

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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CASE MIS No.: TAM-123316-00/CC:PSI:B4

April 25, 2001

Taxpayer's Name:

Taxpayer's Identification No:
Date of Conference:

LEGEND:

Decedent	=
A	=
B	=
State	=
State A	=
State B	=
\$x	=
Year A	=
Year B	=
Year C	=
Year D	=
Year E	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
year 1 - year 2	=
year 3 - year 4	=
year 5	=
year 6	=
year 7	=
year 8-year 9	=
Cite #1	=
Cite #2	=
Cite #3	=

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Cite #4 =

Cite #5 =

Cite #6 =

Cite #7 =

Cite #8 =

Cite #9 =

Cite #10 =

Cite #11 =

Cite #12 =

Cite #13 =

Cite #14 =

Cite #15 =

Cite #16 =

Cite #17 =

Cite #18 =

Cite #19 =

Cite #20 =

Cite #21 =

ISSUES

(1) Is a marital deduction allowable under § 2056(a) of the Internal Revenue Code for \$x to be paid to A under an agreement in settlement of her claim that she was Decedent's common law wife and, therefore, entitled to an elective share of his estate?

(2) Alternatively, is the \$x payment deductible under § 2053(a), as a claim against Decedent's estate, on the basis that the amount is paid in settlement of A's claim against Decedent for alleged tortious conduct prior to his death?

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CONCLUSIONS

(1) A marital deduction is not allowable for the amount payable under the settlement agreement.

(2) Whether the \$x payment is deductible under § 2053(a) is dependent on whether the facts as developed would support a recovery under State law. This factual development is within the jurisdiction of the field office.

FACTS

Decedent and A were residents of State. In Year A, while married to others, they began 33 years of cohabitation. During the entire period, A used Decedent's surname. Decedent divorced his wife later in Year A. Unbeknownst to A, her husband, B, divorced her in Year B. Subsequently, A obtained a divorce from B in Date 1. Decedent and A had no children together.

Decedent and A filed separate income tax returns as follows:

<u>Year</u>	<u>Decedent</u>	<u>A</u>
year 1-year 2	single	married filing separately
year 3-year 4	married filing separately	married filing separately
year 5	single	married filing separately
year 6	single	unmarried head of household
year 7	single	unmarried head of household
year 8-year 9	single	single

Decedent and A continued to live together until Year E. During this period, they made two overnight trips to State B in order to attend an annual event. The program for the reception lists "Mr. and Mrs. [Decedent's name]" as sponsors.

On two other occasions, first in Year C and then in Year D, Decedent and A visited A's child at a boarding school in State A. Both times, they stayed overnight in a hotel. They were introduced at the school as the child's "parents," and a program for a school theatrical production listed "Mr. and Mrs. [Decedent's name]" as sponsors.

In Date 3, A had a stroke. After a hospital stay, she moved to a rehabilitation center to recover. At that time, Decedent allegedly told A and her caretakers that A could return to Decedent's house (where A had lived during their 33-year cohabitation) when she left the rehabilitation center. However, six months later, Decedent refused A's request to return to the house. Sometime thereafter, A suffered a stroke with a resulting complete mental impairment. Two guardians were appointed to act for her.

Decedent, ill with a degenerative disease, died in Date 4. His will, executed in Date 2, made no provision for A. Instead, most of his estate passed to a trust for his child and her family. A, through her guardians, filed an election to take a statutory

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spousal share of the estate on the basis that the Decedent and A were either formally married, or were married under common law.

Although there was evidence that Decedent and A held themselves out publicly in State as being married, no marriage certificate could be found, and there were no witnesses to any civil or religious wedding ceremony. Some deponents said that Decedent told them he and A had never married. Other deponents said that A told them she and Decedent had never married.

In addition to claiming an elective share of Decedent's estate, A's guardians filed suit for damages in the local court alleging that Decedent was liable to A for the tort of intentional infliction of emotional distress. The guardians alleged that Decedent intentionally misrepresented to A that she could return to his house on her discharge from the rehabilitation center, and his refusal to allow her return led to A's complete and permanent mental collapse.

The estate and A's guardians reached an agreement in settlement of both of A's claims. Under the agreement, the estate will pay \$x to A over four years. The executrix of the estate asserts that the settlement amount is an allowable deduction under § 2056(a), as an amount passing to Decedent's surviving spouse, or, alternatively, under § 2053(a), as a claim against the estate.

LAW AND ANALYSIS:

ISSUE 1

Section 2056(a) provides that the value of the taxable estate shall, except as limited by subsection (b), 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.

Section 20.2056(c)-(2)(d)(2) of the Estate Tax Regulations provides that if, as a result of the controversy involving the decedent's will, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to his surviving spouse" only if the assignment or surrender was a "bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate."

A payment pursuant to a settlement agreement will constitute a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate only if the settlement is based on an enforceable right under state law properly interpreted. Estate of Carpenter v. Commissioner, 52 F.3d 1266, 1273 (4th Cir. 1995); Estate of Brandon v. Commissioner, 828 F.2d 493, 499 (8th Cir. 1987); Ahmanson Foundation v. United States, 674 F.2d 761 (9th Cir. 1981); Estate of Mergott v. United States,

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86 AFTR 5877 (D. N.J. 2000).

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Court held that, where a substantive rule is based on state law, the state's highest court is the best authority on its own law. If there is no decision by the state's highest court, then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the state.

Rev. Rul. 76-155, 1976-1 C.B. 286, considers a situation where the decedent and B resided in a state that recognized common-law marriages. On the decedent's death, B claimed a dower interest in the estate that was subsequently settled by a compromise payment. The issue presented is whether a marital deduction is allowable for the payment. Rev. Rul. 76-155 states:

Tax deductions are a matter of legislative grace and a taxpayer must show that all requirements are fully met before a deduction is allowable. The legal status of "surviving spouse" required under section 2056 of the Code must be independently established on the basis of the best evidence available. A compromise payment, even though made as a bona fide arms-length settlement of an alleged widow's claim for dower, does not in and of itself establish a marital relationship.

Rev. Rul. 76-155 concludes that the evidence submitted (described in the ruling) does not support B's claim that she was decedent's surviving spouse under state law. Therefore, a marital deduction is not allowable for the compromise payment. See also, Estate of Hubert v. Commissioner, 101 T.C. 314, 319 (1993), aff'd, 63 F.3d 1093 (11th Cir. 1995), 520 U.S. 93 (1997), (good faith settlements of will controversies do not establish that the complaining party had enforceable rights under state law).

For purposes of §2056(a), the term "surviving spouse" means the legal status arising from the termination of a lawful marital union by the death of the other spouse. Rev. Rul. 76-155, *supra*. The term 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. Estate of Steffke v. Commissioner, 538 F.2d 730 (7th Cir. 1976); Estate of Goldwater v. Commissioner, 64 T.C. 540 (1975). In this case, Decedent's estate is being administered in State. Therefore, the question of whether A is Decedent's "surviving spouse" is to be determined under State law.

Under State law, a common law marriage contracted within State is not valid. However, the courts of State recognize common-law marriages validly contracted in other states. Decedent's estate argues that Decedent's and A's conduct on the visits noted above to State A and State B, two jurisdictions that recognize common-law marriage, would be sufficient to establish them as married in those jurisdictions. Therefore, State would recognize them as married.

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Generally, in order for a common law marriage contracted in another state to be recognized by a State court, the proponent of the marriage must prove each element of the common law marriage under the law of the other state based on the couple's conduct in that other state. Cite #1. For example, in Cite #2, the parties cohabited in State B for more than a year and then moved to State. The court focused entirely on the couple's conduct while living in State B, and noted that they had held themselves out to friends, acquaintances and business associates as married. The court concluded that the nature of the parties' cohabitation while in State B evidenced that they had entered into an agreement to be married there. Accordingly, the court held that a valid common-law marriage was contracted in State B that would be recognized in State.

Both State A and State B recognize common-law marriages contracted within their own borders. Under the laws of State A and State B, if parties who are legally capable of entering into the marriage relation mutually agree, in express words of the present tense, to thereupon become husband and wife, and they consummate their agreement by then cohabiting as husband and wife, a common-law marriage results. Cite #3; Cite #4; Cite #5; Cite #6.

In determining the existence of a common-law marriage, certain presumptions apply. If a relationship was meretricious to begin with, it is presumed that the cohabitation had the same meretricious character throughout. Cite #7; Cite #8; Cite #3. If there was an impediment (such as a living spouse) to the common-law marriage, or if one of the parties believed there was an impediment, the mutual agreement requirement could not be satisfied. Cite #9. In such case, the facts to be considered are limited to events occurring after the impediment, or supposed impediment, was removed. Cite #10.

In State A and State B, because it is difficult to prove a present tense agreement of marriage when one of the parties has died, a rebuttable presumption of a common law marriage is raised provided there is sufficient evidence of: (1) constant cohabitation; and (2) a reputation of marriage which is broad and general. Cite #5; Cite #11. However, in State B, if one of the parties asserts a common-law marriage, but fails to assert a mutual agreement or denies that there was a mutual agreement, then cohabitation and reputation will not raise the presumption of marriage. Cite #12.

In State A and State B, a party alleging a common-law marriage bears the burden of proof by clear and convincing evidence. See, for example, Cite #12; Cite #13.

In several instances, State courts have considered whether State residents should be treated as married as a result of their brief visit to State A. In Cite #1, an intermediate court opinion involving a suit by the putative spouse for support, the couple cohabited in State for 15 years as "Mr. and Mrs." They bought a house as tenants by the entireties, executed a mortgage as "husband and wife," filed joint tax returns, maintained joint bank accounts, and inferentially conducted themselves as a married

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couple. At the same time, over a 5-year period, they often went on ski weekends to State A, registering at hotels as “Mr. and Mrs.” Finding that the evidence did not prove that the parties intended for their weekend trips to State A to be an entry into a common law marriage, the court held:

Common sense would indicate that something as serious and vital to the welfare of society as determination of the marriage relation should not rest on something as insubstantial as a holiday visit to a common-law state with a person of the opposite sex during which the participants held themselves out as husband and wife. This is particularly so where there is no evidence that the parties were aware that any change in their marital status would result or that the visit was made for the purpose of consummating a marriage.

On the other hand, in Cite #14, (involving the putative spouse’s claim for a wrongful death recovery), the couple lived together in State for 38 years, had 6 children together, held themselves out as married, celebrated their wedding anniversary each year, and filed joint tax returns. On a brief trip to State A to attend a funeral, they held themselves out as married and were regarded as such. The court held that the cohabitation (two days in a motel) and reputation (holding themselves out as married to friends and relatives in State A) was sufficient evidence of a common-law marriage to refer the matter to a jury.

In Cite #14, the State court based its conclusion on the State A Supreme Court’s statements in Cite #15, (which held that, “because it is often difficult to prove a common law marriage, the law has created a rebuttable presumption . . . where two . . . elements co-exist, . . . , constant cohabitation and general . . . reputation of marriage”). At the same time, the State court in Cite #14 noted and dismissed as inapposite two State A lower court decisions issued after Cite #15; i.e., Cite #16 and Cite #17, both of which suggested that cohabitation and reputation of marriage were merely circumstances from which a marriage may be presumed and *rebutted* by other facts and circumstances.

However, more recently, the Supreme Court of State A affirmed the trend of Cite #16 and Cite #17, the two State A lower court cases that the State court had dismissed in construing State A law on common-law marriage. In Cite #5, the Supreme Court of State A enunciated a stricter policy on common-law marriages contracted within State A. First, the court stated that claims of a common-law marriage in State A are “disfavored.” When an attempt is made to establish a marriage without the usual formalities, the claim must be reviewed with “great scrutiny.” The court further stated that the continued viability of the common-law marriage doctrine in State A “is seriously in question,” but because the appellant had not raised this issue, the court did not address it.

Further, in Cite #5, the court stated that constant cohabitation conjoined with general reputation of marriage, does *not* create a common-law marriage in State A.

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Rather, these are merely circumstances which give rise to a rebuttable presumption of marriage. The court went on to question the utility of constant cohabitation as an element of common-law marriage.

In view of the State A Supreme Court's statements in Cite #5, we do not believe that the State court's decision in Cite #14, which relied on a prior State A Supreme Court opinion, is controlling. Rather, we believe that the highest court of State, in applying the law of State A and State B in this case, would, in view of Cite #5, follow Cite #1, and would not recognize Decedent's and A's relationship as a common-law marriage. Specifically, because their relationship was meretricious from the outset, it is presumed to have continued as such while they were in State A and State B. Cite #18. That presumption can only be rebutted by clear and convincing evidence that the meretricious relationship was superseded by a consensual agreement of marriage. Cite #13; Cite #19. Moreover, in introducing evidence, A is limited to events occurring after the Date 1 divorce because, until then, she believed there was an impediment to such a marriage. Cite #18.

There is no evidence that Decedent and A entered into an agreement while they were in State A or State B to be married. Moreover, even if the two trips to State A occurred after the Date 1 divorce, the two overnight stays in a hotel and a listing as "Mr. and Mrs." on a school play program do not anywhere near approach the threshold requirements for cohabitation and widespread reputation of marriage required under State A law for raising a rebuttable presumption of a common-law marriage. Cite #5; Cite #1. Similarly, the two overnight hotel stays in State B and a listing as "Mr. and Mrs." on the event program are insufficient to establish the constant cohabitation and widespread reputation of marriage in State B that is needed to raise a rebuttable presumption of a common-law marriage entered into there.

Consequently, we believe that the highest court of State would conclude that Decedent and A did not enter into a common-law marriage while they were in State A or State B. Therefore, consistent with Rev. Rul. 76-155, a marital deduction is not allowable for the settlement amount.

ISSUE 2

Section 2053(a)(3) provides that the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts for claims against the estate as are allowable by the laws of the jurisdiction.

Section 20.2053-1(b)(2) provides as follows regarding the deductibility of claims (and administration expenses) approved by court decree:

The decision of a local court as to the amount and allowability under local law of a claim will ordinarily be accepted if the court passes on the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will not be followed. For example, if the

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question before the court is whether a claim would be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character and was so accepted, if given by all parties having an interest adverse to the claimant. The decree will not be accepted if it is at variance with the law of the State.

Section 20.2053-4 provides that the amounts that may be deducted as claims against a decedent's estate are such only as represent personal obligations of the decedent existing at the time of death. Only claims enforceable against the decedent's estate may be deducted. Liabilities imposed by law or arising out of torts are deductible.

A claim against the estate, in general, whether based in tort or otherwise, will be allowed as a deduction under section 2053(a)(3) only if the claim is enforceable under state law. See United States v. Stapf, 375 U.S. 118 (1963), wherein the Court explained the enforceability requirement as follows:

A deduction under § [2053(a)(3)] should not be predicated solely on the finding that a . . . claim is legally enforceable . . . The claims referred to by the statute are those "claims against" the property of the deceased which are allowed by and enforceable under the laws of the administering State.

375 U.S. at 131.

Thus, in determining whether an arm's length settlement amount compromising a claim is allowable as a deduction under § 2053(a), the crucial question is whether the underlying claim, whether in tort or otherwise, is enforceable under state law. See Estate of Greenberg v. Commissioner, 76 T.C. 680 (1981), in which the court stated, concerning a probate court-approved settlement of litigation filed by a creditor, "[I]t is our duty . . . to decide whether . . . , [the creditor's litigation] would have been successful in state court." See also Estate of Lewis v. Commissioner, 49 T.C. 684 (1968); Estate of Nilson v. Commissioner, T.C. Memo. 1972-141.

Under State law, there are four elements that must be proven for recovery for the tort of intentional infliction of emotional distress:

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- (1) The conduct must be intentional or reckless;
- (2) The conduct must be extreme and outrageous;
- (3) There must be a causal connection between the wrongful conduct and the emotional distress; and
- (4) The emotional distress must be severe.

Cite #20. In Cite #21, the court noted that the Court of Appeals of State (State's highest court) had upheld claims for intentional infliction of emotional distress in just three cases, and only then because these involved egregious acts. The court stated:

It is not enough that the defendant . . . acted with an intent which is tortious or even criminal, or that he . . . intended to inflict emotional distress, or even that his conduct [was] characterized by malice . . . Liability [is] found only where the conduct [is] so outrageous . . . and so extreme . . . as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

In the instant case, the facts giving rise to A's claim have not been developed for this request for technical advice. As discussed above, whether the \$x payment is deductible under § 2053(a)(3) is dependent on whether the facts as developed would support a recovery under State law standards for recovery discussed above, such that A had an enforceable claim under state law. In this regard, consideration may be given to the status of the litigation at the time of settlement (e.g., whether the defendant filed a motion to dismiss the action that was denied by the court, and the basis for such denial) as evidence of the relative merits of A's position.

Because we have not been asked to consider the income tax consequences of such a payment to A, we state no opinion on the income tax consequences of the settlement payment.

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.