TAXATION OF DOMESTIC PARTNER BENEFITS

2015 Update

[Note: This essay is based on published article at 45 University of San Francisco Law Review 481(2010). Post-Windsor, we know that if a same-sex couple is legally married, the marriage will be recognized for federal tax purposes. As a result the spousal coverage is tax-free income to the employee. But the IRS announced in Rev. Rul. 2013-17 that it will not treat RDPs as spouses. That means the existing rules described in this essay from 2010 determine the taxation of domestic partner benefits. The full article can be found at http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1270&context=facpubs]
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I. Taxation of Domestic Partner Benefits

A. The Basic Rules

1. Overview

Sections 105 and 106 of the Internal Revenue Code govern the tax consequences of employer-provided health benefits to employees. [1] Under § 106, employer contributions to health plans on behalf of their employees, usually made by paying insurance premiums, are exempt from tax.[2] Under the § 106 regulations, the exemption applies only to health plan coverage that is provided for the employee, his spouse, or his dependents.[3] Section 105(a) provides that, as a general rule, payments for personal injury or sickness are included in income if the payments can be traced to tax-exempt employer plans.[4] But there is an important exception, contained in § 105(b), which provides that such amounts will not be taxed so long as they are paid for medical care provided to the employee, the employee's spouse, or dependents.[5]

Thus, in order to ensure non-taxation of employer-provided health plan benefits, a taxpayer must determine whether or not his domestic partner is a dependent. A similar determination must be made if the taxpayer's plan covers children of the partner that are not also children of the taxpayer.[6]

While the IRS has never issued a public ruling on the taxation of domestic partner health care benefits, whether provided through health plans or through direct payments by employers, it has always

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1. I.R.C. §§ 105, 106 (2006)

2. Section 106 provides: Except as otherwise provided in this section, gross income of an employee does not include employer-provided coverage under an accident or health plan. I.R.C. § 106 (2006).

3. The exact language in the regulation is: "The gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152." *See* Treas. Reg. §1.106-1.

4. IRC § 105(a) (2006).

5. Exact language is:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include amounts referred to in subsection (a) if such amounts are paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by him for the medical care (as defined in section 213(d)) of the taxpayer, his spouse, and his dependents (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof). Any child to whom section 152(e) applies shall be treated as a dependent of both parents for purposes of this subsection.

I.R.C. § 105(b) (2006).

6. This situation occurs frequently for same-sex couples who have not been able to complete a second parent adoption before the end of the tax year or who live in states where second-parent adoptions are not possible.

been clear from the statutory and regulatory law that the amounts would be taxable if they were paid to someone other than a spouse or dependent of the employee.[7] A number of private letter rulings have been issued confirming that position.[8] Since benefits paid to non-spouses and non-dependents are taxable, the employer must include the value of any such benefits in the gross income of the employee.[9] The amount included is the value of the benefits, calculated by determining the amount of the group coverage that is allocable to the non-employee.[10] Because this payment is made as compensation for the employee's services, the income will be treated as additional wages and thus subject to payroll taxes.[11] The payroll taxes are split between the employer and the employee, with each paying 7.65% on the first $106,800 of income.[12] This means that if the employer pays $500 a month toward health coverage for a domestic partner, the $6,000 in extra income will cost the employer $459 extra in payroll taxes and it will cost the employee (assuming an income tax marginal rate of 35%) a total of $2,559 extra in taxes.[13] These are not trivial sums.[14] The extra cost to the employer can discourage some employers from extending benefits to domestic partners. On the other hand, gay-friendly employers like Google have adopted plans to pay their gay and lesbian employees who experience this extra cost an additional stipend to cover the taxes.[15]

2. Qualifying as a Dependent.

These additional taxes can be avoided, however, if the domestic partner can qualify as a dependent of the employee. The definition of "dependent" is contained in §152. The dependency exemption deduction is authorized in §151. For purposes of claiming an exemption deduction, both of these sections must be read together. At the outset, however, it is important to note that a person might qualify as a dependent for purposes of the exclusion from income for employer provided health care benefits, as well as for purposes

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7. Employer-provided benefits are taxable as income to an employee unless there is a specific exclusion. The two exclusions apply to amounts received by the taxpayer/employee, his spouse and dependents.

8. The first private letter ruling was issued in response to a question from the City of Seattle about how it should report the proposed domestic partner benefits. *See* PLR 9034048, 1990 WL 700179. That ruling concluded that the fair market value of the benefits would be treated as compensation income to the employee unless the benefits were paid to a spouse or a tax dependent under I.R.C. § 152 (2006). The ruling further concluded that the fair market value was to be calculated on the basis of the value to the recipient, i.e., what it would have cost the employee to purchase an individual policy for the partner. The City asked the IRS to reconsider the fair market value question and in PLR 9111018, 1991 WL 777745, the IRS concluded that value should be calculated on the basis of the value of the group policy coverage rather than on the basis of the value of individual coverage. PLR 9111018, 1991 WL 777745. *See also* PLR 9231062, 1992 WL 181641, ruling further that: (1) Domestic partners do not qualify as spouses; (2) Domestic partners may qualify as dependents if they meet the requirements under §152, in particularly that the employee provides over half the support and that the relationship does not violate local law; and (3) if the value of the benefits is included in income, then when the insurance pays for medical expenses, those payments will be excluded from income under §104(a)(3). *See also* PLR 9603011, 1996 WL 18211, following the earlier rulings, but ruling further that: (1) the imputed income to the employee whose domestic partner is included in the plan will be subject to payroll taxes as wages, and (2) the inclusion of taxable benefits to domestic partners would not threaten the tax exempt status of the plan for employees who were covering spouses and dependents.

9. PLR 9111018, 1991 WL 777745.

10. *See Id.*

11. See I.R.C. §§3101 (tax imposed on employee, 3111 (tax imposed on employer) and 3121 (definition of wages).

12. I.R.C. §3101(a) and (b) and I.R.C. §3111 (a) and (b). $106,800 is the upper limit for earnings subject to Social Security taxes in 2010. The hospital insurance tax of 2.9 (split equally between the employer and employee at 1.45 each) is imposed on wages in excess of this amount. SeeWages in excess of this amount are taxed to the employee and employer at the rate of 1.45 each (employer and employee both pay) by the imposition of a hospital tax. The contribution base is determined yearly under 42 U.S.C. §430. It was $106,800 for 2009 and 2010 and will remain at that amount for 2011. The annual amounts are available from the Social Security Administration online. See http://www.ssa.gov/OACT/COLA/cbb.html

13. The income tax burden is $2100 (35% of $6,000) and the employee will be charged $459 in payroll taxes (6.45% of $6,000). Income tax rates are found at I.R.C. §1 and social security and hospital tax rates are at I.R.C. §3101 (a) and (b). The cost is even higher if the benefit is taxable under a state income tax.

14. These amounts are not exaggerated. Indiana University includes estimates of the tax costs for its various health plans when they are extended to cover domestic partners who do not qualify as dependents. "The 2010 annual estimate is $2461.44 for an employee enrolling a non-tax qualified domestic partner in the IU PPO $900 Deductible plan." If you want to access this material on the web go to http://www.indiana.edu/~uhrs/pubs/forms/dptaxinfo.pdf

15. *See* Tara Siegel Bernard, *Google to Add Pay to Cover a Tax for Same-Sex Benefits*, N.EW Y.ORK TIMES, July 1, 2010, at page B-1.

of a medical deduction under §213, and not qualify as a dependent for purposes of the exemption deduction. To make this point more clearly, I will sometimes distinguish between an "exemption dependent" and a "medical dependent."

The starting place for both types of dependent is the basic definition of "dependent" in §152. That section was overhauled in 2004 by the Working Families Tax Relief Act. [16] Before these 2004 amendments to the statute, the definition of dependent in §152 was precisely the same as "medical dependent." But §151 set forth additional requirements for claiming someone as an "exemption dependent." In general, the 2004 amendments changed this basic structure. Today, the definition of "dependent" in §152 is precisely the same as an "exemption dependent," but §§105, 106, and 213 (the sections that apply rules to "medical dependents") have been amended. As a result, one now needs to consult both §152 and §§105, 106, and 213 to determine who is a "medical dependent." To clarify the impact of these changes, the following parts of this Aricle will focus on the definitions of "medical dependent" in the pre and post 2004 law.

B. Definition of Dependent Pre-2004

1. In General

In the early 1990s, when the initial private rulings on taxation of domestic partner benefits were issued, a domestic partner might qualify as a dependent under the "member of the household test," set forward at that time in (now repealed) § 152(a)(9).[17] A partner's child could similarly qualify as a dependent under the "member of the household test."[18] PLR 9034048 specifically ruled that a partner could qualify as a dependent if the partner met the statutory definition in § 152(a)(9), provided that the personal relationship between the taxpayer/employee and the partner was not "in violation of local law."[19]

In addition to satisfying the "member of the household" test, a partner could qualify as a dependent only if the remaining requirements of §152 were met. They were:

1. The taxpayer had to provide over half the support of the individual.[20]
2. The individual could not be a non-resident alien.[21]

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16. The Working Families Tax Relief Act of 2004, Pub. L. No. 108-311Pub. L. No. 108-311, Title II § 201, 118 Stat. 1169, § 208 (2004). This statute became effective for taxable years after 2004. *Id.*

17. IRC.R.C. § 152 (a)(9) (repealed 2004)

18. *Id.*

19. Before 2004, this "violation of local law" rule was contained in § 152(b)(6). I.R.C. § 152(b)(6) (2000). Under the current version of this section, the rule is set forth at §152(f)(3), which provides: "An individual shall not be treated as a member of the taxpayer's household if at any time during the taxable year ,,, the relationship between such individual and the taxpayer is in violation of local law." I.R.C. § 152(f)(3) (2006). Many people read this language and think that it may pose a problem for same-sex couples since in most states their relationships are not recognized. Non-recognition of a relationship is not the same thing as having an illegal relationship—i.e., in violation of local law. Illegal relationships include such things as heterosexual open and notorious cohabitation, bigamy, and adultery. Taxpayers in such relationships who have claimed their partners as dependents have been challenged successfully by the IRS. *See* Ensminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979)) (illegal cohabitation); Ochs v. Commissioner, T.C. Memo 1986-595 (adultery). In states that do not recognize same-sex marriages, the marriage or relationship itself is not illegal, but merely void or not recognized. In that case, the language in § 152(f)(3) does not seem to apply. It is worth noting, however, that before this rule was included in the Internal Revenue Code, the Tax Court ruled that to allow a dependency exemption to a male taxpayer for a woman he was supporting in an illicit relationship was not what Congress intended when it provided the "member of the household" deduction. In other words, as a matter of statutory construction, even without a codified rule regarding the "violation of local law," the Tax Court ruled that a dependency exemption deduction was not available for a paramour. In that case, however, it should be pointed out that the couple was in fact violating the state laws regarding cohabitation and adultery. See *Turnipseed v. Commissioner*, 27 T.C. 758 (1957). The *Turnipseed* holding was codified by adding the "violation of local Law' rule to §152 in 1958. See Boris I. Bittker, Taxation of the Family, 27 Stan. L. Rev. 1389 at 1454, note 173.

20. I.R.C. § 152(a) (repealed 2004)

21. I.R.C. § 152(b)(3) (repealed 2004).

2. Partner as "Member of the Household" Before 2004

Before the 2004 amendments, the definition of "member of the household" was contained in § 152(a)(9).[22] It provided that a person meeting the following description would qualify as taxpayer's dependent: "An individual . . .. who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household."[23]

The only other statutorily-imposed limit on the definition of a "member of the household" dependent was contained in § 152(b)(5).[24] It provided as follows: "An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law."[25]

Some commentators have suggested that state-level Defense of Marriage Acts might prevent a partner from being claimed as a dependent of a taxpayer because of this "violation of local law" rule.[26] It should be noted, however, that, to date, the provision has only been used in cases in which the relationship violated state criminal laws, such as statutes that prohibit bigamy or adultery.[27] State-level DOMAs do not criminalize same-sex relationships. Nor do state laws prohibit such relationships. Rather, they merely refuse to recognize them as having any legal significance.[28] As a result, classification as a dependent under the federal tax laws should not vary from state to state depending on whether or not state law recognizes same-sex relationships. And, of course, there has been a recent wave of court decisions striking down many of the state-level DOMAs.

To summarize, classification as a dependent in the pre-2004 Internal Revenue Code was solely controlled by the § 152 definition.[29] Thus, if the taxpayer and partner met the following tests, the partner could be classified as a dependent:

1. Taxpayer paid over half of the partner's support.[30]
2. Taxpayer and partner shared the same household for the entire tax year.[31]
3. Their relationship was not in violation of local law.
4. The partner was not a nonresident alien.

Classification as a dependent was important for several different purposes under the pre-2004 tax code.[32] A taxpayer could claim a dependency exemption deduction under § 151 for certain dependents,

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22. IRC.R.C. § 152(a)(9) (repealed 2004)

23. I.R.C. § 152(a)(9) (repealed 2004).

24. I.R.C. § 152(b)(5) (repealed 2004).

25. *Id.*

26. *See e.g.*, Frank S. Berall, *Legal and Tax Status of Person in Connecticut Civil Unions and Other Unmarried Cohabitants*, 78 CONN. B. J. 261, 322-23 (2004).

27. *See* Ochs v. Commissioner, T.C. Memo 1986-595 (applying New York law on adultery to deny a deduction); Turnipseed v. Commissioner, 27 T.C. 758 (1957)) (applying Alabama law on adultery and fornication to deny a deduction). *See also* Ensminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979)) (applying North Carolina law on open and notorious cohabitation to deny a deduction).

28. See, e.g., Alaska Constitution, Article I, Section 25, which provides: "To be valid or recognized in this state, a marriage may exist only between one man and one woman."

29. I.R.C. § 152(a) (amended 2004).

30. *Id.* Note: support is determined by actual tracing of funds. In addition, if the taxpayer owned the home that the couple shared, the fair rental value of the home to the partner is treated as a support item. *See* Rev. Rul. 58-302, 1958-1 C.B. 62.

31. I.R.C. § §152(a)(9) (amended 2004). Temporary absences from the household do not disqualify the individual from being a dependent. Such absences would include, vacations, hospital stays, military service or business trips. *See generally* Treas. Reg. §1,152-1(b).

32. Note, however, that although the existence of certain dependents would entitle the taxpayer supporting them to file as Head of Household, a member of the household dependent was (and still is) not a sufficient dependent for this purpose. *See* I.R.C. § §2(b)(3)(b)(i) (2006) (defining Head of Household and excluding consideration of dependents who qualify only as a "member of the household.")

who met additional qualifications.[33] The most important additional qualification under § 151, as it existed pre-2004, was the "gross income limitation."[34] If a dependent had gross income in excess of the exemption amount, the deduction for a dependency exemption was not available.[35] But this gross income limitation was tied only to the question of whether or not the dependency exemption was available. It was irrelevant to the initial question of whether or not the partner was a dependent. Thus, in every other code provision that referred to "dependent," only the four requirements listed above were relevant. The key provisions affecting health plan payments made by employers referred to dependents as defined in § 152.[36] Before 2004, a taxpayer whose partner satisfied the four requirements listed above would qualify as a dependent "as defined in §152" and thus health plan benefits received by that dependent from the taxpayer's employer could be received as a tax-free fringe benefit. In other words, meeting the §152 definition was sufficient to make the partner a "medical dependent."[37]

3. Partner's Child as "Member of the Household" Before 2004

In cases in which a same-sex partner has not adopted the partner's child, or is not automatically recognized as the second legal parent of the child under state law,[38] the child could nonetheless qualify as a tax dependent of the non-parent under the pre-2004 "member of the household" test. As with the partner, the child would simply have to meet the four requirements of then § 152 as listed above.[39] And if the employer-provided health plan covered the child, the result in such cases, as with the partner, was that the value of those benefits would have been received tax-free by the employee.

II. The Problem Post-2004

A. The Qualifying Child Definition

In 2004 Congress amended § 152 to provide two separate definitions for dependent, a "qualifying child" and a "qualifying relative.".[40] One purpose of the new law was to create a uniform definition for "qualifying child" that could be used not only for purposes of the dependency exemption deduction, but also for numerous child-related deductions and credits.[41] A "qualifying child" must meet certain age restrictions.[42] Older children of the taxpayer may qualify as a dependent under the althernative "qualifying relative" test.[43] As a general rule, a child must be the *taxpayer's* child to be considered a "qualifying child". In limited situations, the child may be the qualifying child of someone other than a parent, but only if the child is related to the taxpayer as a sibling, step-sibling, or descendant of such sibling.[44]

One important new change in the definition under § 152 is that the "qualifying child" need not receive

33. I.R.C. §151 (amended in 2004)

34. I.R.C. §151(c)(1)(A)(amended in 2004)

35. I.R.C. § §151(c)(1)(A) (amended 2004).

36. *See* I.R.C. § §105 (2006); Treas. Reg. §1.106-1.;. *See also* I.R.C. § §213 (regarding the deductibility of medical expenses.)..

37 However, to qualify as an exemption dependent, the partner would have to meet the additional requirement set forth in §151 that the partner's income not exceeed the exemption deduction amount. I.R.C. §152. This additional requirement is often referred to as the gross income limitation.

38. *See e.g.*, Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005)) (holding that non-biological mother is legal mother of child born during lesbian relationship even though she had not adopted the child).

39. I.R.C. § 152 (amended 2004).

40. §I.R.C. § 152(a)(1)), (2) (2006). Amended by Section 201, P.L. 108-311.

41 See, e.g., I.R.C. §§ 2(b)(Head of Household status if "qualifying child" is member of the household), 24 (child tax credit), 32 (earned income credit).

42 The child must either be under the age of 19 or a student under the age of 24. See I.R.C. §152(c)(3).

43 I.R.C. §152(d)(2)(A).

44. *See* I.R.C. § §152(c)(2)) (2006) (setting forth the relationship test) and §152(c)(4)(C)(adding requirements that the taxpayer's adjusted gross income (AGI) must also be higher than the parent's and no parent can have claimed the child).

over half of the annual support from the parent or other taxpayer claiming the child as a "qualifying child."[45] Instead, the only requirement is that the child not provide over half of his or her own support.[46] Thus, for example, a grandparent might support a grandchild in order to help out the child's parent, but the child's parent would nonetheless be able to claim the child as a qualifying child for dependency purposes as well as for purposes of claiming additional child-related tax benefits.

B. The Qualifying Relative Definition

The second definition provides that a tax dependent (which can include a child of the taxpayer who is not a "qualifying child" of the taxpayer)[47] can be a "qualifying relative." And, the term "qualifying relative" now includes unrelated individuals who basically meet the same "member of the household" test that was part of pre-2004 law. Specifically, under § 152, a domestic partner (or same-sex spouse) or the partner's child will qualify as a dependent if the following tests are met:

1. The taxpayer provides over half the support for the individual.[48]
2. The individual is a member of the taxpayer's household for the entire tax year,[49]
3. The individual is a citizen or resident alien,[50]
4. The relationship between the taxpayer and the individual does not violate local law.[51]
5. The individual's gross income does not exceed the exemption amount,[52]
6. The individual cannot be the "qualifying child" of any other taxpayer,[53]

Note that the first four requirements are the same as the four requirements for qualification as a dependent under the test in § 152 before it was amended in 2004. Items 5 and 6 in this list of requirements, however, are new. The "gross income limitation," previously contained only in § 151 is now part of the initial definition of "dependent." The last requirement, that the individual cannot be the "qualifying child" of any other taxpayer is new. It is needed under the newly structured definitions in § 152 because an individual can be the "qualifying child" of a taxpayer who does not necessarily provide over half of the child's support. As a result, absent this provision, a child could qualify as a "qualifying child" of one taxpayer and also qualify as a "qualifying relative" of another taxpayer. This provision was needed to prevent taxpayers, in certain situations, from gaming the system, by allowing one taxpayer to claim the qualifying-child benefits and the other taxpayer to claim the dependency exemption benefit.[54]

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45. See old Section 152(a) which provided: "the term 'dependent' means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer …" That language is not present in the new version of Section 152.

46. §152(c)(1)(D)

47. See I.R.C. §152(d)(2)(A). Since a "qualifying child" must be under certain age limits, children above these age limits will be qualifying relatives rather than qualifying children.

48. §152(d)(1)(c)

49. §152(d)(2)(H)

50. §152(b)(3)(A)

51. §152(f)(3). For example, if the partner was married to someone else, but cohabiting with the taxpayer, the relationship might violate a state adultery law.

52. §152(d)(1)(B)(for 2009 the exemption amount is $3650).

53. §152(d)(1)(D). It would be rare for a partner who is living with the taxpayer for the full year and supported by the taxpayer to meet the definition of "qualifying child" of someone else. This provision is more likely to cause a problem for a taxpayer who wants to claim the partner's "qualifying child" as the taxpayer's dependent because the taxpayer is supporting the child.

54. See Nina E. Olson, supra, note **Error! Bookmark not defined.**, which contains examples of marginal cases that seem to come out wrong under the current provisions. None of the examples involve lesbian or gay families and none of the examples focus on the problems created by the reference to dependents in the code provisions that address the taxation of employer provided health care benefits.

C. Problems Caused by the 2004 Changes

1. The "Gross Income Limitation"

Before the 2004 changes, the definition of dependent under §152 did not contain a gross income limitation. That limitation was instead contained in §151 and it was only determinative of whether a dependency exemption deduction could be claimed. Post-2004, however, a partner (or partner's child) will not qualify as a dependent under §152 unless the gross income limitation requirement is satisfied. This change has created some confusion over whether or not a partner, who has gross income in excess of the limitation amount, can still qualify as a "medical dependent."

It seems fairly certain that Congress did not mean to eradicate this distinction between "medical dependents" and "exemption dependents" in the 2004 legislative changes. The best evidence is that in the same legislation that amended §§ 151 and 152, Congress also amended §§ 105 and 213, to remove the gross income limitation from the definition of "medical dependents."

Congress failed, however, to say anything in § 106 about the gross income limitation and whether or not it applied to determine who qualified as a dependent under that provision. That omission makes a certain amount of sense given the fact that dependency status for § 106 purposes is provided in the regulations rather than by statute. What is needed is an amendment to the regulations that tracks the amended statutory language in § 105. Those regulations have yet to be amended. But if you research the issue closely enough, you will find an IRS announcement stating that the IRS intends to amend the regulations to mirror the language about dependents that is included in § 105, and further, that taxpayers can rely on the representation that the regulations will be amended.[55] As a result, current law tracks pre-2004 law, allowing the employee taxpayer to cover his or her partner under an employer's health plan tax-free—provided the partner qualifies as a dependent—disregarding any gross income the partner may have. The law in this regard has in fact stayed the same.

The problem is that employers have not amended their forms or their guidance to employees. Many employers still say things like "a domestic partner will be a dependent only if Section 152 requirements are satisfied." That used to be true. But now Section 152 includes the gross income limitation which is not a requirement for classification as a "medical dependent."

2. The New "Qualifying Child" Definition

The law does appear to have changed in some other instances, however. These changes are caused by the introduction of the category "qualifying child." An example will illustrate the problems:

Example: Someone Else's "Qualifying Child"

Assume that Ann and Betty are raising Ann's child, Carl. Ann is the stay-at home parent, with no income. Carl is just over one year old and Betty is planning to adopt, but due to time constraints and costs, she has not completed the process by the end of the 2009 tax year. Betty is the sole support of the family and her employer covers her family on the company's health plan. Ann is Betty's dependent under the "member of the household" test outlined above. But what about Carl? He is supported by Betty and is a member of the household and meets all of the tests as "qualifying relative" except one: he is Ann's "qualifying child."

While Section 105 was amended to remove the gross income limitation from the definition of a "medical dependent" under Section 105, it was not amended to remove this new requirement that a child cannot be a taxpayer's dependent – even for medical purposes – if the child is someone else's "qualifying child." The effect of this change is to take away a benefit that existed before the law was changed. In other

55. IRS Notice 2004-79, 2004 C.B. 898.

words, a partner's child, supported by the taxpayer, could be both a "medical dependent" and an "exemtion dependent" under prior law. But, because the partner's child is the "qualifying child" of the partner, the child will no longer qualify as any sort of dependent for the taxpayer who is supporting that child.

The IRS has clarified the situation slightly. In a little noticed 2008 announcement, the IRS has explained that the § 152 requirement that a dependent under "qualifying relative" cannot be anyone else's "qualifying child" will be waived in cases in which the parent of the "qualifying child" does not have sufficient income to require the filing of a tax return.[56] This is consistent with the statutory language, which says that the child cannot be the qualifying child of any other *taxpayer*.[57] While this does not solve the problem for all same-sex parents where the non-legal parent is the earner providing health coverage, it does serve to help Betty claim Carl as her "medical dependent" as well as her "exemption dependent," because Carl's parent, Ann, has no income and is thus not a *taxpayer*.

III. A Recent Wrinkle: Community Income Tax Rules

In order to claim that a partner is a dependent, the taxpayer does have to prove that he or she contributed over half of the partner's support.[58] In three states (California, Nevada, and Washington) that recognize registered domestic partnerships, the partners are subject to the state's community property regimes.[59] Under *Poe v. Seaborn*,[60] all community income is split between the two partners for income tax purposes. As a result, even if Betty is the only breadwinner and is supporting her partner, Ann, in California, Washington, and Nevada, Ann will be treated as providing one-half of her own support. While the IRS initially ruled that *Poe v. Seaborn* would not apply to registered domestic partners,[61] it has recently changed course and agreed that *Seaborn* does apply.[62] For most taxpayers with unequal incomes, it will be beneficial to split income between the two partners.[63] But, if they do so, for consistency's sake, they cannot claim that the earner is providing over half the support to the non-earner. In other words, if they claim the reduced income tax rates that result from income splitting, they will most likely lose the benefit of "medical dependency" status for the partner and any employer-provided benefits will become taxable income.

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56. See IRS Notice 2008-5, 2008-2 I.R.B. 256.

57. See I.R.C. §152(d)(1)(D).

58. I.R.C. §152(d)(1)(C)

59. California Family Code §297.5; H.B. 3104, 60th Leg., Reg. Sess. (Wash. 2008); S.B. 283, 2009 Leg., 75th Sess. (Nev. 2009)

60. 282 U.S. 101 (1930). See Patricia A. Cain, Relitigating Seaborn, Taxing the Community Income of California Registered Domestic Partners, 111 Tax Notes 561 (2006)

61. See CCA CCA 200608038, holding that for RDPs earned community income from personal services must be taxed to the earner.

62. See CCA 201021050 and PLR 201021048.

63. That is because under our progressive rates, $100,000 of taxable income reported 50/50 by two single taxpayers produces a lower tax bill than if it is reported by one taxpayer.