



Who Knew that the Internal Revenue Code Could Benefit Same-Sex Couples: The Adoption Tax Credit

By William S. Singer, Esq. and James M. Wood, CPA

In 1996, in order to encourage the placement and the adoption of children by United States citizens, the United States Congress instituted the adoption credit. This tax provision gives adopting parents an economic



incentive to undertake an adoption with special provisions for the adoption of children with special needs. Unlike

most tax provisions, this one has a feature that benefits lesbian and gay families for which non-gay families are not qualified.

Under the Internal Revenue Code Section 23, taxpayers may claim a credit on their income tax for qualified adoption expenses. As with any tax code provision there are intricacies in using this provision, so it is important to understand all of its allowances and restrictions.

A Special "Benefit" For Same-Sex Parents

As long as the Defense of Marriage Act (DOMA) directs that the marriage (or other legally recognized relationships such as civil unions or registered domestic partnerships) of a same-sex couple cannot be recognized under federal law, the adoption tax credit represents an opportunity for same-sex families that is unavailable to different sex couples.

Take the example of a man and woman who have a child and subsequently the man dies. If the woman remarries and the stepfather adopts the child, that stepparent adoption is not eligible for the adoption tax credit. Stepparent adoptions are specifically excluded from using the adoption tax credit as they are

intra-family adoptions.

But because DOMA bars recognition of a same-sex legal relationship, the adoption by the biological parent's same-sex spouse is not considered a stepparent adoption. This fact pattern represents one of the few times that the interplay between the Internal Revenue Code and DOMA work to the advantage of same-sex couples.

This provision in the Internal Revenue Code gives a non-biological parent a method to protect her or his parental rights with the United States government underwriting it through the use of the adoption tax credit.

For example, when a lesbian gives birth to a child, often her same-sex spouse's name is automatically put on the birth certificate as a result of relevant state law. Despite this apparent protection, there are questions whether that non-biological parent's rights are portable to another state, particularly a state with its own mini-DOMA or with courts hostile to the rights of same-sex couples.

Since a birth certificate is only considered indicia of parenthood, the non-biological mother's parentage could be subject to attack in a hostile state if the only reason that she is named on the birth certificate is based on a marriage, civil union or domestic partnership. As a result, lawyers who counsel same-sex families advise that the non-biological parent undertake a confirmatory second parent adoption.

By obtaining the confirmatory adoption order, the non-biological parent's status is thereby protected under the Full Faith and Credit Clause of the U.S. Constitution. The costs of that second parent adoption are eligible for the tax credit.

The same fact pattern holds for a same-sex male couple. If the biological father has a child through a surrogacy or adopts, when the second father adopts his

spouse's child, he is entitled to use of the credit. It does not matter that the child was born through a surrogacy arrangement for the second father to take advantage of the credit as he is not seeking coverage of a surrogacy arrangement; he is using the credit because he adopted a child.

What Is the Amount of the Credit?

In 2010, Congress increased the amount of the tax credit to \$13,170. In 2011, the amount was increased to \$13,360. If the child adopted has special needs, the adopting parent is entitled to the full \$13,170 credit without regard to the amount of qualified adoption expenses paid or incurred and regardless of the taxpayer's liability.

Previous to 2010, any adoption credit in excess of a taxpayer's federal tax liability had to be carried over to the following year. As part of the health care reform legislation, that requirement has changed so that the adoption credit is "refundable;" it will be fully reimbursed regardless of the taxpayer's overall tax liability.

For 2012, the maximum credit is \$12,650, but it reverts to a non-refundable credit. After 2012, the adoption tax credit could disappear unless Congress passes legislation to extend it.

What Expenses Are Covered?

A taxpayer can use the credit for qualified adoption expenses which the taxpayer incurred including: adoption fees, court costs, attorney fees, travel expenses (including meals and lodging) while away from home and other expenses which are directly related to, and whose principal purpose is for, the legal adoption of an eligible child.

Costs associated with a surrogacy parenting arrangement are *not* eligible for the credit. Further, as discussed above, expenses related to the adoption of the children of a taxpayer's spouse are also ineligible unless it is within the context of a same-sex couple. Any employer paid expenses for the adoption are also not eligible for the credit, but they are excludable from the taxpayer's income up to the threshold for the current year.

For the tax year when the adoption will be final, practitioners advise clients to reduce their federal withholding or estimated tax payments to increase their cash flow and obtain the benefits even before filing the tax return.

Which Children Are Eligible?

In order for an adopted child to be eligible for the

adoption tax credit, the child must be under the age of eighteen at the time of the adoption or be a special needs child who is physically or mentally incapable of caring for herself or himself. A child with special needs is any child who cannot or should not be returned to the home of her or his parents and a specific factor or condition makes it reasonable to conclude that the child cannot be placed with adoptive parents unless assistance is provided as determined by a state. Also, a special needs child must be a resident or citizen of the United States. A child who is not a citizen or resident of the United States does not qualify for the adoption credit until the adoption is final.

The Latest Requirements from the IRS

In 2011, the Internal Revenue Service announced that a person using the credit needs to submit documentation with the tax return. For a domestic adoption, the taxpayer should include an adoption order or decree.

If it is an international adoption, the taxpayer should submit a Hague Convention certificate, an IH-3 visa or a foreign adoption decree translated into English.

If the taxpayer is taking a credit for adopting a special needs child, that individual needs to include a copy of the state determination of special needs.

Because the required documents may contain sensitive material, the IRS will allow submission of redacted copies. Given this requirement for paperwork to be included with the tax return, the return cannot be filed electronically, but must be filed by mail. If the IRS receives a return with missing documentation, it will automatically be sent for a correspondence audit.

Latest Developments for Same-Sex Parents

In 2011, in reviewing tax returns for some taxpayers in same-sex families, the IRS initially questioned or denied the credit to some same-sex families because, according to the IRS "the child's mother did not terminate her parental rights in the adoption process" or because "the child's mother and the taxpayer claiming the credit are jointly responsible for supporting the child." These positions taken by the IRS have been contested and defeated because they are not supported in the law or regulations.

The pertinent section of the Internal Revenue Code Section 36C does not require a termination of parental rights. There is no such requirement in any regulations, rulings or other authority. Although Notice 97-9 provides that when an unmarried couple jointly adopts

☉ IRS CODE COULD HELP SOME SAME-SEX COUPLES
Continued from page 43

the same child, they will be entitled to a single adoption credit to be divided between them. That rule does not apply to a situation where a person adopts her or his partner's child on her or his own and did not engage in a joint adoption.

Professor Patricia Cain of Santa Clara Law School reports that the National Office of the IRS fully agrees with the position that a second parent adoption can qualify for the adoption tax credit provided that it meets the other statutory requirements.

IRS Forms

For further information, one can consult IRS Publication 968. To file for use of the credit, a taxpayer files Form 8839. The 2011 Form was recently updated and includes expanded instructions, including a list of the documentation needed by the Internal Revenue Service. <http://www.irs.gov/pub/irs-pdf/i8839.pdf>.

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His practice concentrates on the creation and protection of non-traditional families and as counselor to numerous non-profit organizations. He has succeeded in extending rights to non-traditional families through both the Court system and the legislative process. He has been serving as the general counsel of the National LGBT Bar Association since its founding in the 1980s and, among others, serves as general counsel to ACLU-NJ, the Sierra Club in New Jersey and the New Jersey Association for Justice.

Bill lectures frequently throughout the country on issues concerning LGBT and other non-traditional families and diversity in the practice of law. He received a degree in history with distinction from Rutgers College and his Juris Doctorate degree from the Columbia University School of Law. Bill may be reached at wsinger@singerfedun.com.

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