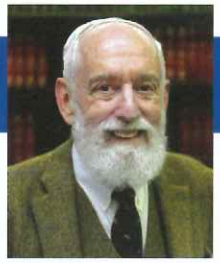
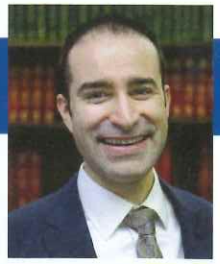
By Bill Singer & John T. Passante





ARTful Deductions: On Allowing Intended Parents and the Socially Infertile to Deduct Medical Expenses

Because of changes made by the 2017 Tax Act, most taxpayers will not find it worthwhile to save all those receipts in order to itemize medical deductions. Starting in 2019, medical deductions must exceed 10 percent of adjusted gross income before taxpayers can itemize. That's a high bar.

Taxpayers who seek to create their families using assisted reproductive technology (ART) will not find that threshold to be an impediment. People using ART to have a child can incur tens of thousands of dollars, if not more than $100,000, in medical expenses. Acquiring donor gametes, creating embryos, or using a gestational carrier all come with expensive, highly specialized medical services and advanced laboratory techniques.

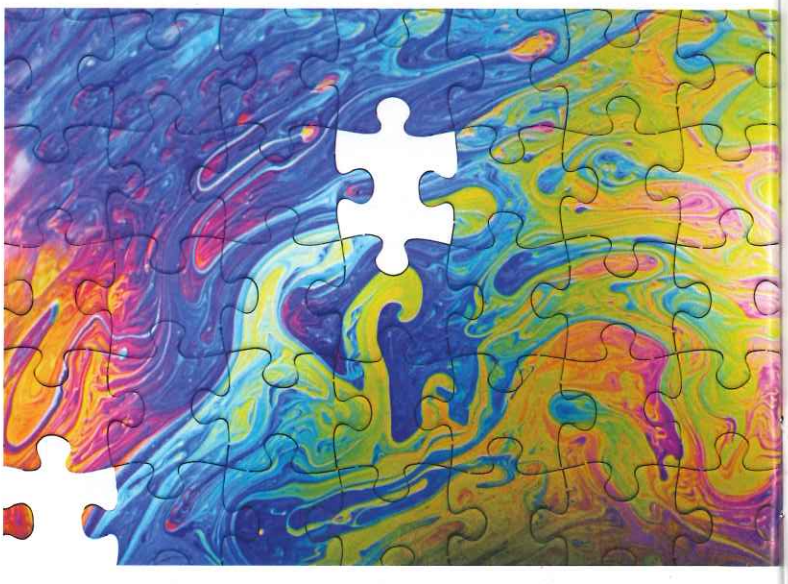
So when is a taxpayer allowed to deduct medical expenses?

I.R.C. § 213(a) allows a deduction for "the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care for the taxpayer, his spouse, or a dependent . . . ." The Code further defines medical care as amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body." I.R.C. § 213(d)(1)(A).

When determining whether a taxpayer may deduct a medical expense, the courts have made a distinction between medical infertility and social infertility. Medical infertility means that people will be deemed infertile if their reproductive organs are incapable of producing viable gametes or if they have an inability to gestate a fetus full term. Social infertility means that people's social circumstances prevent them from reproducing. Same-sex couples, single individuals of either sex who desire to become parents, and couples in which one or both are transgender fall within this category.

Deductibility for the Medically Infertile

The IRS has found that a medically infertile person may itemize unreimbursed expenses when using ART. *See* I.R.S. Priv. Ltr. Rul. 200318017 (May 2, 2003). In this private letter ruling, the IRS stated that a woman may deduct expenses



incurred in an egg donation. The taxpayer had made repeated, unsuccessful attempts to conceive a child through ART using her own eggs. The IRS ruled that she had a medical need and could deduct all of her expenses related to the egg donation, including the egg donor fee, the matching plan fee, the donor's medical and psychological testing, and legal fees for contract preparation.

That said, in an earlier ruling, I.R.S. Priv. Ltr. Rul. 20020291 (Dec. 31, 2002), the IRS made it clear that it would disallow deductions for intended parents using a gestational carrier, even if one or both parents were medically infertile. The IRS held that the gestational carrier and the unborn child do not fall within the tax code requirement that the medical expenses be incurred for the taxpayer or the taxpayer's spouse or dependent.

This IRS position may be ripe for reevaluation. Now, in many states, a taxpayer can obtain a prebirth order declaring that the taxpayer is the legal parent of the unborn child. If the taxpayer is the legal parent of the unborn child, shouldn't the Tax Code classify that child as a dependent?

Deductibility for the Socially Infertile

And where does that leave the socially infertile?

So far, courts have not allowed socially infertile taxpayers to deduct their medical expenses related to ART.

In 2009, in *Magdalin v. Commissioner*, T.C. Memo. 2008-293, *aff'd without published opinion*, 105 A.F.T.R.2d (RIA) 2010-442 (1st Cir. 2009), the First Circuit affirmed the holding of a tax judge who rejected the use of a medical deduction in a case concerning an unmarried man who used in vitro fertilization (IVF) and a gestational carrier to have a child. The tax court distinguished this matter from the egg donor ruling discussed above. In the egg donor ruling, the tax judge found that the taxpayer had a medical need.

In this case, the tax judge held that the taxpayer did not demonstrate medical need. At all times, he had normal levels of sperm count and motility. Previously, he had conceived children with a former spouse and without ART.

The same issues were raised in *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017), a case in Florida where the taxpayer was a gay man in a monogamous relationship. He sought to deduct medical expenses incurred in conceiving a child through IVF. He argued that opposite-sex couples are allowed to deduct these expenses.

The IRS argued that the taxpayer's expenses were not medically necessary. It was asserted that the taxpayer could have fathered a child through a sexual relationship with a woman. The district court and Eleventh Circuit affirmed.

Could the *Morrissey* ruling be challenged using the holdings and rationale in the U.S. Supreme Court trilogy of opinions, *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015); and *Pavan v. Smith*, 137 S. Ct. 2075 (2017)? In those holdings, the Supreme Court ruled that the government must treat married same-sex couples and married opposite-sex couples equally. Thus, when applied to the tax context, these decisions could inure to the benefit of married same-sex couples who seek to deduct ART expenses.

However, these U.S. Supreme Court cases would not benefit unmarried couples—same sex or different sex—and socially infertile taxpayers.

The tax court decisions discussed above looked at this issue through a "traditional" lens of how families are created. They made a distinction between the medically and the socially infertile.

If the socially infertile can use ART to create their families, why can't they have access to the same tax treatment? If they have the right to hire physicians and medical personnel to use ART to have a child, the socially infertile should also be granted the right to deduct their medical expenses.

In making a distinction between medical and social infertility, the court decisions discussed above failed to recognize that, for same-sex couples and couples where one or both individuals are transgender, their social infertility stems from their sexual orientation or gender identity, which are immutable characteristics. FA

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