefore a special power under § 2041 of the Internal Revenue Code. As such the property subject to the power should be excluded from *H*'s estate for federal estate tax purposes. Executor contends that W. VA. CODE ch. 36, art. 1, § 16 (Michie 1966) effectively limited *H*'s power of appointment to an ascertainable standard. This action was brought for refund of estate tax. *Held*, complaint dismissed. *H* had a general

power over the property which was not subject to an ascertainable standard and, therefore, the property subject to the power was included in *H's* gross estate in computing the federal estate tax. The court further held that although W. VA. CODE ch. 36, art. 1, § 36 (Michie 1966) limits the exercise of such powers to *lawful exercise*, such a limitation is not sufficient to be termed an ascertainable standard and thereby gain the favored exclusionary treatment under the federal estate tax. *Potter v. United States*, 269 F. Supp. 545 (N. D. W. Va. 1967).

The granting of a life estate with a power of disposition over the remainder no longer creates a fee simple in West Virginia. W. VA. CODE ch. 36, art. 1, § 36 (Michie 1966). But even so, the estate planner should limit a power of appointment for the benefit of the life tenant to an ascertainable standard if he wants to keep the value of the property subject to the power from being included in the life tenant's gross estate for estate tax purposes. Treas. Reg. 20.2041-1(c)(2) (1958) as amended T.D. 6582, 1962 Cum. Bull. 177.

Evidence—Circumstantial Evidence in a Homicide Prosecution

D was indicted for murder of her lover's wife and, on the same indictment, was convicted of voluntary manslaughter. Testimony placed *D* at the scene of the crime at the proper time and with a motive; however, no homicide weapon was produced. Testimony of deceased's husband, the lover, was that *D* usually carried a gun. The only weapon introduced into evidence, said by the lover to have been in *his wife's* possession at the time of the shooting was found where the lover had hidden it. No ballistics tests were made to determine if the death bullet was fired from this gun. *Held*, affirmed. Positive evidence of *D* having a gun in her possession is not essential. The jury determines the truth of testimony and a reversal is prevented here because the evidence connecting the defendant with the commission of the crime was sufficient to warrant its submission to the jury. *State v. Bailey*, 155 S.E.2d 850 (W. Va. 1967).

This case attracts immediate attention, upon first reading, due to the failure to positively connect the defendant with a homicide weapon. However, research reveals no case in which the actual production of a homicide weapon is an essential element of a homicide offense. As stated by the court, circumstantial evidence can be used to convict one of a crime with the jury determining the weight