



4-1-1977

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Recommended Citation

Steven F. Stratman, *Significance of Divorce Invalidation Decrees for Purposes of Internal Revenue Code #2056(a)*, 52 Notre Dame L. Rev. 702 (1977).

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THE SIGNIFICANCE OF DIVORCE INVALIDATION
DECREES FOR PURPOSES OF INTERNAL
REVENUE CODE § 2056(a)

I. Introduction

Section 2056 of the Internal Revenue Code provides for a deduction from a decedent's gross estate of an amount equal to the value of any interest in property which passes from the decedent to his surviving spouse at deathtime, not to exceed one half the value of his adjusted gross estate.¹ Congress formulated this marital deduction in 1948 in an attempt to equalize estate tax burdens imposed on residents of community property states and common law states.² Prevalent judicial opinion since its enactment has reflected this congressional intent.³ Understandably, the attractive opportunities for tax savings offered by the marital deduction has made it an important factor in estate tax planning.⁴

In order to receive the advantages of the marital deduction, § 2056(a) requires a "passing of property from a decedent to a *surviving spouse*."⁵ However, the Code does not provide a definition of the term "surviving spouse," nor does it establish guidelines for a determination of marital status. Normally the status of the marital relationship is clear, thus obviating the need for a litigated determination of the meaning of "surviving spouse." Yet the right combination of events, particularly in the context of ex parte divorces, may make this determination both difficult and necessary.

Ex parte divorces present an attractive means of escaping a deteriorated marriage and can be readily obtained by either spouse. Such divorces, however, may be challenged by the absent spouse for lack of proper jurisdiction by the divorce-granting court. Nevertheless, even a successful challenge, evidenced by an invalidation decree issued by a court of the couple's marital domicile, may not deter the divorced spouse from remarrying. When the remarried party passes property to his subsequent spouse at deathtime, pursuant to a § 2056 marital deduction, the validity of his ex parte divorce becomes critical. Given these circumstances, the question is raised as to which spouse must receive the property in order to permit the decedent's estate to take advantage of the marital deduction. Perhaps more importantly, a further query arises concerning the extent to which a divorce decree which has been invalidated by a later court judgment will be respected for marital deduction purposes.

Several recent estate tax decisions have turned on this issue with the United

1 I.R.C. § 2056(a). Although the Tax Reform Act of 1976 altered several quantitative aspects of the deduction, particularly affecting § 2056(c), it had no effect on the statute as it is treated in this note.

2 For a general discussion of the congressional purposes underlying the enactment of the marital deduction provisions, see 4 J. MERTENS, LAW OF FEDERAL GIFT & ESTATE TAXATION § 29.01 (Supp. 1972) [Hereinafter cited as MERTENS].

3 *Id.*

4 C. LOWNDES, R. KRAMER & J. MCCORD, FEDERAL ESTATE AND GIFT TAXES 438 (3d ed. 1974).

5 I.R.C. § 2056(a). (Emphasis added). "Surviving spouse," as used herein will assume the feminine gender for purposes of convenience only. Clearly, the statute permits either spouse to receive property within the meaning of § 2056 as the surviving spouse.

States Tax Court and the Court of Appeals for the Second Circuit arriving at conflicting conclusions.⁶ Any attempt to address this specific question necessarily requires some investigation into a host of related issues, including conflicts of law and state domestic relations law. Although some attention will be given to these related issues, this note will focus on the immediate tax ramifications involved with this problem. Specifically, the decisions in these recent cases, and the reasons advanced to support them, will be examined. Additionally, several major points of conflict currently existing between the Commissioner and the Second Circuit will be considered. These include: 1) the interpretation of "surviving spouse" vis-a-vis the applicable state domestic relations law; 2) determining which state law should govern one's marital status for estate tax purposes; 3) the effect of a divorce invalidation decree, outstanding against one spouse, on the estate tax status of the other; and 4) the desirability of determining a decedent's tax status by a strictly "legalistic" approach.

Although an analysis of these issues and the conflicting court results may not provide a clear answer to the problem, it may serve to illuminate the practical and theoretical questions in controversy while indicating alternative ways to resolve this estate tax dilemma.

II. History and Purpose of the Marital Deduction

Congress, through the powers granted it by the Constitution, possesses the right to tax the transfer of wealth from one generation to another.⁷ However, these powers are tempered by constitutionally imposed limitations of reasonableness and uniformity, designed to protect taxpayers from outrageous and disparate treatment.⁸ Thus, the history and purposes of a federal estate tax statute must be studied in light of these constitutional commands.

Prior to 1942, the taxation of transfers of property at deathtime by married persons depended upon the property law of the state in which the transfer took place. Since spouses in community property states could only pass that half of the community property they owned, only that half was subject to estate taxes.⁹ No such division of property existed in common law property states, since practically all the property of the marital union belonged to the husband under state law. Consequently, a substantially lower tax attached to transfers in community property states than to transfers of similar size in common-law states.¹⁰

In 1942, Congress sought to correct this inequity by amending the tax law to provide that all community property would be treated as belonging to the

6 Estate of Spalding v. Commissioner [1975] 44 TAX CT. MEM. DEC. (P-H) ¶ 75,250; 537 F.2d 666 (2d Cir. 1976); Estate of Goldwater v. Commissioner, 64 T.C. 540 (1975), 539 F.2d 878 (2d Cir. 1976); Estate of Steffke v. Commissioner 64 T.C. 530 (1975), 538 F.2d 730 (7th Cir. 1976). The validity of such marriages vary depending on several factors, including the law of the state where they are entered into. However, this problem involves a host of issues which are beyond the scope of this note.

7 U.S. CONST. art. I, § 8 provides: "The Congress shall have the Power to lay and collect Taxes, Duties, Imposts, and Excises . . . but all Duties, Imposts, and Excises shall be uniform throughout the United States."

8 *Id.*

9 H.R. REP. NO. 1274, 80th Cong., 2d Sess. (1948).

10 *Id.*

estate of the first spouse to die.¹¹ However, the 1942 amendments not only failed to produce the desired "geographical equalization," but resulted in vigorous objections from the community property states. As a result, Congress repealed the community property amendments of the 1942 Act and let the taxation of such property revert to its pre-1942 status.¹² Again attempting to redress this discrimination, Congress adopted the marital deduction as part of the 1948 Revenue Act. It reads, in pertinent part:

SECTION 2056. BEQUESTS, ETC. TO SURVIVING SPOUSE (a) ALLOWANCE OF MARITAL DEDUCTION.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d) be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his *surviving spouse*, but only to the extent that such interest is included in determining the value of the gross estate.¹³

Thus, the 1948 Act restored the rule by which estate tax liability is dependent upon the ownership of property under state law.¹⁴ For residents of community property states, the marital deduction is applicable only to that portion of the estate which represents separate property.¹⁵ Deductibility, for purposes of an interest passing to a surviving spouse, must be judged as of the time of death of the deceased spouse.¹⁶ Furthermore, since the general requirement is that a property interest must pass from the decedent to his surviving spouse, it follows that an interest which passes to someone else is not deductible. Thus, it is important to determine who, for purposes of this deduction, constitutes the "surviving spouse."

The theoretical justification for imposing taxes on the transfer and receipt of property at deathtime rests on considerations of public policy. Clearly, inheritance taxes serve to prevent the unrestrained transfer of wealth from generation to generation. In light of the marital deduction, however, the federal estate tax on transfers from one spouse to another (usually within the same generation) only partially promotes this overall tax policy. The statute implicitly recognizes a second, overriding policy, that acknowledges the community aspect of a couple's property and the right of one spouse to transfer freely a portion of that property to the other at deathtime. Whether a taxpayer must pass his property to his "legal" spouse in order for this more specific tax policy to be promoted poses a difficult problem. Though Congress chose not to define the term "surviving spouse," the term's intended meaning may be revealed through an examination of the congressional intent underlying the statute. Prior to a consideration of these issues, however, some attention must be given to the present state of migratory divorce law in this country in order to fully understand the circumstances which give rise to this surviving spouse dilemma.

11 Int. Rev. Code of 1939, §§ 811(d)(5), 811(e)(2), and 811(g)(4) (Amended 1942) 53 Stat. 120 (repealed by §§ 351, 352, and 353 of 1948 Revenue Act).

12 *Id.*

13 I.R.C. § 2056(a). (Emphasis added).

14 S. REP. No. 1013 80th Cong., 2d Sess. (1948).

15 California Trust Co., v. Riddell, 136 F. Supp. 7 (S.D. Cal. 1955).

16 I.R.C. § 2032(b)(2).

III. Migratory Divorce and the Circumstances of the Dilemma

Migratory divorces are oftentimes the result of one spouse's refusal to join the other in a divorce action in the marital domiciliary. Such divorces are facilitated by the short term divorce jurisdiction requirements of several states. However, these divorces are often subsequently found invalid. When an ex parte divorce is later invalidated by a court of another state having personal jurisdiction over both parties, the effect of that divorce for tax purposes is unclear. In the context of the marital deduction, its effect may be determinative when the divorced spouse remarries and subsequently passes property interests to his later spouse at deathtime. The Tax Court has continuously held that, for purposes of Revenue Code provisions, the marital status, its existence and dissolution, is defined by state rather than federal law.¹⁷

State legislatures have traditionally founded their divorce statutes on the much maligned concept of domicile,¹⁸ either alone or in combination with a residency requirement. Several states have demonstrated a clear interest in becoming actively involved in the granting of "quickie" or "tourist" divorces by their permissive residency or domiciliary requirements.¹⁹ Thus, it has been said that Nevada formulates the divorce law for the country.²⁰ Other states, however, have demonstrated an equally clear reluctance to intermeddle in matters in which another state has a paramount interest. Consequently, these states have developed stricter laws which will not permit courts to exercise divorce jurisdiction unless the parties to the divorce are domiciled within the state and meet a residency requirement as well.²¹

The perplexing problem of foreign divorce decrees and their consequent implications plagued the courts for years prior to the Supreme Court's exposition

17 John J. Unterman, 38 T.C. 93 (1962); Albert Gersten, 28 T.C. 756, 770 (1957), *aff'd on this issue* 267 F.2d 195 (2d Cir. 1959); Marriner S. Eccles, 19 T.C. 1049 (1953), *aff'd, per curiam* 208 F.2d 796 (4th Cir. 1953).

18 "Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." *Williams v. North Carolina*, 325 U.S. 226, 229 (1945). Domicile is generally thought to have two requisites, actual presence and intent to remain. See H. GOODRICH, *CONFLICT OF LAWS* § 26 (4th ed. 1964). The use of domicile as a basis for divorce jurisdiction has been heavily criticized. "[D]omicile is a patently deficient test in our suitcase society. . . . A domiciliary may have arrived yesterday. He may be gone tomorrow. . . . The growth of an itinerant and mobile population has seriously undermined the utility of a concept requiring a settled connection with a place called home." Rodgers & Rodgers, *The Disparity Between Due Process And Full Faith And Credit: The Problem Of The Somewhere Wife* 67 COLUM. L. REV. 1363, 1388 (1967). However, until a new basis of local jurisdiction for divorce cases is established, most states will probably adhere to the domicile concept. A. EHRENZWEIG, *CONFLICT OF LAWS*, 240, (1962).

19 The Nevada statute, for example, permits a Nevada court to grant a divorce to a party if either the plaintiff or defendant has resided in the state for at least six weeks preceding the commencement of the action. NEV. REV. STAT. § 125.020 (1973) Similar in its six week minimum residency requirement is Idaho. IDAHO CODE § 32-701 (1963).

20 Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax* 34 U. CHI. L. REV. 26, 27, (1966).

21 For example, Iowa imposes a one year residency requirement which must be met in addition to a proving of domicile before its courts may exercise their divorce jurisdiction. This requirement withstood a constitutional challenge and was upheld in *Sosna v. Iowa*, 419 U.S. 393 (1975). Most states impose such a requirement as a condition for maintaining an action for divorce. The periods vary and range from six weeks to two years. The one year period selected by Iowa is the most common length of time prescribed. IOWA CODE ANN. § 598.6 (Supp. West 1976)

on this issue in *Williams v. North Carolina*.²² In *Williams*, the Supreme Court maintained the requirement of "bona fide domicile"²³ as the basis for divorce jurisdiction if the decree is to be recognized extraterritorially. Of course, in lieu of bona fide domicile of one of the parties, personal jurisdiction of the divorce granting court can be premised on the physical presence of both parties before the tribunal. However, domicile is the most commonly asserted jurisdictional basis in this type of proceeding.

The divorce-granting state's finding of domicile and jurisdiction, however, is not absolute. Such a requirement is necessary since the finding of domicile is not the result of litigation; rather, it is merely a recitation in the pleadings and judgment that the applicable domicile requirement has been fulfilled. As the Supreme Court stated in *Williams*:

[T]he (ex parte) decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact.²⁴

Thus, the spouse who did not participate in the divorce proceedings is not bound by the jurisdictional finding of "domicile" and may collaterally attack the validity of the divorce by demonstrating that, in fact, the purported domicile did not exist.²⁵ A successful challenge to a foreign divorce, because it involves a full scale litigation of the jurisdictional fact of domicile, is entitled to full faith and credit by all other states, provided the state issuing the invalidation decree had jurisdiction over both parties to the contested action.²⁶ Therefore, the migrant spouse assumes the risk that his divorce may be invalidated by the court of another state due to an improper finding of domicile. An apparent revival of "state interest" on behalf of the stay-at-home spouse has made this risk a great one. Appellate courts have been increasingly inclined to exercise their considerable power to protect the non-consenting spouse through a refusal to recognize migratory divorces, ex parte, by denying that there existed a bona fide domicile in the rendering state.²⁷ Within this framework it becomes readily apparent that the determination of one's surviving spouse poses a significant dilemma.

22 *Williams v. North Carolina*, 325 U.S. 226 (1945).

23 The Supreme Court has not ruled on the question as of what time "bona fide domicile" must exist to entitle a divorce decree to full faith and credit in sister states. Apparently, the existence of such domicile must be as of the time when the divorce action was begun. See A. EHRENZWEIG, *supra* note 18, at 242.

24 325 U.S. at 232.

25 The rationale behind this right was outlined in *Williams*: "If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power." 325 U.S. at 231. The Court, however, noted that "the burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant." 325 U.S. at 233-34.

26 *Sutton v. Leib*, 342 U.S. 402, 408 (1952); *But see Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019, *cert. denied*, 371 U.S. 888 (1962). In *Colby*, the Nevada Supreme Court held that an invalidation decree obtained in a Maryland state court which held invalid a Nevada ex parte divorce was not entitled to recognition within the boundaries of Nevada by virtue of the full faith and credit clause. Thus, the Nevada divorce decree was not subordinated to a sister state invalidation decree of that divorce, within Nevada.

27 "The 'Nevada tourist,' or 'quickie' divorce without 'participation' will now prove futile whenever attacked by a deserted spouse who is willing to challenge it in a court battle and to shoulder the 'heavy' burden of proof." A. EHRENZWEIG, *supra* note 18, at 260 (1962).

IV. Defining Surviving Spouse

Because § 2056 constitutes a section of the Internal Revenue Code, a federal statute, the meaning of terms utilized therein present questions of federal law.²⁸ However, Congress failed to define the term "surviving spouse" within the context of § 2056. Nor is the term among those for which federal definitions or standards have been provided elsewhere. Consequently, its meaning must be derived from other sources.

In *Lyeth v. Hoey*,²⁹ the Supreme Court indicated that the will of Congress controls the meaning of taxation statutes and, in the absence of language evidencing a different purpose, those statutes should be interpreted so as to produce a uniform result nationwide. Accordingly, state law can only control when the federal taxing act by express language or necessary implication makes its operation depend upon state law.³⁰

Acknowledging this principle of federal statutory construction, the Tax Court, in *Goldwater's Estate v. Commissioner*³¹ expressed its view that the term surviving spouse refers to the same person who is the surviving spouse under the law of the state in which the decedent's estate is being administered.³² This construction of the statute best promotes uniformity in the administration of estate law while reflecting the congressional intent underlying the statute's enactment.³³ Other taxation authorities, however, feel that both the applicable law and the term's meaning are unsettled issues.

It is not clear whether Congress intended local law to control the determination as to whether the term 'surviving spouse' means one who is legally married to the decedent at his death, as contrasted with one who had been legally divorced. It is possible that it may be ultimately held that the test is whether under the state law a particular person is entitled, in his or her capacity of a spouse, to the property bequeathed or transferred.³⁴

Numerous federal statutes employ terms similar to "surviving spouse" in creating various benefits to those who qualify. Several of these statutes have provided specific definitions for these terms while others leave them undefined. A brief survey of the various interpretations accorded these similar terms may serve to demonstrate how courts have applied the necessary implication principle. It may also elucidate the interpretation dilemma created by § 2056(a).

28 *Commissioner v. Tower*, 327 U.S. 280 (1946).

29 305 U.S. 188, (1938).

30 *Id.* at 194.

31 64 T.C. 540 (1975).

32 *Id.* at 550.

33 *Id.*

34 4 MERTENS § 29.08. This same commentator posits the instance where the decedent is resident in a state which refuses to recognize a particular foreign divorce for purposes of testamentary transmission, and also permits the survivor as a spouse of the decedent to receive the property interest transferred by or from the decedent by will, deed, or intestacy, the fact of divorce is only secondary and does not itself justify allowance or disallowance. The ALI FED. INCOME, ESTATE AND GIFT TAX STAT. § X2034 (April 1955 Draft) would define the term spouse as follows: "An individual shall be treated as the decedent's spouse if and only if she survived the decedent and at the time of the decedent's death she was not legally separated from him under a final decree of divorce or a decree of separate maintenance."

When federal statutes have not clearly defined terms like "wife," "widow," "spouse," or "surviving wife," these words have usually been interpreted to include only the legal spouse, as determined by state law. The Federal Employees Liability Act³⁵ and the Jones Act,³⁶ for example, permit the decedent's personal representative to recover damages for the benefit of the decedent's "surviving widow." The Fourth Circuit, interpreting this term in *Bell v. Tug Shrike*,³⁷ a case brought under the Jones Act, concluded that the state law of the claimant's domiciliary should be applied to determine the marital status of the parties. Therefore, because the appellant was not legally married to the decedent at the time of his death according to the law of the claimant's domiciliary she was not his lawful "surviving widow" and could not recover. Here, applicable state domestic relations law governed in the absence of clearly delineated congressional requirements or established admiralty law. The Fourth Circuit summarized this interrelationship between federal statutes and state law when it stated:

Emphatically we must decline to accept the appellant's contention that by applying the law of (the claimant's domiciliary) to interpret the term "surviving widow" in the Jones Act, a federal right is being defeated by the State. There can be no federal right unless the claimant can qualify as a beneficiary under the statute. Under the circumstances this can only be achieved through a lawful marriage as that term is interpreted in the only available domestic relations law—the law of the domicile.³⁸

In some acts, Congress has outlined more clearly how the benefiting parties should be determined. The Social Security Act, for example, provides various benefits for persons qualifying as the "wife, husband, widow, or widower" of the insured.³⁹ A determination as to that status, however, depends upon whether the courts of the insured's domicile could find that such applicant and such insured individual were validly married. Here, the Congress established a two step procedure: 1) a determination must be made as to the domicile of the insured at the time the claimant files his application, and 2) in accordance with the law of that domicile, it is necessary to decide whether the claimant could be considered the "wife" of the insured at the time she files for benefits. Therefore, the applicable state law will prove determinative when benefits are awarded under this Act.

Analogizing the interpretation dilemma created by § 2056(a) to other federal statutes suggests that a resolution may lie in the application of proper state law. By looking to state law to determine the legal spouse, courts promote

35 45 U.S.C. §§ 51-60 (1970).

36 46 U.S.C. § 688 (1970).

37 *Bell v. Tug Shrike*, 332 F.2d 330 (4th Cir. 1964).

38 *Id.* at 336-37. Another federal act which fails to define a crucial term is the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970) which leaves "surviving wife" undefined. The Ninth Circuit had cause to interpret this term in *Albina Engine & Mach. Works v. O'Leary*, 328 F.2d 877 (9th Cir. 1964). The court reasoned that since marital status is ordinarily determined by local law, it "has been assumed that Congress intended the term to have the meaning which it is given by local law." 328 F.2d at 878. Therefore, courts have, in the absence of Congressional intent or definition, interpreted many such terms like surviving spouse to mean the lawful spouse. They assume that if Congress had intended for it to mean otherwise, they would have provided a specific definition or requirements that claimants must meet.

39 42 U.S.C. § 416(h)(1)(A) (1970).

the public policy considerations underlying these statutes: it discourages bigamous relationships while encouraging compliance with the domestic relations laws of the several states.

However, the significant distinction between these federal death benefit acts and the federal estate tax must not be overlooked. Whereas the former provide compensation directly to widowed or dependent persons, the estate tax marital deduction is not designed to benefit any person. Rather, it is claimed by the decedent's estate, thereby reducing the taxable estate and, simultaneously, that portion of the estate which may freely be transferred at deathtime.

The Commissioner's posture on this issue reflects the applicability of the "necessary implication" principle to statutory construction. His attitude reflects an underlying assumption that correct interpretation of § 2056(a) requires the surviving spouse to be the taxpayer's legal spouse who survives him. Accordingly, he would grant tax recognition to judicial determinations regarding a taxpayer's marital status if these determinations are made by a court of the state where the decedent's estate is administered.

The Second Circuit, however, would not allow the extension of the Commissioner's approach without the benefit of a judicial determination of status by a court of the decedent's domicile. Absent such judicial determination, it preferred to recognize the real status of the parties as it existed at the time of the taxpayer's death. Demonstrating flexibility, the court decided to base its determinations on the specific facts of each case. Consequently, it disregarded the parties' real status in one case but acknowledged it in another.

Whether a judicial determination of a person's legal marital status is necessarily binding for federal tax purposes presents a troublesome taxation problem. The treatment accorded three recent cases by the Tax Court and the Second and Seventh Circuit Courts of Appeal elucidates the competing rationales advanced for its resolution.

V. Approach of the Courts

The tax significance of divorce invalidation decrees constitutes an issue that rarely presents itself to the courts. Yet this precise question, framed in an estate tax context, has recently been addressed in three cases: *Estate of Steffke v. Commissioner*,⁴⁰ *Estate of Goldwater v. Commissioner*,⁴¹ and *Estate of Spalding v. Commissioner*.⁴²

In *Steffke*, Priscilla Baker Lane had received an ex parte Mexican divorce from her previous husband. Shortly thereafter Steffke's will, which left most of his property to his "friend," Priscilla Baker Lane, was executed. However, subsequent to the execution of his will, Steffke and Priscilla were married in a valid Wisconsin ceremony. The question arose concerning whether, for state inheritance tax purposes, this transfer of Steffke's property to Priscilla should be taxed at rates applicable to beneficiaries who are strangers to the deceased or rates applicable to widows of the deceased. The County Probate Court, based on the

40 64 T.C. 530, 538 F.2d 730.

41 64 T.C. 540, 539 F.2d 666.

42 [1975] 44 TAX CT. MEM. DEC. (P-H) ¶ 75,250.

applicable Wisconsin statute which gave no legal effect to Priscilla's ex parte Mexican divorce, determined Priscilla was not the legal wife and widow of the decedent. The Wisconsin Supreme Court affirmed the Probate Court's decision, finding that Priscilla's purported second marriage was void.⁴³ The Commissioner, relying on the Wisconsin Supreme Court's decision, disallowed the marital deduction claimed by Steffke's estate for property which passed to Priscilla. The estate's appeal to the Tax Court resulted in that court's most comprehensive treatment to date of this issue.

The circumstances present in *Steffke* afforded the Tax Court an opportunity to give its views regarding the relation of migratory divorces to § 2056. The Tax Court, in affirming the Commissioner's disallowance, recognized the general rule of construction used in the interpretation of federal tax laws. Citing *Lyeth v. Hoey*,⁴⁴ the court noted that state law may control the meaning of "surviving spouse" in a federal statute, "only [if that] federal taxing act by express language or necessary implication makes its operation dependent upon State law."⁴⁵ The Tax Court concluded that the "necessary implication of § 2056(a) makes the identification of the decedent's surviving spouse dependent upon local law."⁴⁶ The court demonstrated the intimate relationship of § 2056 to state law by examining the nature of various property interests that may lawfully be passed to the surviving spouse under the provisions of § 2056. The court recognized that the nature of community property, and such interests as property inherited by the spouse, or received through dower, curtesy, or the homestead allowance, are defined and governed by state law and "depend for their operation upon the marital status of the decedent and the identity of his surviving spouse under applicable state law."⁴⁷

Perhaps the court's most persuasive argument posited the situation in which a decedent has died intestate. Since intestacy statutes are clearly areas under state control, a person having a status similar to that of Priscilla would not have a lawful claim to any property, dower, support allowances or homestead rights, which might otherwise qualify for the marital deduction. Thus, had Steffke died intestate, no marital deduction would be allowed. Consequently, the court was not prepared to sanction treatment for intestate estates which differed from the treatment accorded testate estates, and found that the petitioner's contention would render § 2056 unworkable.⁴⁸

On appeal, the Seventh Circuit concurred with the Tax Court's reasoning and affirmed its decision.⁴⁹ In doing so, the court framed the major issue as whether Wisconsin state law, as applied by the Wisconsin Supreme Court in denying Priscilla's Mexican divorce legal effect in Wisconsin, should be recognized for § 2056 purposes. Two factors weighed heavily with the court: first, Wisconsin was the proper and controlling taxation jurisdiction; second, was the connection between § 2056 and the law of Wisconsin as the state where the

43 In re Estate of Steffke, 65 Wis. 2d 199, 222 N.W.2d 628 (1974).

44 305 U.S. 188.

45 *Id.* at 194.

46 64 T.C. at 534.

47 *Id.* at 538.

48 *Id.* at 538-39.

49 538 F.2d at 735.

decendent's property was to be administered. The court noted that § 2056(e)⁵⁰ enumerates several methods by which a person may pass interests in property to a spouse in order to qualify for the marital deduction. These ways include passing property by will, by intestacy succession, by dower, and by joint tenancy with right of survivorship.⁵¹ Each method, however, is dependent for its operation upon state law.

Considering these persuasive factors, the court held that the law of the state which has primary jurisdiction over the administration of the decedent's estate (i.e. the jurisdiction in which the decedent was domiciled at the time of his death) must be recognized.⁵² Consequently, because Wisconsin law denied legal effect to Priscilla's Mexican divorce, she would not qualify as Steffke's surviving spouse for marital deduction purposes.

Furthermore, the court noted the consistency of its holding with the position of the Commissioner in a Revenue Ruling⁵³ which stated that the IRS will abide by the last judicial decree rendered by a court which has jurisdiction over the relevant parties.

Finally, the court opined that the words surviving spouse must, of necessity, be interpreted to mean a decedent's surviving legal spouse.

We find nothing in the Code, however, dispensing with the necessity of the existence of the legal status of the marriage as a prelude to there being a surviving spouse situation. The plain meaning of the words 'surviving spouse' can have no other meaning than that the person not only outlived but bore a particular relationship here that of being a legal spouse.⁵⁴

The treatment accorded this case by the Tax Court and the Seventh Circuit reveals two points of critical importance. First, the decisions provide a general rule to be followed under these circumstances: when a prior divorce has been ruled invalid by a court of the state where the decedent's estate is being administered, the surviving spouse requirement of § 2056(a) is not satisfied by a transfer to the second spouse. Second, these courts tacitly recognize that interpretation of the term "surviving spouse" necessarily requires a determination of the legality of the decedent's marital status.

50 I.R.C. § 2056(e) provides in part:

Definition.—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

- (1) such interest is bequeathed or devised to such person by the decedent;
- (2) such interest is inherited by such person from the decedent;
- (3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;
- (4) such interest has been transferred to such person by the decedent at any time;
- (5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

This section has been relabeled under the Tax Reform Act of 1976 as § 2056(d), but remains identical.

51 538 F.2d at 735.

52 *Id.*

53 Rev. Rul. 67-442, 1967-2 C.B. 65 provided that where a state court in a proceeding in which there is personal jurisdiction of the parties or jurisdiction of the subject matter of the action, declares a prior divorce to be invalid, the Service will usually follow the later court decision in determining questions of marital status for federal estate and gift tax purposes.

54 538 F.2d at 737.

In *Estate of Goldwater v. Commissioner*, the decedent had remarried after obtaining a Mexican decree of divorce, ex parte, from his first wife.⁵⁵ Soon after his remarriage, however, a New York state trial court, applying the law of that state, and having personal jurisdiction over both parties, issued a declaratory judgment invalidating Goldwater's Mexican divorce and his subsequent remarriage.

Goldwater, in order to utilize the marital deduction, had bequeathed to his second wife an interest in property equal to, or greater than, fifty per cent of the value of his adjusted gross estate. The Commissioner, however, disallowed the deduction, asserting that the second wife did not qualify as the surviving spouse within the meaning of § 2056(a). The Tax Court opined that Congress intended the term "surviving spouse" to refer to the same person who is the surviving spouse under the law of the state in which the decedent's estate is being administered.⁵⁶

The court's analysis reflected the application of the same reasoning it had advanced in *Steffke*. A court of the state where the decedent's estate was being administered, New York, had declared Goldwater's prior divorce invalid. Therefore, the Tax Court concluded that Goldwater's second wife was not his surviving spouse and sustained the Commissioner's determination that the only marital deduction available to Goldwater's estate must be calculated on the basis of property which passed to his first wife.⁵⁷

The Tax Court's decision in *Goldwater* was appealed to the Second Circuit Court of Appeals. In its opinion, the Second Circuit heavily emphasized the proper role played by New York law in this case. Goldwater had been domiciled and his estate administered in New York. Furthermore, a New York court had held his Mexican divorce and purported remarriage invalid. Consequently, under these facts, the New York invalidation decree demanded respect, leaving the Second Circuit "no alternative but to follow the law of New York and hold that Gertrude [Goldwater's first wife] is his 'surviving spouse' and that Lee [Goldwater's second wife] does not qualify as such within the meaning of § 2056."⁵⁸

As in *Steffke*, all the relevant parties involved in *Goldwater* were domiciliaries of the same state: New York. Therefore, the domestic relations law of New York, as well as that state's property law, would clearly be controlling in all legal disputes pertaining to marital status or property distribution. Thus, although Lee had been Goldwater's spouse for nearly ten years, granting her estate tax recognition as his surviving spouse would have been a difficult decision to sustain. Neither the Commissioner nor the Second Circuit was prepared to ascribe such flexibility to § 2056(a).

⁵⁵ Goldwater's first wife tried unsuccessfully to secure a court injunction barring Goldwater from remarrying in New York or elsewhere.

⁵⁶ The court stated: "For the determination of the nature of property rights inherited by the 'surviving spouse' we must look to State law, and to consider a different person to be the 'surviving spouse' for purposes of section 2056 than is considered the 'surviving spouse' under State law would result in confusion as to the nature of the property interest inherited by the surviving spouse." 64 T.C. at 550.

⁵⁷ 64 T.C. at 551.

⁵⁸ 539 F.2d at 881.

*Estate of Spalding v. Commissioner*⁵⁹ also placed the determination of one's "surviving spouse" at issue. Charles and Elizabeth Spalding were married in 1945 and settled in Connecticut. Marital discord prompted their separation in 1962, at which time Charles moved to New York. In 1964, Charles obtained an ex parte Nevada divorce while still a domiciliary of New York. Elizabeth challenged the Nevada divorce in a New York court. The judge determined that the Nevada court was not a "[c]ourt of competent jurisdiction," according to New York standards, and declared that Elizabeth was, and had been since 1945, the lawful wife of Charles. This determination reflected the standard grounds for invalidating an ex parte foreign divorce: absence of genuine domicile in the divorce-granting state. Nevertheless, in 1968, Charles remarried in California and settled there with his second wife, Amy. Amy's will, probated after her death in 1969, devised her interest in their residence, other articles and a portion of her residuary estate, to Charles pursuant to a marital deduction provision.⁶⁰

The Commissioner, however, disallowed the deduction on the ground that Charles and Amy were not legally and validly married on the date of her death, hence Charles was not a "surviving spouse" for § 2056(a) purposes. On the basis of its decisions in *Goldwater* and *Steffke*, the Tax Court upheld the Commissioner's disallowance, although the rule⁶¹ enunciated in those cases could not be neatly applied. Unlike the earlier circumstances examined in *Steffke* and *Goldwater*, Charles' prior divorce was ruled invalid by a New York court, not a court of the state where the decedent's estate was being administered.

The Tax Court, however, did not consider the absence of such a determination as a material distinction. In disallowing the deduction the court stated:

The fact is that a New York Court, having jurisdiction of the parties and subject matter had declared Charles' prior divorce invalid and that California would have been required to accord full faith and credit to the New York judgment under Article IV, Section I, of the United States Constitution. *Sutton v. Leib*, 342 U.S. 402, 406-409 (1952).⁶²

On appeal, the Second Circuit displayed a reluctance to accept the Commissioner's mechanical reasoning and reversed the decision of the Tax Court.⁶³ Because California, the state of both the matrimony and the administration of the estate, had taken no action to invalidate or annul the questioned marriage, the Second Circuit implied that the Commissioner had overstepped his authority in deciding that Amy and Charles were illegally united. Reflecting a clear desire to abstain from interfering in the domestic relations law of California, the court stated:

By far transcending the tax importance of this case . . . is our unwillingness on this record to assume the responsibility for declaring that Charles and Amy were not husband and wife in California.⁶⁴

59 537 F.2d 666.

60 *Id.* at 667.

61 In deciding *Goldwater* and *Steffke* the Tax Court purported to follow the following rule: "Where a prior divorce has been ruled invalid by a court of the state where the decedent's estate is being administered, the "surviving spouse" requirement of § 2056(a) is not satisfied.

62 [1975] 44 TAX CT. MEM. DEC. (P-H) ¶ 75,250.

63 537 F.2d 666.

64 *Id.* at 669.

Thus, the Second Circuit would not grant "constitutional sanctity to a decree of the lowest court of original jurisdiction in a state (New York) which had not been the state of the original marriage."⁶⁵

The Second Circuit also based its decision on a second ground. The court believed that the Commissioner had incorrectly focused on Charles' marital history rather than that of Amy, whose estate was the subject of the tax.⁶⁶ The court contended that Charles' former wife played no part in this particular controversy, despite the fact that she had obtained the invalidation decree. Demonstrating its desire to consider these matters on a case by case basis, the court felt its only concern was whether, at the time of Amy's death, Charles was her spouse, not whether Amy was necessarily Charles' spouse. The Second Circuit satisfied itself that Charles was Amy's spouse.

A third cause for the Second Circuit's reversal involved considerations of public policy. By denying interstate recognition to the New York invalidation decree, the court attempted to achieve some degree of practical justice out of this matrimonial tax difficulty. By this approach, the court recognized the real status of these parties, acknowledging that they had participated in a valid California marriage ceremony evidenced by a certificate of marriage. The couple had held themselves out to the community as husband and wife. Consequently, in not applying the New York invalidation decree to Amy's status, the court's decision recognized the "living marriage and not the atrophied one."⁶⁷

The Second Circuit's decision in *Spalding* may cause one to question whether it is consistent with its decision in *Goldwater*. A review of the facts, however, reveals two major distinctions between these cases. First, in *Goldwater*, all the relevant parties were domiciliaries of the same state, New York. Second, the court in *Goldwater* was aided by a judicial determination of marital status. This determination was rendered by a court of the state (New York) entitled to administer the taxpayer's estate.

On the other hand, the interested parties in *Spalding* were not all domiciliaries of the same state. Furthermore, no court of California, the jurisdiction empowered to administer Amy's estate, had made a determination regarding her marital status. These distinguishing facts provided the court in *Spalding* with greater freedom to disregard New York's alleged state interest claim. However, this same claim appeared much more compelling under the circumstances in *Goldwater*. Whether these distinctions justify the outcome in *Spalding*, however, remains problematical.

A critical examination of the Second Circuit's rationale in *Spalding* may prove beneficial for several reasons. It will illuminate the conflicts of opinion existing between the Second Circuit and the Tax Court. Such an analysis would place in focus the Commissioner's argument that full faith and credit obligations require the Spaldings' marriage in California to be void *ab initio*. It would also shed light on the relation between state law and § 2056. Finally, a thorough

65 *Id.* at 668.

66 *Id.* The court stated: "The Commissioner looks only at Charles and the New York proceedings as to him. But for tax purposes, he should look at Amy. It is her property and her tax with which he is dealing. Charles, despite New York's opinion vis-a-vis the Charles-Elizabeth relationship, was Amy's husband." *Id.* at 668.

67 *Id.* at 669.

analysis of the Second Circuit's decision in *Spalding* would produce a clearer understanding of its "realistic" approach. Consequently, one may better evaluate the advantages and drawbacks that result from its application in an estate tax context.

VI. *Spalding*: The Competing Rationales

The major thrust of the Commissioner's argument against allowing the marital deduction in *Spalding* rests on two main considerations. First, the Commissioner asserts that if the California courts had involved themselves in a proceeding to determine Amy and Charles' status, the full faith and credit requirements of the Constitution would have compelled the California courts to recognize the outstanding New York invalidation decree. This constitutional obligation would have forced them to declare the purported marriage void *ab initio*.

Second, the Commissioner argues that the deduction's intimate relationship to state law is undeniable and overriding. Thus, if state law denies legal effect to Charles' marriage to Amy, then it must be recognized for purposes of determining Amy's surviving spouse for § 2056 purposes. The Commissioner then asserts that California law dictates this precise result.⁶⁸

A critical examination of the *Spalding* decision will serve to illuminate these two major points of conflict between the Tax Court and the Second Circuit.

A. *Full Faith and Credit and the Second Circuit's Divisible Taxpayer Argument*

In an effort to circumvent the Commissioner's full faith and credit argument, the Second Circuit claimed that the Commissioner had misdirected his attention to the marital history of Charles rather than that of Amy, since Amy was the taxpayer whose estate was the subject of the tax. Whether her relationship with Charles may be disregarded in determining her tax status, however, raises an important question.

The issue of whether a divorce invalidation decree requires interstate recognition was left unanswered by *Williams v. North Carolina*.⁶⁹ The Commissioner's position on this issue, however, appears correct. Additional support for the Tax Court's viewpoint is provided by the Second Restatement of Judgments which provides that:

- (2) A judgment in an action whose purpose is to determine a person's status is conclusive with respect to that status upon all other persons.⁷⁰

The rationale underlying the effect to be accorded status determinations reflects the state's supervisory interest in the personal relationships associated with status. Such a determination properly allocates the rights and obligations concerning property and support that attend those relationships.

68 CAL. CIV. CODE § 4401 (West 1970).

69 325 U.S. 226.

70 RESTATEMENT (SECOND) OF JUDGMENTS § 74(2) (Tent. Draft No. 3, 1976).

[T]hese proceedings . . . are conducted with the sole or principal purpose of determining status and with a view to making a determination that can be taken as a firm legal premise in all matters in which the status may subsequently be significant.⁷¹

The importance of granting interstate recognition to these determinations is readily apparent.

The Commissioner, in the *Spalding* case, was not aided by a California court decision which established the validity of the Spaldings' union. His position, however, reflects the reality that one man cannot be legally married to two women simultaneously.

To support his position and to illuminate this argument, the Commissioner cited applicable state law § 4401 of the California Civil Code. It prescribes that a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning unless the former marriage has been dissolved or declared a nullity prior to the date of the subsequent marriage.⁷²

Due to the New York invalidation decree, Charles does not meet the tests imposed by this statute. Since he is not legally married to Amy it logically follows, the Commissioner asserts, that Charles may not qualify as her lawful surviving spouse for § 2056 purposes. Thus, the law of the state administering the decedent's estate would deny validity to the marriage of Charles and Amy Spalding. This test has consistently served the taxing authorities as an important statutory criterion in determining the proper surviving spouse. Consequently, it constitutes the Commissioner's most convincing argument for disallowing the deduction.

Apparently, the Tax Court's decision also rests on considerations of public policy, since it grants tacit recognition to the constitutionally based power of the states to regulate and control the rights and status of their domiciliaries. To grant the marital deduction, despite the outstanding invalidation decree, might serve to undermine the state's authority to exercise their lawful police powers.

The Second Circuit contends that the Commissioner's focus was misplaced. Its position is that Amy's marital status is the critical issue, and therefore Charles' marital history is irrelevant. The court seems to suggest that, for marital deduction purposes, the marital union as a whole may be ignored and some form of split status may be recognized. The troublesome concept of divisible divorce, however, was supposedly buried by the decision in *Williams*. Moreover, this position would appear untenable since the presence of one illegal party would poison the entire union. Owing to his incapacity to legally remarry, Charles' purported marriage to Amy must, of necessity, be void *ab initio*.

Therefore, the soundness of the Second Circuit's contention that the Commissioner had misdirected his focus is substantially reduced after careful statutory analysis.

71 RESTATEMENT (SECOND) OF JUDGMENTS, Explanatory Notes § 74(2), comment *b* at 4-5. (Tent. Draft No. 3, 1976).

72 CAL. CIV. CODE § 4401 (West 1970).

B. *The Relationship of State Law to § 2056*

Courts have generally held that terms relating to familial relationship, when left undefined in a statutory provision, are to be defined by reference to state law. This rule was initially adopted on the ground that to hold otherwise would be to create a set of federal rules which did not accord with those of the states "on subjects of the most intimate character."⁷³ Therefore, the Commissioner contends that a proper interpretation of § 2056(a) requires adoption of the same definitions of marital status that the decedent's domiciliary state would apply in a similar situation. This conclusion is premised upon the Commissioner's belief that § 2056, as a whole, is inextricably intertwined with state law. Therefore, application of state law would constitute the most consistent and logical method for determining who shall qualify as the taxpayer's surviving spouse.

The validity and persuasiveness of the Commissioner's syllogistic argument hinges on the strength of its major premise, the intimate relationship of § 2056 (overall) to state law. A brief analysis of other subsections of § 2056, therefore, seems appropriate.

Section 2056 conditions the benefit of the marital deduction upon a passing⁷⁴ of interests in property from a decedent to his surviving spouse. An interest in property is considered as passing from the decedent to any person, however, only if it passes in certain defined ways. For example, interests which are inherited by such person from the decedent, interests which constitute the dower or curtesy (or statutory interest in lieu thereof), of the decedent's surviving spouse, and interests which are bequeathed or devised to such person by the decedent, all qualify as interests in property "passing" from the decedent to his surviving spouse.⁷⁵ Therefore, the value of these property interests will be included in the calculation of the marital deduction.

All of these possible methods of passing interests in property, however, depend on state law for their operation. The right of inheritance by one who is the surviving spouse of the decedent, for example, is governed by intestate succession statutes of the several states.⁷⁶ Similarly, dower and curtesy rights, or statutory interests which replace them, depend upon state law. Likewise, the validity of testamentary transfers of wealth at deathtime hinge upon full compliance with the wills acts of the testator's domiciliary state.

The connections between § 2056 and state law are further exemplified specifically by subsection (c)(2)(B). This subsection establishes special rules to be followed in computing the deduction for decedents who have owned property as community property with their surviving spouse.⁷⁷ Community property,

⁷³ *Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489, 494, (1916).

⁷⁴ I.R.C. § 2056(a) provides in pertinent part: [T]he value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse. . . ."

⁷⁵ See note 50 *supra*.

⁷⁶ 538 F.2d at 735.

⁷⁷ I.R.C. § 2056(c)(2)(B) provides:

(B) Special rule in cases involving community property.—If the decedent and his surviving spouse at any time, held property as community property under the law of any State, Territory, or possession of the United States, or of any foreign country, then the adjusted gross estate shall, for purposes of subsection (c)(1), be

however, is a state law concept, with the nature and extent of the community interest dependent upon applicable state law.⁷⁸ As the Seventh Circuit noted in *Steffke*, "state law also determines the nature of the property interest passing for purposes of the terminable interest rule of § 2056(b)."⁷⁹

These examples, only a few of a myriad of relevant property interests,⁸⁰ demonstrate the necessity for turning to state law to determine whether specific interests, transferred by a decedent to his surviving spouse, qualify for the § 2056 marital deduction.

In light of the intimate relationship between § 2056 and state law, the Commissioner's position that only the legal spouse, as defined by applicable state law, may qualify as the surviving spouse for marital deduction purposes is a persuasive one. This view would produce a consistent interpretation of the statute, allowing no one part of it to defeat another.

The legalistic approach advocated by the Commissioner is also rooted in considerations of public policy. Transcending the problems of practical application and interpretation is the state's compelling interest in the institution of marriage by virtue of its command over its domiciliaries.

Each State as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance . . . with which the State must deal.⁸¹

determined by subtracting from the entire value of the gross estate the sum of—

(i) the value of property which is at the time of the death of the decedent held as such community property; and

(ii) the value of property transferred by the decedent during his life, if at the time of such transfer the property was held as such community property; and

(iii) the amount receivable as insurance under policies on the life of the decedent, to the extent purchased with premiums or other consideration paid out of property held as such community property; and

(iv) an amount which bears the same ratio to the aggregate of the deductions allowed under sections 2053 and 2054 which the value of the property included in the gross estate, diminished by the amount subtracted under clauses (i), (ii), and (iii) of this subparagraph, bears to the entire value of the gross estate.

For purposes of clauses (i), (ii), and (iii), community property (except property which is considered as community property solely by reason of the provisions of subparagraph (C) of this paragraph) shall be considered as not "held as such community property" as of any moment of time, if, in case of the death of the decedent at such moment, such property (and not merely one-half thereof) would be or would have been includible in determining the value of his gross estate without regard to the provisions of section 402(b) of the Revenue Act of 1942. The amount to be subtracted under clauses (i), (ii), or (iii) shall not exceed the value of the interest in the property described therein which is included in determining the value of the gross estate.

78 *Poe v. Seaborn*, 282 U.S. 101, 110 (1930).

79 538 F.2d at 735.

80 4 MERTENS, § 29.03(B) (Supp. 1972). This section incorporates numerous examples showing the applicability of state law, including:

(1) the extent of a power granted to a surviving spouse under the terms of an instrument of transfer.

(2) The nature of a dower interest.

(3) Rules of construction to be applied to pertinent instruments

(5) Determination of the reduction of the deduction, for taxes payable, with respect to property passing to the surviving spouse

(7) Allowance of a marital deduction for commuted dower.

(8) Reduction of the value of jointly held property in determining the marital deduction thereof.

81 *Williams v. North Carolina*, 317 U.S. 287, 298, (1942).

Absent convincing and overriding arguments to the contrary, this state interest, coupled with the expressed reluctance of the federal courts to involve themselves in these areas, forcefully suggests that a state court decree invalidating an ex parte foreign divorce should be recognized for federal estate tax purposes.

VII. *Spalding*: The Second Circuit and Realism

A. *Prior Application of the Second Circuit's Realistic Approach to Tax Matters*

Over a decade ago a similar pair of cases, containing nearly identical fact situations to those in *Spalding* and *Goldwater*, received appellate review from the Second Circuit: *Borax' Estate v. Commissioner*⁸² and *Wondsel v. Commissioner*.⁸³ Although set in an income tax framework, they too involved the issue of the tax significance of invalidation decrees. In reversing the Tax Court's decisions in these cases, the Second Circuit denied tax significance to invalidation decrees which evidenced successful challenges to a spouse's foreign divorce. These decisions were based on the belief that to grant tax recognition to these invalidation decrees would ignore the real status of the parties as an economic unit. The court viewed the Commissioner's approach as one that elevated legal abstractions above practical tax considerations. A brief review of these two cases will highlight the competing approaches.

Borax involved a taxpayer and his wife who separated by mutual consent in 1946 and executed a separation agreement providing for the wife's support. In 1952 the taxpayer obtained an ex parte Mexican divorce and, for income tax purposes, began deducting subsequent support payments.⁸⁴ The following year, New York, the domicile of the wife, declared the divorce invalid in a proceeding instituted by the wife in which the court had jurisdiction over both parties.⁸⁵ Upon the husband's remarriage, he continued to deduct support payments, filed a joint return with his second wife, and claimed some of her relatives as dependents. The Commissioner, however, disallowed these deductions and *Borax'* filing of a joint return with his second wife. Because there existed no body of federal law from which one could determine whether the status of divorce existed, the Commissioner held that the state law of the parties' domicile, New York, must control their marital status.⁸⁶ Under the laws of New York, however, *Borax* was still legally married to his first wife. Consequently, *Borax* was not entitled to deduct the support payments, utilize the exemptions, or file joint returns with his second wife. For the Commissioner, the issue was not construction of the federal statute but was rather a question of determining the marital status of the parties.

In its consideration of the case, the Second Circuit approached the conflict

⁸² 40 T.C. 1001 (1963), *rev'd.*, 349 F.2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935, (1966).

⁸³ [1964] 33 TAX CT. MEM. DEC. (P-H) ¶ 64,213, *rev'd.*, 350 F.2d 339 (2d Cir. 1965), *cert. denied*, 383 U.S. 935, (1966).

⁸⁴ The taxpayer claimed that these payments should be considered income to his previous wife and therefore deductible by him.

⁸⁵ *Borax v. Borax*, 119 N.Y.S.2d 819 (Sup. Ct. 1953).

⁸⁶ 40 T.C. at 1008.

in a different manner. The court, expressing a policy preference, advocated recognition of the "real" status of the parties and not the "legal" status of their relationship. It analogized to a related Code section, § 71(A)(2), which allows deduction of support payments when the husband and wife are voluntarily separated and there is a written separation agreement.⁸⁷ The court could not distinguish this situation from the facts in *Borax*' case. It opined:

The requirement that the marital relationship be dissolved by a judicial decree of divorce (or legal separation) as opposed to being dissolved by having the parties cease living together as husband and wife is not expressive of any significant policy.⁸⁸

Because the support payments clearly benefited the first wife, the court felt the burden of tax payment should rest with her and therefore be deductible by the husband. In refusing to subordinate the practical considerations of the applicable statute to legal abstractions, the court enunciated a "rule of validation": "The subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence under these provisions of the tax law."⁸⁹

This rule, the court reasoned, achieved important goals of the federal tax scheme: certainty and uniformity. By this doctrine, every taxpayer who had obtained a divorce in a particular jurisdiction would be similarly treated for tax purposes. Furthermore, under these circumstances, an invalidation decree obtained by the previous spouse would be ignored, at least for income tax purposes.

The Second Circuit's decision in *Borax*, based on a realistic rather than legalistic view of marital status, is significant for several reasons. It rejects the Tax Court's position that such statutory terms as "husband" and "wife" invariably require investigation into the legality of a marriage. As a result, it suggests that practical policy arguments, coupled with flexible statutory construction, eliminates the necessity of inquiries into questions of domicile, divorce jurisdiction prerequisites and conflicts of law. For these reasons, the Second Circuit's decision in *Borax* has been praised as a sound one.⁹⁰

⁸⁷ The issue in *Borax* centered on the interpretation of I.R.C. § 71(a)(1) which provided:

- (1) DECREE OF DIVORCE OR SEPARATE MAINTENANCE.—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

The Tax Court believed the payments were only deductible if incident to a *valid, legal* divorce. The Circuit Court analogized the situation to where the husband and wife are voluntarily separated and the husband is making support payments. Since, in this situation, § 71(a)(2) allowed the husband to deduct the payments, the Circuit Court could not practically distinguish this situation from the facts in *Borax*. Therefore, the court felt *Borax* should receive the same benefit conferred upon his § 71(a)(2) counterpart.

⁸⁸ 349 F.2d at 670.

⁸⁹ *Id.*

⁹⁰ Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 75 (1966).

Wondsel v. Commissioner, decided soon after *Borax*, involved a similar fact situation with one distinction: the divorce was granted by a sister state, Florida, instead of a foreign country. The Commissioner recognized a New York decree invalidating Wondsel's ex parte Florida divorce and disallowed the deduction of his support payments, his filing of a joint return and his claimed dependency exemptions.

Relying on the reasoning espoused in *Borax*, the Second Circuit again reversed the findings of the Tax Court.⁹¹ The court asserted that:

Here it does not seem that Florida would be required by the full faith and credit clause of the Constitution to acquiesce in New York's declaration as to the validity *vel non* of the Florida divorce.⁹²

Therefore, Wondsel's Florida divorce had not been "drained of all validity" and could be recognized for income tax purposes, at least until a Florida court declared its decree void and of no effect. For this contention the court cited *Colby v. Colby*,⁹³ a Nevada Supreme Court decision, which held that the full faith and credit clause of the Constitution did not require Nevada to recognize a decree rendered by the court of another state which invalidated a Nevada divorce. To do so, the Nevada court argued, would be to grant greater credit and respect to the decree of another state's court than to a decree by one of its own courts.⁹⁴ Thus, for these and the reasons stated in *Borax*, the court concluded that Wondsel had properly deducted his support payments and could file a joint return and claim a dependency exemption using his new wife.

If the position of the Commissioner on the issue of foreign divorces and subsequent invalidation decrees was not entirely clear prior to *Borax* and *Wondsel*, it soon became so. Revenue Ruling 67-442, issued in 1967, announced:

However, where a state court, in a proceeding in which there is personal jurisdiction of the parties or jurisdiction of the subject matter of the action, declares the prior divorce to be invalid, the Service will usually follow the later court decision rather than the divorce decree for Federal income tax purposes for such years . . . Furthermore, the Service will not follow the *Borax* and *Wondsel* decisions in the disposition of cases involving questions of marital status for Federal estate and gift tax purposes, such as questions pertaining to the marital deductions allowed by sections 2056 and 2523 of the Internal Revenue Code of 1954.⁹⁵

This Revenue Ruling explicitly stated that the holdings in *Borax* and *Wondsel* would not be followed. The underlying rationale of the Ruling apparently rests on the theory that the last judicial decree by a court of competent jurisdiction over the relevant parties is the judgment entitled to full faith and credit by other states. Furthermore, the Ruling makes a tacit distinction between the situation in

⁹¹ 350 F.2d 339.

⁹² *Id.* at 341.

⁹³ 78 Nev. 150, 369 P.2d 1019, *cert. denied*, 371 U.S. 888, (1962).

⁹⁴ 369 P.2d at 1023.

⁹⁵ Rev. Rul. 67-442, 1967-2 C.B. 66.

which persons are divorced under a doubtful decree but no court of competent jurisdiction had invalidated it. Apparently the Service will recognize the divorce under the doubtful decree until it is overturned.⁹⁶ Thus, the Internal Revenue Service will continue to construe both income and estate tax statutes to make benefits dependent upon a legal marriage as defined by applicable state law.

The *Borax* and *Wondsel* decisions focus on practical consequences stemming from the parties' circumstances. The Second Circuit believed the party receiving the benefit of the support payments, the first wife, should bear the tax burden attaching to this income. The court acknowledged that *Borax* and his second wife were living together as man and wife, having been married in a valid Connecticut ceremony. Consequently, for purposes of filing a joint return, they were no less an economic unit because *Borax* had not been lawfully divorced.⁹⁷ Thus, in *Borax* and *Wondsel*, the court's decisions achieved the genuine goals of the applicable income tax statutes while granting practical justice to the parties involved.

In their treatment of both *Spalding* and *Goldwater*, the Second Circuit considered applying the rule of validation to the estate tax situations before them. Under the particular facts in *Goldwater*, the court reluctantly conceded that New York's compelling state interest in the matter precluded the rule's application. In *Spalding*, however, the facts did not establish an overriding interest in any one state. New York could not exercise its jurisdiction over Amy's status or property. Its only tie to the *Spalding*'s relationship in California was the outstanding invalidation decree involving Charles and issued by one of its state courts. Whether these factual distinctions permit greater flexibility when interpreting § 2056 in *Spalding*, however, remains to be seen.

Against this background of *Borax* and *Wondsel*, the cases in which the Second Circuit's "realistic" approach was adopted, one may examine the potential for its application in an estate tax context.

B. *The Realistic Approach*

The companion cases of *Spalding* and *Goldwater* do not represent the first instances in which the Tax Court has challenged the Second Circuit over the interpretation of tax statutes involving complex marital arrangements. As the *Borax* and *Wondsel* decisions illustrated, the Second Circuit has displayed a willingness to recognize the real status of parties rather than their legal status, at least in an income tax framework. *Spalding* provides an opportunity to investigate the possibilities of extending this approach to the estate tax situation.

1. The Marital Deduction as a Tax Fiction

Despite the questionable reasoning advanced by the Second Circuit in *Spalding*, its result deserves serious consideration as a plausible and practical resolution of this thorny estate tax problem. Although the close ties between the

96 4 MERTENS § 29.08 (Supp. 1972).

97 See *Currie supra* note 90 at 75.

marital deduction and state law are undeniable, the deduction is also intimately linked to the taxation of community property.⁹⁸ Reduced to its ultimate purposes, the marital deduction constitutes a tax fiction created primarily to equate the estate tax burdens on residents in common law property states with those on community property state residents. Consequently, blatant inequities which result from its application defeat the intent underlying its enactment.

The deduction's relationship with state law should not automatically preclude its application under the particular circumstances present in *Spalding*. Congress earlier demonstrated its willingness to ignore state law when it adopted the 1942 amendments whereby all community property was treated as that of the first spouse to die for estate tax purposes. In this earlier attempt to equate the estate tax burdens between residents of the two property systems, the property rights of the surviving spouse, stemming from state law, were clearly disregarded to effectuate a desirous tax policy. Thus, all the community property was "deemed" to be possessed by the first spouse to die.

Upon the discovery of numerous tax inequalities created by this legislation, the 1948 amendments to the Revenue Code replaced the 1942 provisions with a new tax fiction, the marital deduction. Since its inception, the marital deduction has adequately served as a mechanism to offset the estate tax advantages enjoyed by community property state residents. However, it has not been able to eliminate all estate tax inequalities that exist due to the competing systems of property ownership. Demonstrating a desire to achieve the most equitable solution possible under the particular facts of each case, the Second Circuit's approach to these cases has differed from the Commissioner's preference for strict legal compliance. The existence of peculiar marital circumstances may give rise to situations in which the traditional application of the deduction would not produce its intended result or a desired effect.

2. The Concept of Community Property

In addition to its announced desire to fashion equitable solutions on a case by case basis, the Second Circuit's decision in *Spalding* may reflect its recognition of two important factors: 1) the system of community property operative in California and the persons to whom California law will grant its attendant rights, and 2) the real status of the parties at the time of the decedent's death.

The concept of community property differs substantially from common law property concepts.

The statutes with reference to community property proceed upon the theory that the marriage, in respect to property acquired during its existence is a community, of which each spouse is a member equally contributing, by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other.⁹⁹

Things that are encompassed by or may constitute community property are

⁹⁸ See note 77 *supra*.

⁹⁹ *Tribbetts v. Fore*, 70 Cal. 242, 11 P. 648, 649 (1886); *Meyer v. Kinzer*, 12 Cal. 247, 251 (1859).

seemingly limitless. They include all property acquired by the spouses through their joint efforts, realty acquired by either spouse on the credit of a community estate, all property purchased with community funds, the earnings of both spouses, and life insurance proceeds providing the premiums were paid from community funds. Although property and money acquired before or after a marriage may be retained by its owner, it may easily lose its status as "separate property" if commingled with community property or utilized to secure community benefits.

California law delineates the marital arrangements that may give rise to community property and produce rights to succeed to such property upon dissolution of the marital unit. Clearly, a valid marriage of two persons possessing the legal capacity to marry will produce community property with its consequent rights attaching to each party. A non-marital relationship, the unsolemnized cohabitation of a man and a woman, will not result in the creation of community property. Therefore, neither party may assert any community property rights.¹⁰⁰

The circumstances in *Spalding*, however, suggest that Charles' and Amy's marital arrangement may constitute something different from either of these situations. The possible community property rights stemming from their union may provide reasons to alter the traditional application of the marital deduction.

3. The Spaldings as Putative Spouses and their Community Property Rights

Somewhere between these two versions of marital arrangements lies the situation involving two parties, joined in good faith and with the benefit of marriage, but legally unable to be considered a validly married couple due to a legal impediment unknown to one or both of the spouses. Such a union in California is termed a "putative marriage."

Putative marriage . . . is . . . a marriage which has been solemnized when one or both parties were ignorant of an impediment which made the marriage either void or voidable. The good faith of the party who asserts a claim based on the marriage is required.¹⁰¹

To such putative spouses, the Family Law Act of California extends the same community property rights accorded to spouses of a patently valid marriage. Section 4452 of the California Civil Code prescribes this division of property acquired during a putative marriage.

[If the] . . . court finds that either party or both parties believed in good faith that the marriage was valid, the court should declare such party or parties to have the status of a putative spouse, and shall divide, in accordance with Section 4800, that property acquired during the union. . . .¹⁰²

100 *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). In *Marvin*, the California Supreme Court held that the Family Law Act of 1970 does not extend to parties of a nonmarital relationship the right to an equal division of property. However, a partner to such a relationship may recover in quantum meruit for the reasonable value of household services rendered, for example, less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.

101 H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS*, 54 (1968).

102 CAL. CIV. CODE § 4452 (West 1970).

Section 4800 requires the equal division of community property.

Under the facts of the *Spalding* case, it is highly probable that Amy and Charles would qualify as putative spouses. They were joined in a valid California marriage ceremony, evidenced by a certificate of marriage. They took up residence there and, under the available facts, appeared determined to make California their home. The record also suggests that Amy's belief that her marriage was a valid one was based in good faith. Nor does his knowledge of the New York invalidation decree automatically preclude Charles as a "good faith" putative spouse. He may have believed that the invalidation decree prevented him only from legally remarrying in New York. The Second Circuit's opinion implies that the couple was ignorant of the impediment which barred their legal marriage.

[T]he Commissioner . . . in complete disregard of the California situation, Amy's belief that she had a husband and the standing that Mr. and Mrs. Spalding must have had with friends and neighbors in the community, decreed, in effect, that Amy and Charles were living in sin and that Charles was not a "spouse" at all.¹⁰³

Therefore, that Amy and Charles were putative spouses seems the most reasonable conclusion.

By according full legal rights to share in the division of property to putative spouses, the California law acknowledges the contributions of the partners to the marital/economic unit and fulfills the reasonable expectations of the innocent party¹⁰⁴ or parties who undoubtedly entered the marriage assuming property would be equally divided upon its dissolution. Furthermore, the Spaldings at the time of Amy's death were indeed a "marital community," despite the fact that their marriage was, in the eyes of the Commissioner, legally invalid.

The status of the Spaldings as putative spouses, combined with the California property rights incident to such status, suggests that California law would recognize the "real" status of the Spaldings and allow their jointly acquired property to be equally divided upon Amy's death. This result, reflecting a legislative mandate, would require recognition of the surviving partner as the legal surviving spouse. Supportive of this conclusion are numerous court decisions which have extended the rights of putative spouses beyond the ability to share in community property.¹⁰⁵

Although only a few states utilize the device of putative marriage, many

103 537 F.2d at 667.

104 In re Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973). Although the rights of a good faith spouse to a putative marriage to share in the equal division of the property are undisputed, Cary suggested that, under § 4452, the "guilty spouse" (the spouse who knows the marriage is invalid) has the same right to half the property as long as one spouse believed in good faith that the marriage was valid.

105 Other recognized benefits incident to a putative marriage include the right to inherit property, Succession of Fields, 222 La. 310, 62 So. 2d 495 (1952), the right to sue for wrongful death, Kunakoff v. Woods, 166 Cal. App. 2d 59, 332 P.2d 773 (1958), and the right to benefits under the Social Security Act, Speedling v. Hobby, 132 F. Supp. 833 (N.D. Cal. 1955). Furthermore, the children of a putative marriage are legitimate. Texas Co. v. Stewart, 101 So. 2d 222 (La. App. 1958). Therefore, some of the rights created by state law and so intimately linked to the marital deduction are accorded to a putative spouse.

others reach similar results by recognizing common law marriages.¹⁰⁶ Unlike putative marriages, common law marriages need not be solemnized. They are nonceremonial unions entered into by agreement without compliance with statutory formalities.¹⁰⁷ Because parties in this situation have assumed the burdens of marriage, fourteen states grant full legal recognition to common law marriages.¹⁰⁸ A common law marriage carries with it the same rights and incidents as a ceremonial marriage.¹⁰⁹ Consequently, the laws of inheritance, descent and distribution, dower, and other property rights apply alike to common-law marriages and to ceremonial marriages.¹¹⁰ By recognizing this domestic relations doctrine, states accord legal rights to common-law spouses to share in the division of property upon the dissolution of the union.¹¹¹ Some of these rights, whether statutorily or judicially created, are linked to the marital deduction.¹¹²

Therefore, the tax dilemma highlighted in *Spalding* extends beyond those jurisdictions which recognize putative marriages. To refuse recognition to Charles as Amy's surviving spouse for § 2056 purposes although he may otherwise legitimately demand his share of community property and inherit property from her, would place the Commissioner in a paradoxical position. To deny such recognition for estate taxation purposes would be to accord Charles a dual status. He would qualify as her surviving spouse for California property purposes (and presumably for any California state estate, death, income, or inheritance tax purposes), but not for federal estate tax purposes.

Furthermore, denying estate tax significance to Charles' marriage to Amy would produce an additional taxation anomaly. By the Commissioner's approach, only Amy's half of the community property, but all of her separate property, would be subject to the estate tax. This was the estate tax inequality the marital deduction was designed to alleviate. These and other consequent tax snares, resulting from the Commissioner's stance, may best be illuminated by two reasonable hypothetical situations, created by a simple alteration of the facts present in *Spalding*.

106 Actually, the doctrine of putative marriage is a more restricted doctrine than common law marriage, a device created to recognize the status of de facto spouses. H. CLARK, JR., *supra* note 101, at 54.

107 Catlett v. Chestnut, 107 Fla. 498, 146 So. 241 (1933). In re Zemmick, 76 N.E.2d 902 (Ohio Ct. App. 1946).

108 H. CLARK, JR., *supra* note 101, at 47. As Clark points out, although only fourteen states officially recognize this doctrine of common law marriage, these states validate the marriages of a disproportionately large number of persons. For these reasons the doctrine of common law marriage continues to have greater practical consequences than might be expected solely from a count of the states which cling to such a doctrine.

109 Argiroff v. Argiroff, 215 Ind. 297, 19 N.E.2d 560 (1939); People v. Mendenhall, 119 Mich. 404, 78 N.W. 325 (1899); Oatis v. Mingo, 199 Miss. 896, 26 So. 2d 453 (1946).

110 Budd v. J.Y. Gooch Co., 157 Fla. 716, 27 So. 2d 72 (1946).

111 Although this result is often criticized for debasing the institution of marriage, one commentator views it in just the opposite vein: "We debase the entire institution of marriage when we place conclusive significance on the occurrence of a ceremony. When a woman has performed the obligations of a wife for thirty-five years and then is brutally deprived of all the financial benefits of marriage on the sole ground that the relationship was not signalized by some sort of ceremony, this debases marriage." H. CLARK, JR., *supra* note 101, at 58.

112 For example, the right to inherit and the right to dower are among these. See note 50 *supra*.

4. Inconsistencies Created by Denying Recognition to Putative Spouses for Marital Deduction Purposes: Two Constructs

In the first case, assume the facts are identical to those in *Spalding* excepting that Charles' first wife died soon after Amy. The Commissioner would recognize Charles as the surviving spouse of his first wife and grant her estate the marital deduction. This conclusion would not deprive Amy's estate of the tax benefits realized by her ability to divide their community property. The dilemma stemming from the Commissioner's designation is obvious. Charles, for estate tax purposes, is serving as the legal husband under both property systems. The arbitrariness of the Commissioner's "legalistic" approach works to Amy's decided benefit. In actuality, the Commissioner is merely "deeming" Charles as the surviving spouse for § 2056 purposes. This result contradicts the rationale advanced in his brief in *Spalding*;

that generally the law of the decedent's domicile [here California], towards the validity of the marriage will prevail (and that this) . . . is a sound and expedient solution to the many factual variations which may occur.¹¹³

The second case assumes that Charles predeceased Amy. All his property, but for his previous residence in New York, is community property. Amy would be entitled to one half of the community property as his putative spouse. His former wife, however, asserts a claim demanding her statutory elective share of his estate. Whether this claim can be satisfied depends upon two factors: 1) the type of property, real or personal, comprising Charles' estate at deathtime; and 2) the state which may properly exercise probate jurisdiction over his estate. This is determined by his legal domicile at the time of his death. Real property will be distributed in accordance with the law of the state where it is situated,¹¹⁴ whereas the law of the decedent's domicile will govern personal property.¹¹⁵

Considering the given facts, answers to the questions above could be reasonably predicted. Charles' domicile would probably be deemed to be California, since after his marriage to Amy he resided there and demonstrated an intent to stay.¹¹⁶ His real estate situated in New York, however, could be utilized to satisfy his former wife's elective share claim even if Charles did not give the residence to her in his will. This could occur since: 1) New York law would control the disposition of his New York residence; 2) New York law recognizes the former wife as his legal spouse; and 3) the former wife would, therefore, be legally entitled to her statutory forced share. Under these facts, the Commissioner would recognize Charles' New York wife as his legal surviving spouse. Consequently, Charles' estate could claim the marital deduction for this real

¹¹³ Brief for Appellee at 33, *Estate of Spalding v. Commissioner*, 537 F.2d 666 (2d Cir. 1976).

¹¹⁴ J. RITCHIE, N. ALFORD, JR., R. EFFLAND, *DECEDENTS' ESTATES AND TRUSTS* 31-32 (4th ed. 1971).

¹¹⁵ *Id.*

¹¹⁶ A contrary finding of domicile by any other state court, New York, for example, would not be conclusive against California for the same reasons that Nevada's finding of domicile in Charles' divorce action was not binding on New York which challenged and overturned it. See note 25 *supra* and accompanying text.

property which passes to his former wife since the property clearly qualifies under § 2056.¹¹⁷ Assuming that the value of this property was not greater than the value of his half of the community property, it could pass to the former wife free of estate taxes. The only property subject to the federal estate tax would be Charles' half of the community property in California. A significant tax benefit is thus realized by Charles' estate due to recognition of the former wife as his surviving spouse.

Within this second hypothetical construct, had Charles and Amy remarried and settled in a common law property state these tax benefits would not have accrued to his estate. This conclusion stems from the interpretation of gross estate in § 2056. All of the property acquired and possessed by the union would be includable in Charles' gross estate. (Obviously including the equivalent of Amy's community property.) Unable to utilize the marital deduction, his taxable estate would be twice as much. Therefore, the Commissioner's approach would work to the distinct advantage of the community property state residents, and the purposes underlying the marital deduction's creation would be defeated.

The Commissioner's options in this second hypothetical may not be appealing. If he were to recognize Amy as the surviving spouse for estate tax purposes, he would be hard pressed to deny the estate a marital deduction based on the property passing to the New York spouse who exercised her elective share option since § 2056(e) states that such a transfer qualifies for the deduction. The conflicting and paradoxical results possible in this case serve to fulfill the Commissioner's prophecy:

In the context of the federal estate tax law, it is probably impossible to reach an equitable rule which will unquestionably comply with all jurisdictions' attitudes towards the validity of a particular marital state.¹¹⁸

5. The Advantages Realized by Application of the Realistic Approach

In light of the inequities produced by a strict statutory interpretation of § 2056(a), the Second Circuit's rationale in *Spalding* appears sound for several reasons. First, it recognizes the living marriage and not the atrophied one. The reasonable expectations of the parties are fulfilled, since the tax advantages which would accrue to the estate in *Spalding* benefit the party who contributed to the prosperity of the marital unit existing at the taxpayer's death. Furthermore, the Second Circuit's realistic viewpoint subordinates form to substance and promotes Congress' intent that the taxpayer's marital status, for purposes of § 2056, be determined as of the time of his death.¹¹⁹ The court's ruling acknowledges the reasonableness of this congressional criterion, since it more accurately equates the surviving spouses under both property systems.

¹¹⁷ I.R.C. § 2056(e)(3). This section has been relabeled under the Tax Reform Act of 1976 as § 2056(d)(3), but remains identical.

¹¹⁸ Brief for Appellee at 33, *Estate of Spalding v. Commissioner*, 537 F.2d 666 (2d Cir. 1976).

¹¹⁹ 4 MERTENS § 29.08 provides: DEFINITION OF TERM "SURVIVING SPOUSE." Neither the word "surviving" nor the word "spouse" is expressly defined in the statute; however, the term is also used in the income tax chapter and interpretations thereunder may have some relevance. Under the estate tax provision, the Senate Finance Committee Report (S. REP. No. 1013 (Part 2), 80th Cong., 2d Sess., 6, 7) suggests that the following rules apply: (a) the marital status is to be determined as of the time of the decedent's death;

Second, the Second Circuit's desire to seek an equitable tax solution within the framework of each particular fact situation contributes a flexibility which is not present in the Commissioner's legalistic approach. The wide variety of marital histories and circumstances suggests that all relevant considerations must be weighed in order to avoid disparate and inequitable results. As *Spalding* illustrates, many complex marital arrangements do not lend themselves to the neat application of prefashioned formulas and rigid rules of construction. The adherence to a strict statutory interpretation forced the Seventh Circuit to admit that its result, though harsh, was produced partly because the court did not wish to sit "in the capacity of balancing the equities of a particular situation."¹²⁰ Such a judicial attitude clearly illuminates the divergent approach taken by the Second Circuit whose only concern was whether at the time of Amy's death Charles was her spouse. Just as it demonstrated in *Borax* and *Wondsel*, the Second Circuit again is willing to subordinate literal, technical statutory compliance to considerations of equity.

Furthermore, since the marital deduction constitutes little more than a contrived tax mechanism designed to effect estate tax equality, it may be well suited to manipulation when reason dictates. An occasional departure, prompted by unusual circumstances, from a legalistic interpretation would not undermine the taxation purpose of § 2056.

Third, the Second Circuit's decision furthers a probable, though unenunciated estate policy designed to allow a couple to benefit from the fruits of their combined labor by eliminating the taxation of the estate twice in one generation.

VIII. Available Options to Resolve the Surviving Spouse Dilemma

A. *The Rule of Validation*

Confronted by the uncommon circumstances presented in cases like *Steffke*, *Goldwater*, and *Spalding*, several avenues of approach avail themselves to the Commissioner and the courts.

One course of action involves the application of the rule of validation enunciated in *Borax*. This would deprive a subsequent declaration of invalidity, by a jurisdiction other than the one that decreed the divorce, of estate tax significance. As the Second Circuit opined in *Spalding*: "Such a rule would also avoid such problems as may arise where states had widely disparate codes of morals as to divorce and the grounds therefor. . . ."¹²¹

Application of this rule would facilitate the transfer of a greater portion of the decedent's wealth to his marital partner at deathtime. The rule's operation will not depend on the validity of the decedent's marriage, therefore eliminating tedious investigations into the legal status of the union. It would provide a semblance of evenness and certainty in this area as well.

This approach would not be free of drawbacks, however. Such a rule would not only ignore the invalidating decree, but also the various ties currently

120 538 F.2d at 736.

121 537 F.2d at 669.

existing between the marital deduction and state property laws.¹²² Its application would also place the Commissioner in a most difficult posture. He might be forced to deny the marital deduction to an estate despite a successful claim by a former spouse to an elective share or share by intestate succession. Consequently, the spouse would be considered to have inherited nothing as far as federal estate tax law is concerned.

B. *Variation on the Rule of Validation*

A variation of the first alternative would produce a second possible approach whereby taxing authorities would recognize the marital union that existed at the time of the taxpayer's death, providing it had been entered into via a solemnized marriage. Under this rubric would fall not only situations like *Steffke*, *Goldwater*, and *Spalding*, but situations where no divorce, valid or otherwise, was ever secured by one of the parties. By this method the real status of the parties is recognized and the tax benefits would flow to the survivor of the union which most clearly expressed the desires and expectations of the parties at the time of its dissolution. Like the rule of validation, this attitude would allow a greater share of the decedent's wealth at deathtime to lapse into the hands of a surviving spouse.

The adoption of this approach would again require the Commissioner to deal with the problem of a former wife's elective share. He could ignore this transfer for tax purposes or force the estate to proportion its marital deduction between the transfers to both spouses.

C. *The Legalistic Approach*

A third possible option is that exercised by the Commissioner in these cases, the legalistic approach. This manner of determining the surviving spouse provides a consistent and certain answer to the estate tax difficulties here discussed. All taxpayers would be treated alike since the benefit of the marital deduction is conditioned upon the passing of property to one's legal surviving spouse. Failure to comply with the technical rules of the statute would deny one the benefit of the deduction.

Yet, this procedure suffers from several significant drawbacks. As a rigid and unyielding mode of determination, it is unresponsive to the realities of a particular situation. As these three cases have demonstrated, it may produce harsh results while frustrating the valid expectations of the parties and the testamentary intent of the decedent. Furthermore, the legalistic position maintained by the Commissioner may serve to deprive an estate of many dollars that would otherwise be passed to a decedent's preferred, though not legal, spouse.

This high priority on technical statutory compliance reflects a certain arbi-

¹²² The degree to which such an approach would ignore compelling ties to state property law would vary significantly between the community property states and the common law states, hence it is important to determine the state which may properly administer the decedent's estate and his domicile. As *Goldwater* and *Spalding* illustrate, the links are much more numerous, therefore arguably more compelling in a common law property state than where the spouse automatically derives the right to any equal share of the community property.

trariness as well, since the Commissioner would apparently recognize a taxpayer's real status and ignore an invalidly obtained divorce simply because it was never challenged and overturned. Therefore, those spouses who possess the financial resources and legal sophistication to challenge their partner's invalid divorce will qualify as surviving spouses. Those that don't possess such resources will not so qualify.

It is apparent that all of these approaches, if uniformly applied in all situations, will create important problems. Each would violate the intimate ties between the marital deduction and state law in varying degrees. Consequently, the Commissioner and the courts must reconcile themselves to some interpretive inconsistencies, or adopt the Second Circuit's case by case approach which allows a court to balance the state's vital interest against the need to produce an equitable tax result. Because § 2056 does not require the Commissioner to respect all links to state law, a reasonable resolution to this estate tax difficulty may necessitate such a balancing of relevant considerations.

IX. Conclusion

Whether the passing of property to a "surviving spouse" under § 2056(a) is dependent upon the legal marital status of the parties presents a troublesome estate taxation problem. The pivotal question is whether to give effect, for estate tax purposes, to pieces of paper that say a taxpayer is divorced from a spouse with whom he no longer lives and is married to another with whom he does live.

Advocates of the realist approach would argue that rigid legal requirements should be subordinated to the real status of the parties. Supporters contend that the goal of the deduction is thus achieved while the practical realities of the parties' relationship are recognized. Proponents of the strict statutory construction approach maintain that § 2056 requires a consistent, and rigid legal interpretation based on the applicable state law of the parties' domicile. Their position is strengthened by: 1) the intimate relationship between § 2056 and many property interests which qualify for the deduction and are created by state law; and 2) the state's legitimate and paramount interest in the marital status of its domiciliaries.

The Internal Revenue Service has adopted the latter view. The Service is officially committed to the position that it will grant tax significance to the decision of the last court of competent jurisdiction (that is, one that properly has jurisdiction over both the parties and the subject matter) that determines a taxpayer's marital status.

The uncertainty created by these conflicting theories could be alleviated by amending § 2056 to include a specific definition of the term "surviving spouse." The present confusion regarding the term tends to frustrate the already difficult process of estate planning. Estate planners must try to anticipate which spouse will be recognized as the "surviving spouse" and, if litigation ensues, which position the court will take. Confronted with these potential obstacles to effective estate planning, one commentator has suggested several practical precautionary measures: 1) in actions where a partner has divorced and remarried, the

estate planner must probe for all relevant details surrounding the divorce; 2) the planner will have to estimate the success of an attack on a couple's marital status. In doing so, the Commissioner's consistent position granting tax recognition to a determination by a court of the decedent's domiciliary state cannot be ignored. If an invalid foreign divorce has occurred during one of the parties' marital history, it will probably be accorded recognition unless challenged and invalidated by a court with proper jurisdiction. The planner's most difficult problem will result when all relevant parties are not domiciliaries of the same state. The estate lawyer will also have to consider workable and attractive alternatives to the marital deduction if he believes the threat to the marital status is ominous.¹²³

The respective advantages of the two competing approaches taken by the Tax Court and the Second Circuit must be studied in light of the undeniable interests of the states to govern the domestic relations of their domiciliaries. Theoretical inconsistencies will no doubt exist with the application of either viewpoint. Whether the Tax Court and the Second and Seventh Circuits have met their burden of persuasion in espousing their respective holdings will be answered by other courts which render future interpretations of § 2056(a).

Steven F. Stratman

¹²³ 4 EST. PLANNING 10, 11 (Autumn 1976).