

THE CURIOUS STATE OF TAX DEDUCTIONS FOR FERTILITY TREATMENT COSTS

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Parenting children is central to the life plans and identity of most adult Americans,¹ but around one in ten intended parents experience infertility.² Medically infertile different-sex couples and, increasingly, same-sex

¹ *Cf., e.g.*, Frank Newport & Joy Wilke, *Desire for Children Still Norm in U.S.*, GALLUP (Sept. 25, 2013), <https://news.gallup.com/poll/164618/desire-children-norm.aspx> (finding that only 5 percent of adult Americans do not want children). Infertile intended parents often experience emotional distress. Katherine Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1129 (2004) [hereinafter Pratt, *Inconceivable*] (stating that intended parents describe infertility as the “most upsetting experience of their lives.”).

² *See, e.g., How Common is Infertility?*, EUNICE KENNEDY SHRIVER NAT’L INST. OF CHILD HEALTH & HUMAN DEV., <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common> (last updated Feb. 8, 2018) (stating that 9 percent of men and 11 percent of women of “reproductive age in the United States have experienced fertility problems.”).

couples and individuals often resort to reproductive medical treatment to become parents.³ Such treatment may include medical procedures performed on intended parents to diagnose or treat physiological sources of infertility and allow them to conceive and gestate a child. Medical fertility treatment also includes various types of Assisted Reproductive Technologies (“ARTs”), including *in vitro* fertilization (“IVF”),⁴ intracytoplasmic sperm injection (“ICSI”),⁵ egg donation,⁶ and surrogacy.⁷ ARTs are sometimes performed *on* the intended parents (or their gametes, including eggs and sperm), and other times performed *on* unrelated egg donors or surrogates—but ARTs always are performed *for* the intended parents. Additionally, the costs of such ARTs always are reproductive expenses *of* the intended parents.

ARTs are costly⁸ but often are not covered by health insurance for several reasons. First, insurance codes in most states do not mandate

³ See, e.g., Ethics Committee of the American Society for Reproductive Medicine, *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons: A Committee Opinion*, 100 FERTILITY & STERILITY 1524, 1525 (2013) (noting an “increase in the number of unmarried persons, including those who are gay or lesbian, who seek medical assistance to reproduce,” and highlighting that “a notable trend is for lesbian women and couples and, increasingly, for single and coupled gay men, to have offspring, most commonly through some form of assisted reproduction.”).

⁴ IVF is the fertilization of gametes (eggs) with sperm in a test tube, followed by implantation of the resulting embryos in the uterus of the woman who will gestate the child. RESOLVE: NAT’L INFERTILITY ASS’N, RESOLVING INFERTILITY: UNDERSTANDING THE OPTIONS AND CHOOSING SOLUTIONS WHEN YOU WANT TO HAVE A BABY 176–82 (1999) [hereinafter RESOLVING INFERTILITY].

⁵ ICSI, a procedure in which an embryologist injects a single sperm into each egg, is typically used in conjunction with IVF, especially if a sperm disorder has been diagnosed. See AM. SOC’Y FOR REPROD. MED., INFERTILITY: AN OVERVIEW 10, 17 (2017), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/infertility-an_overview_booklet2.pdf.

⁶ Egg donation involves the hormonal stimulation of a third-party egg donor’s ovaries and extraction of the gametes (eggs) from the donor. The donated eggs are fertilized through IVF. RESOLVING INFERTILITY, *supra* note 4, at 273.

⁷ Gestational surrogacy involves the implantation of embryos in a third-party surrogate, who gestates and delivers a child on behalf of the intended parents. *Id.* at 280. Traditional surrogacy typically involves intrauterine insemination (“IUI”) of a third-party surrogate who provides gametes and gestates the child. *Id.*

⁸ See, e.g., Valarie Blake, *It’s an Art Not a Science: State-Mandated Insurance Coverage of Assisted Reproductive Technologies and Legal Implications for Gay and Unmarried Persons*, 12 MINN. J.L., SCI. & TECH. 651, 659 (2011) (estimating a \$10,000 cost of one IVF cycle and a \$66,667–\$114,286 cost of a “successful delivery” via IVF). Egg donation adds an estimated \$15,000–\$20,000 cost, and surrogacy adds an estimated \$50,000–\$100,000 cost. Kristiana P. Boutell, Comment, *Redefining Infertility After Obergefell v. Hodges: Why the Fourteenth Amendment Warrants Infertility Insurance Coverage for Same-Sex Couples to Achieve Biological Parenthood*, 2017 MICH. ST. L. REV. 595, 627 (2017). Intended parents often go to extremes to fund large out-of-pocket expenses for ARTs. See, e.g., Nina Bahadur, *The Cost of Infertility: This*

insurance coverage of infertility.⁹ Only fifteen states mandate insurance coverage (or an offer of coverage) for fertility treatment. Second, some states that mandate fertility treatment coverage specifically exclude IVF from the mandate.¹⁰ Third, self-insured employers, small employers, and religious organizations are exempt from state insurance mandates.¹¹ Fourth, the states that have an IVF insurance mandate restrict the use of IVF, for example, by limiting the number of IVF treatment cycles that must be covered.¹² In addition, the state mandates impose specific conditions on IVF coverage. For example, the IVF coverage mandates in several states require that the sperm of the “patient’s” “spouse” be used to fertilize the eggs of the “patient,” thus excluding from coverage IVF with donated sperm or eggs.¹³ Also, an insured person must prove a history of “infertility” to qualify for an infertility treatment coverage mandate.¹⁴ Originally, state law definitions of infertility tracked the standard medical definition of infertility¹⁵—the

Is How Real People Pay for IVF, SELF (Jan. 8, 2018), <https://www.self.com/story/the-cost-of-infertility> (observing that intended parents spend up to \$70,000 on ARTs).

⁹ See, e.g., Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 74 (2008) (stating that most states have no insurance mandate to cover infertility treatment).

¹⁰ See, e.g., *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT’L CONF. ST. LEGISLATURES (Apr. 27, 2018), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx> (describing features of infertility treatment state insurance mandates in fifteen states). California, Louisiana, and New York specifically exclude IVF from their fertility treatment coverage mandates. By contrast, Arkansas, Connecticut, Hawaii, Illinois, Massachusetts, Maryland, New Jersey, and Rhode Island mandate coverage of IVF or similar treatments (including gamete intra fallopian transfer and zygote intra fallopian transfer), albeit with various restrictions and limitations. *Id.*

¹¹ See generally *Infertility Coverage by State*, RESOLVE: NAT’L INFERTILITY ASS’N, <https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state/> (last visited Jan. 24, 2019) [hereinafter RESOLVE, *Infertility Coverage by State*] (listing the sixteen states which have infertility coverage and the exemptions that apply to each).

¹² Although some states with IVF mandates cover just one or two IVF treatment cycles, IVF mandates in other states cover a higher number of cycles. For example, the Illinois and New Jersey insurance mandates require coverage of up to four IVF treatment cycles. 215 ILL. COMP. STAT. ANN. § 5/356m(a), (b)(1)(B) (West, Westlaw through P.A. 100-1179, excluding portions of P.A. 100-1176 and P.A. 100-1178, of the 2018 Reg. Sess. of the 100th General Assemb.); N.J. STAT. ANN. § 17:48-6x (West, Westlaw through N.J. 218th 2d Ann. Sess., L. 2019, c.6). States with generous IVF benefit mandates include Delaware, Illinois, Massachusetts, Maryland, and New Jersey. RESOLVE, *Infertility Coverage by State*, *supra* note 11.

¹³ See, e.g., TEX. INS. CODE ANN. art. 1366.005 (West, Westlaw through 2017 Reg. Sess. and 1st C.S., 85th Leg.) (requiring that fertilization of a “patient’s oocytes is made only with the sperm of the patient’s spouse.”).

¹⁴ See *id.* (requiring proof of at least five years of infertility).

¹⁵ See, e.g., *Treating Infertility: Frequently Asked Questions*, AM. COLLEGE OBSTETRICS & GYNECOLOGISTS (last visited March 7, 2019), <https://www.acog.org/Patients/FAQs/Treating-Infertility> (defining infertility as “not having become pregnant after [one] year of having regular sexual intercourse without the use of birth control”) (emphasis in original); *Infertility*, AM. SOC’Y FOR REPROD. MED., <https://www.asrm.org/topics/topics-index/infertility> (last visited Feb. 28,

inability to conceive after twelve months of sexual intercourse without birth control.¹⁶ However, this heteronormative definition of infertility does not fit intended parents whose inability to conceive and bear children is attributable to the intended parents' sexual orientation. As a result, some states recently expanded the definition of infertility in their insurance codes to increase access to reproductive care.¹⁷ Notwithstanding the recent expansion of state insurance mandates for fertility treatment, many intended parents still receive no insurance reimbursement for their ART costs.¹⁸

Intended parents whose ART expenses are not covered by insurance may be able to reduce their net ART costs by taking an income tax

2019) (“Infertility is the result of a disease (an interruption, cessation, or disorder of body functions, systems, or organs) of the male or female reproductive tract which prevents the conception of a child or the ability to carry a pregnancy to delivery. The duration of unprotected intercourse with failure to conceive should be about [twelve] months before an infertility evaluation is undertaken, unless medical history, age, or physical findings dictate earlier evaluation and treatment.”).

¹⁶ See, e.g., CAL. HEALTH & SAFETY CODE § 1374.55(b) (Deering, LEXIS through 2018 Reg. Sess. and Nov. 6, 2018 Ballot Measures) (defining “infertility” as “(1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception.”).

¹⁷ See, e.g., N.J. STAT. ANN. § 17:48-6x(a) (West, Westlaw through N.J. 218th 2d Ann. Sess., L. 2019, c.6) (expanding definition of infertility beyond the standard medical definition). The revised New Jersey statute defines “infertility” as “a disease or condition that results in the abnormal function of the reproductive system, as determined pursuant to American Society for Reproductive Medicine practice guidelines by a physician who is Board Certified or Board Eligible in Reproductive Endocrinology and Infertility or in Obstetrics and Gynecology *or* that the patient has met one of the following conditions:

- (1) A male is unable to impregnate a female;
- (2) A female with a male partner and under 35 years of age is unable to conceive after 12 months of unprotected sexual intercourse;
- (3) A female with a male partner and 35 years of age and over is unable to conceive after six months of unprotected sexual intercourse;
- (4) A female without a male partner and under 35 years of age who is unable to conceive after 12 failed attempts of intrauterine insemination under medical supervision;
- (5) A female without a male partner and over 35 years of age who is unable to conceive after six failed attempts of intrauterine insemination under medical supervision;
- (6) Partners are unable to conceive as a result of involuntary medical sterility;
- (7) A person is unable to carry a pregnancy to live birth; or
- (8) A previous determination of infertility pursuant to this section.” *Id.* (emphasis added).

This expanded definition of infertility could apply to a married lesbian couple or an unmarried woman. How it would apply to a married gay couple or single man is less clear, however.

¹⁸ See *ART and Insurance*, CDC, <https://www.cdc.gov/art/key-findings/insurance.html> (last visited Apr. 8, 2019) (stating that “only eight states mandat[e] reimbursement for assisted reproductive technology.”).

deduction for the costs of their “medical care.”¹⁹ For example, a \$30,000 medical expense tax deduction would save parents in the 35 percent tax bracket \$10,500 of tax. In addition to the medical expense tax deduction, other federal income tax rules provide benefits for taxpayers’ medical care expenses. For example, taxpayers who maintain a Health Savings Account are allowed to make tax-free distributions from their Health Savings Account to pay for their medical care.²⁰ Also, if a taxpayer-employee is reimbursed for medical care expenses by either employer-provided insurance or directly by the employer, the employee is not taxed on the reimbursement.²¹

Are intended parents’ out-of-pocket costs for medical fertility treatments (including IVF, ICSI, egg donation, and surrogacy) “medical care”? Although millions of intended parents have received medical fertility treatment over the last four decades in the United States,²² the answer is not clear.²³ The Internal Revenue Service (“IRS”) has issued treasury regulations and revenue rulings that address the deductibility of a wide variety of expenses as “medical,”²⁴ but it has not issued any regulations or

¹⁹ Taxpayers can deduct their unreimbursed costs of “medical care” in excess of 10 percent of their Adjusted Gross Income. I.R.C. § 213(a) (Deering, LEXIS through Pub. L. 115-385 (excluding Pub. L. No. 115-344) 2012).

²⁰ *Id.* § 223(d)(2)(A), § 223(f) (excluding from gross income distributions from a Health Savings Account to pay for “medical care,” “as defined in § 213(d),” for the taxpayer, the taxpayer’s spouse or the taxpayer’s dependent).

²¹ I.R.C. §§ 105, 106 (West, Westlaw through Pub. L. No. 115-223, 2012).

²² *Infertility*, CDC, <https://www.cdc.gov/nchs/fastats/infertility.htm> (last updated July 15, 2016) (reporting that 7.3 million women have used fertility treatment services). ARTs have been performed in the U.S. since the late 1970s. *Id.*

²³ *See infra* Part II (applying the tax test for deductible “medical care” to costs of IVF, egg donation, and surrogacy). Various tax commentators have addressed other tax issues related to fertility treatment. *See, e.g.*, Tessa Davis, *Freezing the Future: Elective Egg Freezing and the Limits of the Medical Expense Deduction*, 107 KY. L.J. (forthcoming 2019); Bridget J. Crawford, *Taxation, Pregnancy, and Privacy*, 16 WM. & MARY J. WOMEN & L. 327, 343–45 (2010) (discussing income inclusion of surrogacy fees received in income); James Edward Maule, *Federal Tax Consequences of Surrogate Motherhood*, 60 TAXES 656, 661–64 (1982) (discussing same). *See also* Naomi Cahn & Sarah B. Lawskey, *Embryo Exchanges and Adoption Tax Credits*, 52 TAX NOTES 927, 935 (2009) (stating that intended parents that “adopt” embryos under Georgia law cannot claim adoption tax credits because an embryo is not an “eligible child”).

²⁴ *See, e.g.*, Rev. Rul. 2007-72, 2007-2 C.B. 1154 (ruling that diagnostic tests, including physical examination, full-body scan, and pregnancy test, are “medical” even in the absence of “disease”); Rev. Rul. 2003-102, 2003-2 C.B. 559 (ruling that dietary supplements are not “medical”); Rev. Rul. 2002-19, 2002-1 C.B. 779 (ruling that medically supervised weight loss program for obesity is “medical,” but similar program to improve health is not medical; special diet foods ordered in anti-obesity weight-loss program are not “medical”); Rev. Rul. 99-28, 1999-1 C.B. 1269 (ruling that smoking cessation program and nicotine withdrawal prescription drugs are “medical”); Rev. Rul. 87-106, 1987-2 C.B. 67 (ruling that cost of structural modifications to residence, to allow handicapped access, is a deductible medical expense); Rev. Rul. 82-111, 1982-1 C.B. 48, *superseded by* I.R.C. § 213(d)(9) (ruling that hair transplants and electrolysis are “medical” but

revenue rulings that address the deductibility of ART costs, such as IVF, ICSI, egg donation, and surrogacy, as “medical” expenses. The last time the IRS issued any medical expense deduction regulations or revenue rulings on reproductive care was in 1973,²⁵ following the landmark decision in *Roe v. Wade*.²⁶ The lack of IRS guidance on the tax deductibility of costly, high-frequency ART expenses is curious.

Instead of issuing the standard forms of administrative guidance on the issue, the IRS has provided only limited, informal advice—in the form of a Taxpayer Publication intended for lay taxpayers.²⁷ For many years, Taxpayer Publication 502 has included on its list of deductible medical expenses: “Fertility Enhancement. You can include in medical expenses the cost of the following procedures to overcome an inability to have children[:] Procedures such as *in vitro* fertilization (including temporary storage of eggs or sperm).”²⁸ Publication 502 also includes on the list of deductible “medical” expenses the costs of abortion, birth control pills, vasectomy, surgery to reverse vasectomy, and sterilization.²⁹ On the enforcement side, the IRS has instructed its personnel to refer to Publication 502 in determining which expenses taxpayers can and cannot deduct as medical expenses.³⁰ In disputes involving just one taxpayer, the IRS twice has taken a position on tax deductions for specific types of fertility treatment expenses. In a 2003 Private Letter Ruling, the IRS allowed a married different-sex couple with a medical history of infertility to deduct the costs

tattoos and ear piercing are not “medical”); Rev. Rul. 72-593, 1972-2 C.B. 190 (ruling that acupuncture is “medical”).

²⁵ See Rev. Rul. 73-200, 1973-1 C.B. 140 (ruling that cost of birth control pills is a deductible medical expense); Rev. Rul. 73-201, 1973-1 C.B. 140 (ruling that cost of a legal abortion or vasectomy is a deductible medical expense); Rev. Rul. 73-603, 1973-2 C.B. 76 (ruling that the cost of a female taxpayer’s sterilization procedure is a deductible medical expense).

²⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁷ DEP’T OF THE TREASURY, I.R.S., PUBLICATION 502 (2018): MEDICAL AND DENTAL EXPENSES (2019), <https://www.irs.gov/pub/irs-pdf/p502.pdf> [hereinafter I.R.S. PUB. 502].

²⁸ *Id.* at 7. Many of the deductible items listed in Publication 502 were addressed in prior Revenue Rulings. For example, the list of “medical” items includes acupuncture, annual physical exams, body scans, pregnancy test, smoking cessation programs, travel to medical conferences, and weight loss programs for obesity. See *supra* note 24 and accompanying text. Some items on the list are addressed in Treasury Regulations. See, e.g., Treas. Reg. § 1.213-1(e)(1)(v)(a) (as amended in 1979) (allowing deduction for braille books for the blind). Publication 502 also lists items that are not “medical,” including items addressed in prior Revenue Rulings (e.g., nutritional supplements, electrolysis, and hair transplants). See *supra* note 24 and accompanying text.

²⁹ I.R.S. PUB. 502 at 5, 7, 13, 14. The medical procedures to prevent or facilitate pregnancy were addressed in prior Revenue Rulings in 1973. See *supra* note 24 and accompanying text.

³⁰ See, e.g., I.R.S. IRM 3.12, Exh. 2-6, Unallowable Codes (1) Code 33 (Dec. 4, 2018) (instructing I.R.S. personnel to use certain codes for medical expenses that are disallowed and listing various expenses that are disallowed, stating: “See Publication 502”).

of egg donation.³¹ In a 2002 Information Letter, the IRS argued that the taxpayer could not take a medical expense deduction for surrogacy costs.³² However, the IRS pronouncements in Publication 502, the private letter ruling, and the information letter are not law.

There are no reported federal tax cases on the question of whether a married different-sex couple or a married or unmarried woman can take a medical expense deduction for IVF, ICSI, egg donation, or surrogacy expenses. The IRS allowed taxpayers to deduct surrogacy expenses in two United States Tax Court cases it settled, but these two cases have no precedential value.³³ Additionally, three cases addressing the question of whether an unmarried man can deduct ART costs held that a medically fertile unmarried man, gay or straight, cannot deduct IVF, egg donation, and surrogacy expenses to bear a biological child.³⁴

Two developments further complicate the question of whether intended parents can deduct their IVF, ICSI, egg donation, and surrogacy expenses. First, the IRS has tried to narrow the scope of the medical expense deduction through litigation.³⁵ The IRS's argument would eliminate medical expense deductions for reproductive medical care, absent reproductive pathology. Second, the 2017 decision by the Eleventh Circuit Court of Appeals in *Morrissey v. United States*³⁶ muddles the parts of the tax law that previously seemed clear regarding medical expense deductions for various types of ART expenses.

The absence of clear law on this tax issue is curious in light of the fact that each year, many thousands of taxpayers incur significant costs for ARTs, including IVF, ICSI, egg donation, and surrogacy.³⁷ This Article addresses the important question of whether various categories of taxpayers—including medically fertile and infertile unmarried men, unmarried women, same-sex married men, same-sex married women, and

³¹ I.R.S. Priv. Ltr. Rul. 200318017 (Jan. 9, 2003).

³² I.R.S. Information Ltr. 2002-0291 (Dec. 31, 2002).

³³ *Morrissey v. United States*, 871 F.3d 1260, 1271 (11th Cir. 2017) (citing *Osius v. Comm'r*, No. 15472-11S (T.C. filed June 30, 2011)); *Sedgwick v. Comm'r*, No. 10133-94, (T.C. filed June 14, 1994).

³⁴ See *Magdalin v. Comm'r*, 96 T.C.M. (CCH) 491 (2008), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009); *Longino v. Comm'r*, 105 T.C.M. (CCH) 1491 (2013), *aff'd*, 593 Fed. Appx. 965 (11th Cir. 2014); *Morrissey v. United States*, 226 F. Supp. 3d 1338, 1342-44 (M.D. Fla. 2016), *aff'd*, 871 F.3d 1260 (11th Cir. 2017).

³⁵ See *infra* Part III(A).

³⁶ *Morrissey*, 871 F.3d at 1262 (holding that the cost of various ART procedures could not be deducted because the expenses were not “paid for the purpose of affecting the taxpayer’s own reproductive function.”).

³⁷ See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., CDC, 2015 ASSISTED REPRODUCTION TECHNOLOGY: NATIONAL SUMMARY REPORT 3 (2017) (stating that 231,936 ART cycles were performed in 2015).

different-sex married couples—can take a medical expense tax deduction for the costs of IVF, ICSI, egg donation, and surrogacy under current law. In addition, it proposes a change in the statutory definition of “medical care” to address potential reproductive unfairness that may result under current law.

Part I of this Article outlines the contours of the income tax deduction for “medical care,” discussing the statutory requirements for the deduction and the interpretation of the requirements by the IRS and the courts. Part II applies the “medical care” definition in Internal Revenue Code § 213(d)(1)(A) to expenses incurred by different-sex married couples for specific types of reproductive medical care and ancillary payments. The analysis begins with this cohort of intended parents because the IRS seems to have had such taxpayers in mind when it initially provided informal advice to taxpayers incurring fertility treatment costs. Next, this analysis is extended to same-sex couples and unmarried individuals, focusing primarily on the U.S. Tax Court decision in *Magdalin v. Commissioner*.³⁸ and briefly summarizing *Longino v. Commissioner*.³⁹ In both cases, the court denied fertile unmarried men a medical expense deduction for ART expenses.⁴⁰ Part II then considers *Magdalin*’s implications for medically infertile men, married and unmarried women, and married different-sex couples. Part II then explains the arguments that men still can make for deducting the costs of certain ART procedures, notwithstanding *Magdalin*.

Part III challenges the recent attempt by the IRS to narrow the scope of the medical expense deduction. In addition, Part III explains and critiques the appellate decision in *Morrissey*, which oversimplifies male reproductive functioning and characterizes IVF, egg donation, and surrogacy as exclusively “female” reproductive functioning procedures. This Part also argues that the *Morrissey* court’s new “IVF-related expense” terminology erroneously conflates the distinct tax consequences of different types of fertility treatments and potentially unsettles what previously seemed to be a settled part of the tax law. Part III further challenges the *Morrissey* court’s assertion that heterosexuals are not allowed to deduct “IVF-related expenses.” In addition, Part III comments on the *Morrissey* court’s moral objections to “science fiction” ARTs and questions the legal relevance of such opprobrium for purposes of the medical expense deduction. Part III

³⁸ *Magdalin*, 96 T.C.M. (CCH) 491.

³⁹ *Longino*, 105 T.C.M. (CCH) 1492. While *Magdalin* and *Longino* may not have precedential force, parties and federal courts use them as persuasive authority. See FED. R. APP. P. 32.1 note (2006) (“Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions.”).

⁴⁰ *Magdalin*, 96 T.C.M. (CCH) at 493; *Longino*, 105 T.C.M. (CCH) at 1499.

also critiques the “reproductive binarism” of current law and the potential failure of current law to address the family formation implications of *Obergefell v. Hodges*.⁴¹

Part IV proposes a change in the definition of tax deductible “medical care” to bring “inherently medical” reproductive care and ancillary expenses within the definition of “medical care,” regardless of the taxpayer’s sex, sexual orientation, or marital status. Lastly, Part V concludes with several observations about current law and the proposal.

I. THE INTERNAL REVENUE CODE § 213 DEFINITION OF “MEDICAL CARE”

A. “MEDICAL CARE” UNDER THE “DISEASE” PRONG OR THE “STRUCTURE OR FUNCTION” PRONG OF INTERNAL REVENUE CODE § 213(D)(1)(A)

Internal Revenue Code § 213(a) allows taxpayers to deduct the costs of “medical care” above a certain income threshold.⁴² Section 213(d)(1)(A) defines the term “medical care” to include 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 [of the taxpayer, the taxpayer’s spouse, or the taxpayer’s dependent.]”⁴³

For decades, the IRS has interpreted the term “disease” *very* broadly, to include mental or physical illnesses, conditions, traumatic injuries, impairments, and disorders.⁴⁴ Pregnancy, for example, could be considered a “condition” of the body and therefore within the broad definition of “disease.” However, Treasury Regulation § 1.213-1(e) states that reproductive care, such as obstetric care, is within the “structure or

⁴¹ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴² I.R.C. § 213(a), (f)(2) (Deering, LEXIS through Pub. L. 115-385 (excluding Pub. L. No. 115-344) 2012) (allowing taxpayers to deduct annual unreimbursed costs of “medical care” to the extent such expenses exceed 10 percent of annual adjusted gross income).

⁴³ *Id.* § 213(d)(1)(A). This definition of medical care also applies to other income tax rules that govern the tax treatment of medical expenses, including the exclusion of reimbursements from medical flexible spending accounts for “medical care” and the exclusion of disbursements for “qualified medical expenses” from tax-free health savings accounts. *See, e.g., id.* § 223(d)(2)(A) (“The term ‘qualified medical expenses’ means, with respect to an account beneficiary, amounts paid by such beneficiary for medical care (as defined in section 213(d)) for such individual, the spouse of such individual, and any dependent.”).

⁴⁴ *See, e.g.,* Treas. Reg. § 1.213-1(e)(1)(v)(a) (as amended in 1979) (“[C]ost of medical care includes the cost of attending a special school for a mentally or physically handicapped individual, if his *condition* is such that the resources of the institution for alleviating such mental or physical handicap are a principal reason for his presence there.”) (emphasis added).

function” prong of the definition of “medical care.”⁴⁵

The term “medical care” does not include expenses incurred for the “general well-being” of the taxpayer.⁴⁶ For example, if a doctor prescribes a tropical vacation for a stressed, workaholic couple to help them conceive a child, the costs of the vacation are not “medical care,” even if the doctor’s advice is sound as a medical matter.⁴⁷

Prior to 1990, cosmetic surgery and similar treatments undertaken to improve physical appearance were classified as “medical care” because such treatments affected the structure or function of the taxpayer’s body.⁴⁸ In 1990, Internal Revenue Code § 213(d) was amended to exclude from the definition of “medical care” “cosmetic surgery or similar procedures,” “unless the surgery or procedure is necessary to ameliorate a deformity arising from or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.”⁴⁹ Further, “cosmetic surgery” is defined as “any procedure which is directed at improving the [taxpayer’s] appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.”⁵⁰

B. APPLICATION TO EXPENSES THAT ARE AND ARE NOT “INHERENTLY MEDICAL”

Regulations and cases interpreting § 213 distinguish between “inherently medical” treatments and treatments that might be health enhancing but are not “inherently medical.”⁵¹ Procedures or treatments that

⁴⁵ Treas. Reg. § 1.213-1(e)(1)(ii) (“Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses . . . are deemed to be for the purpose of affecting any structure or function of the body.”).

⁴⁶ *Id.* (“[A]n expenditure which is merely beneficial to the general health of an individual . . . is not an expenditure for medical care.”).

⁴⁷ See *Havey v. Comm’r*, 12 T.C. 409, 412–13 (1949) (ruling that a taxpayer could not deduct the costs of vacation recommended by his physician because the medical benefit was incidental to the vacation).

⁴⁸ See, e.g., Rev. Rul. 82-111, 1982-1 C.B. 48 (ruling that hair transplants and electrolysis are “medical care”); Rev. Rul. 76-332, 1976-2 C.B. 81, 82 (ruling that fees paid for face-lift operation qualified as “medical care”). The 1990 amendment of § 213 superseded these rulings. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (amending § 213 to add § 213(d)(9), the cosmetic surgery exception, to the § 213(d)(1) definition of medical care).

⁴⁹ *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491, 493 n.5 (2008).

⁵⁰ I.R.C. § 213(d)(9)(B) (Deering, LEXIS through Pub. L. 115-385 (excluding Pub. L. No. 115-344) 2012).

⁵¹ See *Huff v. Comm’r*, 69 T.C.M. (CCH) 2551 (1995) (distinguishing between “inherently medical” treatments and nonmedical treatments, such as massage, undertaken to improve general well-being).

are inherently medical include doctors' services, diagnostic tests, surgery, prescription drugs, and hospital expenses.⁵² This is the core concept of the definition of "medical care." The assumption is that inherently medical treatment originates out of the taxpayer's medical needs to function normally, not out of personal consumption motives,⁵³ despite the fact that certain medical expenses may include an element of personal consumption.⁵⁴

The fact that an inherently medical procedure is "elective," meaning that the patient can decide whether to undergo the procedure, does not take the procedure out of the definition of "medical care." All medical treatment that requires the patient's informed consent—including all treatment other than emergency treatment for which the patient cannot give informed consent—is "elective."⁵⁵ What matters is whether the procedure is for the diagnosis, cure, mitigation, treatment, or prevention of "disease" (broadly construed), or for the purpose of affecting the functioning of the patient—not whether the procedure is elective.⁵⁶ For example, if a 70-year-old man can walk without assistance but decides to undergo knee replacement surgery to be able to play tennis, the surgery is "medical care" notwithstanding the fact that the surgery is "elective."

Nor does the § 213 definition of medical care require a taxpayer to prove that an inherently medical procedure is "medically necessary."⁵⁷ Showing that a medical procedure is medically necessary is sufficient, although not required, to establish that the procedure is "medical care" under § 213(d)(1)(A).⁵⁸ A medical procedure can be medical care even if

⁵² Care that is inherently medical includes: "hospital services, nursing services, medical, laboratory, surgical, dental and other diagnostic and healing services, X-rays, medicine and drugs . . . artificial teeth or limbs, and ambulance hire." Treas. Reg. § 1.213-1(e)(1)(ii) (as amended in 1979).

⁵³ See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 314 (1972).

⁵⁴ See Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 866–68 (1979) (challenging the assumption that medical expenses are involuntary and noting the income elasticity and price elasticity of medical care). See also *id.* at 864–65 (noting that richer taxpayers buy more amenities (e.g., luxurious, private hospital rooms) when receiving medical care).

⁵⁵ See Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of Magdalin v. Commissioner for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283, 1293–94 (2009) [hereinafter Pratt, *Implications of Magdalin*].

⁵⁶ *Id.*

⁵⁷ See I.R.C. § 213 (Deering, LEXIS through Pub. L. No. 115-385 (excluding Pub. L. No. 115-344) 2012).

⁵⁸ Katherine Pratt, *The Tax Definition of "Medical Care": A Critique of the Startling IRS Arguments in O'Donnabhain v. Commissioner*, 23 MICH. J. GENDER & L. 313, 370 (2016) [hereinafter Pratt, *Definition of Medical Care*].

the taxpayer cannot establish that the procedure is regarded by insurance plans as medically necessary.⁵⁹ Medical necessity is a malleable, indeterminate, context-dependent term that typically is invoked to deny insurance benefits.⁶⁰

Insurance companies often argue that a medical procedure is not medically necessary to justify denying insurance coverage of the procedure.⁶¹ Such denial of coverage for a procedure does not establish that the procedure is not “medical.” An example of this is the nearly universal denial of insurance coverage for breast reconstruction following mastectomy (prior to the enactment of breast reconstruction mandates), on the grounds that breast reconstruction is not medically necessary.⁶² Notwithstanding the broad insurance industry consensus that breast reconstruction surgery is not medically necessary, Congress and state legislatures enacted breast reconstruction insurance mandates to reverse the denial of insurance coverage for breast reconstruction.⁶³ Although breast augmentation surgery is “cosmetic surgery,” breast reconstruction surgery following a cancer-related mastectomy is not “cosmetic surgery” for purposes of § 213(d)—notwithstanding the widespread insurance company determination that these surgeries are not “medically necessary.”⁶⁴

Much of the § 213 litigation involves taxpayers trying to deduct as a medical expense the cost of items that are not inherently medical, such as recreational items that usually are purchased for nonmedical, personal consumption reasons.⁶⁵ In these cases, courts distinguish between nondeductible personal consumption expenses and deductible medical expenses by looking for a “direct or proximate relation” between the expense and the ostensible medical problem.⁶⁶ In other words, an expense

⁵⁹ *Id.* (citing I.R.C. § 213).

⁶⁰ *See, e.g.*, Linda A. Bergthold, *Medical Necessity: Do We Need It?*, HEALTH AFF., Winter 1995, at 180 (noting that the term “medical necessity” is ambiguous, “undefined” and “open to interpretation,” and that insurance plans use it “as a place holder to define the limits of their benefit coverage, despite widespread disagreement about its meaning.”).

⁶¹ *See id.* at 181 (noting that the term “medical necessity” has evolved into “a rationing tool largely under the control of insurance plan administrators,” and is used by insurance companies to contain health care costs through denial of coverage for expensive treatments).

⁶² Pratt, *Definition of Medical Care*, *supra* note 58, at 326.

⁶³ *Id.* at 326 n.56.

⁶⁴ 136 CONG. REC. 30, 570 (1990).

⁶⁵ *See, e.g.*, France v. Comm’r, 690 F.2d 68 (6th Cir. 1982) (ruling that the taxpayer could not deduct the cost of dancing lessons doctor recommended as therapy); Evanoff v. Comm’r, 44 T.C.M. (CCH) 1394 (1982) (ruling that the taxpayer could not deduct cost of a home pool used for therapy because a community pool was located nearby).

⁶⁶ *See, e.g.*, Havey v. Comm’r, 12 T.C. 409, 412–13 (1949). In *Havey*, the court noted the following:

In determining allowability, many factors must be considered. Consideration

that is not inherently medical is not for medical care if the taxpayer would have purchased it without regard to the taxpayer's disease or dysfunction.

Another group of § 213 cases involves fees paid to nonmedical providers, such as lawyers, for items that are not recreational, but are generally characterized as nondeductible personal expenses.⁶⁷ The IRS and courts classify these types of fees as medical expenses only if the services provided by the person are necessary (using a "but for" test) to treat the taxpayer's medical condition.⁶⁸

With this background, consider whether various expenses incurred for reproductive care constitute deductible "medical care."

II. APPLICATION OF THE "MEDICAL CARE" TEST TO IVF, ICSI, EGG DONATION, AND SURROGACY EXPENSES

A. EXPENSES INCURRED BY MEDICALLY INFERTILE DIFFERENT-SEX MARRIED COUPLES

1. Expenses Incurred for the Infertility Medical Workup, IVF, and ICSI

Medical treatment of infertility is progressive.⁶⁹ A reproductive care medical workup begins with rounds of office examinations and screening tests, including physical examinations, blood tests, semen tests, transvaginal ultrasounds, and imaging of the fallopian tubes and uterus.⁷⁰ The workup

should be accorded the motive or purpose of the taxpayer, but such factor is not alone determinative . . . [A]lso it is important to inquire as to the origin of the expense. Was it incurred at the direction or suggestion of a physician; did the treatment bear directly on the physical condition in question; did the treatment bear such a direct or proximate therapeutic relation to the body condition as to justify a reasonable belief the same would be efficacious; was the treatment so proximate in time to the onset or the recurrence of the disease or condition as to make one the true occasion for the other, thus eliminating expense incurred for general, as contrasted with some specific, physical improvement?

Id. at 412.

⁶⁷ *See, e.g., Jacobs v. Comm'r*, 62 T.C. 813 (1974) (ruling that the taxpayer could not deduct cost of divorce as a medical expense, even though taxpayer's psychiatrist recommended the divorce to treat mental illness).

⁶⁸ *See, e.g., Gerstacker v. Comm'r*, 414 F.2d 448, 453 (6th Cir. 1969) (ruling that the taxpayer could deduct legal fees incurred to establish a guardianship for his spouse under § 213 because guardianship was necessary to commit his spouse to a mental institution for medical treatment).

⁶⁹ For a more detailed descriptive of the fertility treatment workup, *see Pratt, Inconceivable, supra* note 1, at 1132–35 nn.49–78.

⁷⁰ *Id.* at 1132–33. *See also* RESOLVING INFERTILITY, *supra* note 4, at 68–69, 74–79, 85–87 (describing procedures for a variety of such examinations and tests).

helps medical specialists identify and treat specific causes of infertility. Many causes of infertility can be treated. For example, endometriosis can be treated with surgery, hormonal treatment, or a combination of the two.⁷¹ Specialists can also treat certain male causes of infertility with surgery or hormonal medication.⁷² Although people often assume that infertility is attributable to female health problems, male factors and female factors contribute about equally to infertility.⁷³

If these initial treatments are not successful, however, patients often resort to ARTs, including intrauterine insemination (“IUI”), IVF, and ICSI.⁷⁴ In an IVF procedure, a doctor prescribes drugs to stimulate the ovaries of the intended mother and extracts her eggs when they are mature.⁷⁵ The eggs are fertilized in a Petri dish, typically with the intended father’s sperm.⁷⁶ Several days later, the resulting embryos are implanted in the intended mother’s uterus.⁷⁷ In an ICSI procedure, a single sperm is injected into an egg to facilitate fertilization.⁷⁸ ICSI generally is used in conjunction with IVF.⁷⁹

The inherently medical diagnosis, treatment, and amelioration of medical infertility constitutes “medical care” under both the “disease” prong and the “structure or function” prong of § 213’s definition.⁸⁰ Medical

⁷¹ RESOLVING INFERTILITY, *supra* note 4, at 125–28; Pratt, *Inconceivable*, *supra* note 1, at 1133. Endometriosis is a disease in which endometrial cells, which normally line the uterine cavity, implant outside of the uterus instead; it is also associated with infertility in about 40 percent of those who have the disease. RESOLVING INFERTILITY, *supra* note 4, at 121–22.

⁷² RESOLVING INFERTILITY, *supra* note 4, at 166–68; Pratt, *Inconceivable*, *supra* note 1, at 1133.

⁷³ *FAQs About Infertility, Q02: What Causes Infertility?*, AM. SOC’Y FOR REPROD. MED., <https://www.reproductivefacts.org/faqs/frequently-asked-questions-about-infertility/q02-what-causes-infertilitynew-page/> (last visited Apr. 19, 2019) (noting that one-third of infertility cases are attributable to male factors, one-third are attributable to female factors, and one-third are unexplained or attributable to a combination of male and female factors); *How Common Is Infertility?* NAT’L INST. OF CHILD HEALTH & HUMAN DEV., <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/common> (last updated Feb. 8, 2018) (noting that 9 percent of males and 11 percent of females of “reproductive age in the United States have experienced fertility problems”).

⁷⁴ Pratt, *Inconceivable*, *supra* note 1, at 1133–34.

⁷⁵ RESOLVING INFERTILITY, *supra* note 4, at 176–80; *FAQs About Infertility Q05: What is In Vitro Fertilization?* AM. SOC’Y FOR REPROD. MED., <https://www.reproductivefacts.org/faqs/frequently-asked-questions-about-infertility/q05-what-is-in-vitro-fertilization/> (last visited Apr. 19, 2019) [hereinafter *What is In Vitro Fertilization?*].

⁷⁶ RESOLVING INFERTILITY, *supra* note 4, at 180–81; *What is In Vitro Fertilization?*, *supra* note 75.

⁷⁷ RESOLVING INFERTILITY, *supra* note 4, at 181–82; *What is In Vitro Fertilization?*, *supra* note 75.

⁷⁸ AM. SOC’Y FOR REPROD. MED., *supra* note 5, at 17.

⁷⁹ *Id.*

⁸⁰ Inherently medical reproductive care is “medical care,” even in the absence of medical infertility, in certain circumstances, as discussed *infra* in Part III. I initially addressed only ARTs

“infertility” is a “disease” that is substantiated by the medical workup performed by the reproductive care specialists.⁸¹ In addition, the inherently medical procedures are undertaken by a couple for the purpose of conceiving and bearing a child, which affects the structure or function of “the body” of “the taxpayer” and the taxpayer’s “spouse.”⁸² If ARTs are not collaborative (i.e., do not involve third-party sperm donors, egg donors, or gestational surrogates), the expenses of inherently medical fertility treatments, including IVF and ICSI, are undisputedly “medical care.” For years, the IRS has allowed medically infertile different-sex married couples to deduct certain fertility treatment costs as “medical” expenses.⁸³ IRS Taxpayer Publication 502 has consistently stated that taxpayers can deduct the costs of “fertility enhancements,” including IVF, to “overcome an inability to have children.”⁸⁴

2. Expenses Incurred for Collaborative ARTs

Some couples can only have a child with the help of a third-party sperm donor, egg donor, or surrogate. The addition of a third-party sperm donor, egg donor, or surrogate to the fertility treatment protocol adds a layer of complexity to the tax analysis, but it does not exclude the fertility treatment from the definition of “medical care.”⁸⁵

to mitigate medical infertility. I expanded my conclusions about classifying ARTs as medical care following *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), discussed *infra* at Part III(B)(3).

⁸¹ See I.R.C. § 213(d)(1)(A) (Deering, LEXIS through Pub. L. No. 115-385 (excluding Pub. L. No. 115-344) 2012). See also *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491, 493 (2008), *aff’d*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009) (holding that the taxpayer could not deduct his ART costs because he did not have a medical condition, “such as, for example, infertility, that required treatment or mitigation through IVF procedures”); Pratt, *Inconceivable*, *supra* note 1, at 1133–35 (describing how infertility workups show what the cause is as well as a variety of treatment responses).

⁸² I.R.C. § 213(d)(1)(A).

⁸³ See, e.g., I.R.S. PUB. 502, *supra* note 27, at 2–3, 12 (indicating various medical expenses that are deductible, including procedures and surgeries); I.R.S. Priv. Ltr. Rul. 200318017, at *2, *4 (Jan. 9, 2003) (ruling that egg donor expenses and related costs are deductible medical expenses). The language in Publication 502 has been similar for years. See, e.g., Pratt, *Inconceivable*, *supra* note 1, at 1139 n.102 (quoting identical “fertility enhancement” and “*in vitro* fertilization” language from the 2002 version of Publication 502).

⁸⁴ Compare I.R.S. PUB. 502, *supra* note 27, at 7 with *supra* note 83 and accompanying text.

⁸⁵ See Pratt, *Inconceivable*, *supra* note 1, at 1133–35, 1132–35 nn.49–78. The cost of sperm donation is minimal. If the intended mother cannot produce healthy eggs, an egg donor can provide them. The intended parents may know the donor or find the donor through an agency. An egg donation procedure resembles an IVF procedure, except the doctor stimulates the egg donor’s ovaries and extracts the donor’s eggs when they are mature. After the eggs are fertilized, the resulting embryos are implanted in the intended mother’s uterus if she can gestate the fetus. *Id.*

a. *Sperm Donation and Egg Donation*

IUI and IVF with donor sperm or donor eggs, which often enable the intended parents to conceive and bear a child, treat the “disease” of infertility and affect the structure or function of “the body” of “the taxpayer” and the taxpayer’s “spouse.” Such care thus is within the tax definition of “medical care.”

The only additional question is whether the payment to the third-party donor (as opposed to payments to medical providers) constitutes “medical care.” The provision of donated eggs requires multiple medical procedures and prescription drugs.⁸⁶ Although the medical procedures performed on an egg donor’s body are not performed *on* “the body” of the “the taxpayer, [the taxpayer’s] spouse, or a dependent,” the egg donor medical costs are incurred *for* the purpose of enabling “the taxpayer” and the taxpayer’s “spouse” to conceive and bear a child. The costs of the medical procedures performed on the donor are thus for “medical care” *of* “the taxpayer” and the taxpayer’s “spouse.”⁸⁷

In addition, intended parents pay costs that are not inherently medical, but nevertheless are directly related to the egg donation. For example, intended parents typically pay the legal fees and medical fees of the egg donor and monetarily compensate the donor for enduring the medical procedures involved in egg donation.⁸⁸ These related egg donor costs, which are necessary and ancillary to the reproductive care of “the taxpayer” and the taxpayer’s “spouse,” also likely qualify as medical care; “but for” incurring such expenses of egg donation, the egg donation could not occur and the intended parents could not conceive and bear a child.⁸⁹ In a Private Letter Ruling regarding a specific tax controversy, the IRS allowed a medically infertile different-sex married couple to deduct the direct and ancillary costs of egg donation.⁹⁰ Although a Private Letter Ruling (“PLR”)

⁸⁶ *Id.* at 1134–35.

⁸⁷ I.R.S. Priv. Ltr. Rul. 200318017 (Jan. 9, 2003) (ruling that egg donor expenses and related costs are deductible medical expenses).

⁸⁸ *Id.* (“The unreimbursed expenses for the egg donor fee, the agency fee, the donor’s medical and psychological testing, the insurance for post-procedure donor assistance, and the legal fees . . . are medical care expenses that are deductible under [I.R.C.] § 213.”).

⁸⁹ Compare *Gerstacker v. Comm’r*, 414 F.2d 448, 453 (6th Cir. 1969) (ruling that the taxpayer could deduct legal fees incurred to establish a guardianship for his spouse under § 213 because guardianship was necessary to commit his spouse to a mental institution for medical treatment), with *Jacobs v. Comm’r*, 62 T.C. 813, 820 (1974) (ruling that the taxpayer could not deduct cost of divorce as medical expense, even though taxpayer’s psychiatrist recommended the divorce to treat mental illness).

⁹⁰ I.R.S. Priv. Ltr. Rul. 200318017 (Jan. 9, 2003). These expenses were:
the donor’s fee for her time and expense in following proper procedures to ensure a successful egg retrieval[;] [t]he agency fee for procuring the donor

is not legal precedent, accountants and tax lawyers often advise their clients based on private letter rulings, which sometimes provide the only examples of the views of the IRS on a given issue.⁹¹

b. *Surrogacy*

Surrogacy expenses require an additional layer of tax analysis. If the intended mother can produce eggs but cannot gestate the child, the intended parents can arrange for a “gestational surrogate” to gestate the child.⁹² After the intended mother’s ovaries are stimulated, the eggs are extracted and fertilized, and the resulting embryos are implanted in the uterus of a gestational surrogate who carries and bears the child.⁹³ If the intended mother cannot produce healthy eggs or gestate the child, the intended parents can arrange (1) for an egg donor to provide eggs, which are fertilized, followed by implantation of the resulting embryos into the uterus of a gestational surrogate who carries and bears the child, or (2) for a “traditional surrogate” to both provide the eggs and gestate the child.⁹⁴ Intended parents typically choose the former approach in order to strengthen their legal claim as the parents of the child gestated by the surrogate.⁹⁵

In an earlier article, I argued that the surrogacy costs incurred by “the

and coordinating the transaction between the donor and recipient; [e]xpenses for medical and psychological testing of the donor prior to the procedure and insurance for any medical or psychological assistance that the donor may require after the procedure[;] [and] [l]egal fees for preparing a contract between [the taxpayers] and the egg donor.

Id. at *1–2.

⁹¹ See I.R.C. § 6110(k)(3) (Deering, LEXIS through Pub. L. 116-8, 2012) (“Precedential status. Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent.”); Rev. Proc. 2019-1 § 2.01 (explaining that a letter ruling, which “interprets the tax laws and applies them to the taxpayer’s specific set of facts,” is “a written determination issued to a [specific] taxpayer by [the IRS] in response to the taxpayer’s written inquiry . . .”); *Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts*, I.R.S., <https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts> (last visited Apr. 29, 2019) (stating “[a] PLR may not be relied on as precedent by other taxpayers or by IRS personnel.”). Although private letter rulings are not precedent, tax lawyers often refer to them in their tax planning for clients. See, e.g., Robert W. Wood, *No Virginia, You Can't Rely on IRS Rulings*, FORBES (Oct. 7, 2000), <https://www.forbes.com/sites/robertwood/2010/10/07/no-virginia-you-cant-rely-on-irs-rulings/#72f2bbfc5911> (observing that tax lawyers routinely rely on private letter rulings to advise their clients).

⁹² RESOLVING INFERTILITY, *supra* note 4, at 280.

⁹³ *Id.*

⁹⁴ SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL, & ETHICAL CONSIDERATIONS 251 (1998).

⁹⁵ Justin Trent, *Health Care Law Chapter: Assisted Reproductive Technologies*, 7 GEO. J. GENDER & L. 1143, 1147–51 (2006) (noting that this method of collaborative reproduction strengthens the parental claim of the intended parent).

taxpayer” and the taxpayer’s “spouse” to conceive and bear a child are for “medical care” if “the taxpayer or [the taxpayer’s] spouse” is medically incapable of gestating a child.⁹⁶ I analogized to cases in which the IRS allowed taxpayers to deduct the costs of medical procedures performed *on* other persons (e.g., on a potential organ donor) if the costs were incurred *for* the care of the taxpayer or the spouse.⁹⁷ In addition, the IRS treats as medical care the expenses of other “substitutes for normal functioning”—such as a seeing eye dog for a blind person or a human notetaker for a deaf student—notwithstanding the fact that these expenses are not incurred for inherently medical procedures and do not affect the body of the taxpayer or the taxpayer’s spouse.⁹⁸

There is no binding precedent to directly support or refute my earlier argument for deductibility of surrogacy expenses. In 2002, the IRS took the position in a non-binding Information Letter that surrogacy expenses are not incurred for medical care.⁹⁹ However, the IRS has allowed medically infertile different-sex married couples to deduct surrogacy costs in two cases it settled—only after it became apparent that the taxpayers would win and create unfavorable precedent.¹⁰⁰

To date, no decisions of the United States Tax Court or other federal courts address the tax consequences of fertility treatment costs incurred by medically infertile different-sex married couples or single or married women. The only cases with judicial opinions all involve unmarried men who claimed medical expense deductions for the costs of ARTs, including IVF, ICSI, egg donation, and surrogacy. In *Magdalin v. Commissioner* and *Morrissey v. United States*, the courts applied the § 213(d)(1)(A) medical care definition in the context of a medically fertile, unmarried gay man who incurred expenses for IVF, ICSI, egg donation, and gestational surrogacy.¹⁰¹

⁹⁶ Pratt, *Inconceivable*, *supra* note 1, at 1198–99.

⁹⁷ *Id.* at 1143, 1143 nn.129–131 (citing a ruling which allowed a taxpayer who needed an organ transplant to deduct costs of medical procedures performed on a prospective organ donor who was not the taxpayer’s spouse or dependent).

⁹⁸ *See, e.g.*, Estate of Baer v. Comm’r, 26 T.C.M. (CCH) 170, 173 (1967) (holding that human notetaker expenses were deductible as a medical expense because the taxpayer incurred the expenses primarily to mitigate deafness); Treas. Reg. 1.213-1(e)(1)(iii) (as amended in 1979) (ruling that a taxpayer can deduct the cost of a seeing eye dog to mitigate blindness).

⁹⁹ *See, e.g.*, I.R.S. Information Ltr. 2002-0291 (Dec. 31, 2002).

¹⁰⁰ *See* Sedgwick v. Comm’r, No. 10133-94 (T.C., filed June 14, 1994); *Osius v. Comm’r*, No. 15472-11S (T.C., filed June 30, 2011). *See also* Pratt, *Inconceivable*, *supra* note 1, at 1161 n.226 (describing the meeting in chambers following Mrs. Sedgwick’s testimony, after which the IRS settled the case in favor of the taxpayer).

¹⁰¹ *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491, 491–92 (2008), *aff’d*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009); *Morrissey v. United States*, 226 F. Supp. 3d 1338, 1344–45 (M.D. Fla. 2016), *aff’d*, 871 F.3d 1260 (11th Cir. 2017). *See also* Pratt, *Implications of Magdalin*, *supra*, note 55 at 1334–35 (citations omitted) (describing Magdalin’s disagreement with the IRS’s

In *Longino v. Commissioner*, the court applied the medical care definition in the context of a medically fertile, unmarried heterosexual man who incurred IVF expenses to conceive a child with his fiancée.¹⁰² In these three cases, the trial courts ruled, and the federal appellate courts affirmed, that the unmarried male taxpayer could not take a medical expense deduction for the IVF, egg donation, or gestational surrogacy expenses he paid.¹⁰³

Part II(B) analyzes the *Magdalin* case in more detail and explores the question of whether the holding of *Magdalin* is generalizable to other taxpayers incurring IVF, ICSI, egg donation, and surrogacy expenses. In addition, Part II(B) also briefly discusses the subsequent *Longino* case.

B. ART EXPENSES INCURRED BY UNMARRIED MEN

1. *Magdalin v. Commissioner*¹⁰⁴

The 2008 United States Tax Court memorandum decision in *Magdalin v. Commissioner* was the first legal opinion to address the tax deductibility of ART expenses.¹⁰⁵ The specific issue in *Magdalin* was whether the taxpayer—a medically fertile unmarried man—could take a medical expense deduction for expenses he incurred for IVF, ICSI, egg donation, and surrogacy to father biological children.¹⁰⁶ Dr. Magdalin also made a constitutional law argument “that it was his civil right to reproduce, that he should have the freedom to choose the method of reproduction, and that it is sex discrimination to allow women but not men to choose how they will reproduce.”¹⁰⁷

repeated assertion that he could have had children “naturally or “normally” with a woman, but made a “choice” not to do so). According to Dr. Magdalin, the IRS Revenue Agent stated in the audit that Dr. Magdalin “should have had children by conventional means—by marrying a woman.” *Id.* at 1335 n.316. Dr. Magdalin countered that a marriage between a gay man and a woman to procreate “is unstable, and can only cause suffering for all involved.” *Id.* at 1335 (citations omitted).

¹⁰² *Longino v. Comm’r*, 105 T.C.M. (CCH) 1491 (2013), *aff’d*, 593 Fed. Appx. 965 (11th Cir. 2014).

¹⁰³ *Magdalin*, 96 T.C.M. (CCH) at 493, *aff’d*, No. 09-1153, 2009 WL 5557509; *Morrissey*, 226 F. Supp. 3d at 1342–44, *aff’d*, 871 F.3d 1260; *Longino*, 105 T.C.M. (CCH) at 1499, *aff’d*, 593 Fed. Appx. 965. None of the opinions analyze the costs incurred for ICSI or for the combination of ICSI with IVF.

¹⁰⁴ *Magdalin*, 96 T.C.M. (CCH) 491. *See generally* Tessa Davis, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality & Marriage*, 19 CARDOZO J.L. & GENDER 1 (2012) (analyzing the case).

¹⁰⁵ *Magdalin*, 96 T.C.M. (CCH) at 493; Pratt, *Implications of Magdalin*, *supra* note 55, at 1298.

¹⁰⁶ *Magdalin*, 96 T.C.M. (CCH) at 491–92; Opening Brief for Respondent at 6–8, *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491 (2008) (No. 7880-07), *aff’d*, No. 09-1153 2009 WL 5557509 (1st Cir. Dec. 17, 2009) [hereinafter Respondent’s Opening Brief, *Magdalin*].

¹⁰⁷ *Magdalin*, 96 T.C.M. (CCH) at 493; Opening Brief of Petitioner at 7–9, *Magdalin v. Comm’r*,

The IRS denied Dr. Magdalin's medical expense deductions on the grounds that (1) he did not suffer from medical infertility, and (2) the medical procedures did not affect the structure or function of "the taxpayer's" "male body,"¹⁰⁸ but instead "affected the structures or functions of the bodies of the unrelated surrogate mothers."¹⁰⁹ Judge Wherry agreed with the IRS, concluding that the expenses at issue in the case were not expenses for "medical care," because the taxpayer "had no medical condition or defect, such as, for example, infertility, that required treatment or mitigation through IVF procedures," and the medical procedures "did not affect a structure or function of *his* body."¹¹⁰ However, Judge Wherry did not address the question of whether a medically infertile man could deduct IVF expenses if the IVF was undertaken to mitigate the man's medical infertility. Judge Wherry dismissed Dr. Magdalin's constitutional argument, concluding that there was no constitutional issue to resolve on the facts of the case.¹¹¹ The First Circuit Court of Appeals affirmed the Tax Court decision without an opinion.¹¹²

a. *Aggregation and Disaggregation of Bodies and Reproductive Expenses*

For purposes of applying the I.R.C. § 213 definition of "medical care," *Magdalin* highlights the importance of asking (1) whether the *bodies* of the taxpayers and third-party donors or surrogates are aggregated or disaggregated; and (2) whether *reproductive expenses* incurred and paid by the taxpayers, regarding medical treatment performed *on* third-party donors

96 T.C.M. (CCH) 491 (2008) (No. 7880-07), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009) [hereinafter Petitioner's Opening Brief, *Magdalin*]. Judge Wherry concluded that based on the facts of the case, there were no constitutional issues to resolve. *Magdalin*, 96 T.C.M. (CCH) at 493.

¹⁰⁸ *Magdalin*, 96 T.C.M. (CCH) at 493 n.6. Although IRS Taxpayer Publication 502 states that taxpayers can deduct IVF expenses "to overcome [the] inability to have children," the IRS interpreted "inability to have children" to mean medical infertility, not dysfertility due to sexual orientation. *Id.* See also Pratt, *Implications of Magdalin*, *supra* note 55, at 1327-30, 1344-45 (comparing rulings of *Magdalin* and *Sedgwick* as to deductibility of IVF and fertility treatments); Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1029, 1033 (1996) [hereinafter Ikemoto, *In/Fertile, Too Fertile, Dysfertile*] (exploring social and gender biases in the process of accessing fertility treatments).

¹⁰⁹ *Magdalin*, 96 T.C.M. (CCH) at 493 n.6. See also Crawford, *supra* note 23, at 343-45 (discussing inclusion of surrogacy fees in the surrogate's gross income); Maule, *supra* note 23, at 661-64 (1982) (discussing same).

¹¹⁰ *Magdalin*, 96 T.C.M. (CCH) at 493 (emphasis added).

¹¹¹ *Id.* ("Although petitioner at times attempts to frame the deductibility of the relevant expenses as an issue of constitutional dimensions, under the facts and circumstances of his case, it does not rise to that level.").

¹¹² *Magdalin v. Comm'r*, No. 09-1153, 2009 WL 5557509, at *1 (1st Cir. Dec. 17, 2009).

or surrogates *for* the taxpayers, are reproductive medical expenses *of* the taxpayers. Another way of framing this latter question is to ask: *on behalf of whom* did the taxpayers incur the reproductive medical expenses?

Recall that § 213(a) allows a deduction for the costs of “medical care” of the taxpayer, the taxpayer’s spouse, or a dependent, and § 213(d)(1)(A) 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*.”¹¹³ Section 213 sometimes aggregates bodies for purposes of determining deductions for “medical care.” For example, in the context of a married, different-sex couple that incurs IVF expenses to enable the wife to gestate and deliver the couple’s child, § 213(d)(1)(A) *aggregates* the separate physical bodies of the husband, wife, and child (as well as the embryo and fetus prior to the birth of the child).¹¹⁴ In such cases, whether the medical care was *for* the taxpayers or performed *on* the father, mother, or fetus/child is irrelevant.¹¹⁵

Compare the tax consequences to intended parents in the context of adoption, where cases have addressed two separate tax issues.¹¹⁶ The first issue is whether the intended parents can claim a dependent exemption deduction for a fetus prior to birth, where the fetus is born and adopted by them in a subsequent tax year.¹¹⁷ Cases hold that parents cannot claim a dependent deduction before a dependent child is born alive.¹¹⁸ For tax purposes, these cases ignore the existence of the embryo and fetus until birth.¹¹⁹ This rule makes sense because the justification for allowing

¹¹³ I.R.C. § 213(a), § 213 (d)(1)(A) (Deering, LEXIS through Pub. L. No. 115-385 (excluding Pub. L. No. 115-344) 2012) (emphasis added) (allowing a tax deduction for “medical care of the taxpayer, [the taxpayer’s] spouse, or a dependent” and defining “medical care”).

¹¹⁴ Anthony C. Infanti, *Dismembering Families*, in CHALLENGING GENDER INEQUALITY IN TAX POLICY MAKING: COMPARATIVE PERSPECTIVES 159, 164–66 (Kim Brooks et al. eds. 2011).

¹¹⁵ *Id.* at 161–63.

¹¹⁶ Although adoption and foster care can also establish legally recognized parent-child relationships, the intended parents who cannot become parents through sexual reproduction generally prefer ARTs over adoption or foster care. COOPER & GLAZER, *supra* note 94, at 246–47.

¹¹⁷ At the time the adoption cases arose, parents were allowed a dependent exemption for each dependent child, but today the exemption amount is zero. I.R.C. § 151(a), (d)(1), (d)(5) (West, Westlaw through Pub. L. No. 115-442, 2012).

¹¹⁸ *See, e.g.*, *Cassman v. United States*, 31 Fed. Cl. 121, 129 (1994) (denying taxpayers a dependent exemption in 1991 for a child who was born in July 1992, holding that a taxpayer is not allowed a dependent exemption until the year in which a child is born). *See also* *Wilson v. Comm’r*, 41 B.T.A. 456 (1940) (ruling that the taxpayer could not claim a dependent exemption for an unborn child). *See generally* Timothy Stoltzfus Jost, *Rights of Embryo and Foetus in Private Law*, 50 AM. J. COMP. L. 633 (2002) (stating that under the Constitution, “the word ‘person’ . . . does not include the unborn.” (citing *Roe v. Wade*, 410 U.S. 113, 159 (1973))).

¹¹⁹ *See, e.g.*, *Cahn & Lawsky, supra* note 23, at 935 (arguing that “adoption” of an embryo is not adoption of a “child” and does not qualify for adoption tax credit). In *Magdalin* the taxpayer

exemption deductions and the standard deduction is to provide a simple mechanism for taxpayers to deduct a portion of their living expenses.¹²⁰ Intended parents do not incur living expenses, other than medical expenses, for their “dependent” children until the children are born.

The second tax issue in the adoption context is whether intended adoptive parents can deduct expenses they incur and pay for medical treatment of the birth mother and/or the unborn child. Cases articulate a general rule and an exception. The general rule is that intended adoptive parents cannot deduct medical expenses they incur and pay for prenatal and obstetric medical procedures performed on the birth mother, even though such care may protect the health of the child they will adopt.¹²¹ The cases presume that prenatal care and obstetric medical procedures performed *on* the birth mother are *for* the birth mother; the cases ignore medical care for the fetus until birth by treating any medical care of the fetus as care of the birth mother.¹²² The general rule thus aggregates the birth mother and unborn child, but it disaggregates the intended adoptive parents from the birth mother and the fetus. Under the general rule, the intended parents can deduct medical expenses incurred for the care of the child after birth, but not for medical expenses incurred prior to the child’s birth.

An exception to the general rule applies if the adoptive parents can prove that specific medical expenses are more properly attributable to the

argued that he could aggregate “his” “body” and the separate bodies of the female egg donors, surrogates, and his biological children. He also argued that all of the ART procedures directly affected the structure or function of “his” “body” because the ART procedures kept alive his sperm, the embryo, and the fetus. Reply Brief of Petitioner at 4–5, *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491 (2008) (No. 7880-07), *aff’d*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009) [hereinafter Petitioner’s Reply Brief, *Magdalin*]. He also argued that “his” “body” included any living cells that carried his DNA. *Id.* Accepting this argument would have had enormous legal repercussions; Judge Wherry rejected it without explanation. *See Magdalin*, 96 T.C.M. (CCH) at 493.

¹²⁰ *See, e.g.*, Louis Kaplow, *The Standard Deduction and Floors in the Income Tax*, 50 TAX L. REV. 1, 1, 7 n.21 (1994) (asserting that standard deduction and exemption deductions are instruments for simplifying tax compliance versus a system that measures income and ability to pay more accurately).

¹²¹ *See, e.g.*, *Kilpatrick v. Comm’r*, 68 T.C. 469 (1977) (ruling that adoptive parents could not take a medical expense deduction for expenses they incurred and paid for medical treatment of the birth mother and the child they adopted).

¹²² *See, e.g., id.* at 473 (acknowledging that prenatal medical expenses possibly could be allocable to care of the fetus if the taxpayer could prove that the expense was solely for the care of the fetus and not the birth mother; “[h]owever, we are unable to determine from the record before us which services rendered to the mother were so proximately or directly related to the health of the child as to constitute medical care for the child. Certainly, the medical services rendered to the natural mother after the child was born do not constitute medical care for the child. And as for those medical services rendered prior to or during the birth of the child, it is insufficient to show only that the health of the unborn child was promoted generally by such services. More is required.”).

fetus than to the birth mother.¹²³ If this exception applies, the tax law treats the costs of medical procedures performed *on* the fetus as expenses *of* the intended parents, not the birth mother.¹²⁴ In *Kilpatrick v. Commissioner*, the court acknowledged “the general commonsense proposition that medical care rendered to an expectant [birth] mother *may*, under certain circumstances, constitute medical care rendered to her child.”¹²⁵ However, the intended parents must establish the fact and amount of the medical expenses specifically attributable to the unborn child in order to take a medical expense deduction under this exception.¹²⁶ In addition, the intended parents must establish that they paid the unborn child’s medical expenses at a time when the child was the taxpayer’s “dependent”—meaning that the intended parents deferred payment of the unborn child’s expenses until after the child’s birth.¹²⁷ The intended adoptive parents in *Kilpatrick* failed to meet the heavy burden of proof required for the exception to apply.¹²⁸

In *Magdalin*, for purposes of applying the § 213(d)(1)(A) definition, (1) Dr. Magdalin could not aggregate his body and the separate physical bodies of the female gestational surrogates, because the surrogates were not the taxpayer’s “spouse[s] or . . . dependent[s]”; (2) the fetuses that became Dr. Magdalin’s children at birth were not his “dependent[s]” for tax purposes until they were born; and (3) Dr. Magdalin could not aggregate his body and the separate embryos/fetuses, for purposes of the medical expense

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 472–73 (emphasis in original).

¹²⁶ *Id.* at 473.

¹²⁷ *Id.* at 473 n.4 (noting that dependent status is determined either when medical care is rendered or when the cost of the care is paid). *See also* Treas. Reg. 1.213-1(e)(3) (as amended in 1979) (stating that, for purposes of determining whether medical expenses are for the taxpayer’s “dependent,” status as a dependent is determined “either at the time the medical services were rendered or at the time the expenses were paid.”).

¹²⁸ *Kilpatrick*, 68 T.C. at 473 (“[W]e are unable to determine from the record before us which services rendered to the mother were so proximately or directly related to the health of the child as to constitute medical care for the child. . . . [A]s for those medical services rendered prior to or during the birth of the child, it is insufficient to show only that the health of the unborn child was promoted generally by such services. More is required.”). The court concluded:

Petitioners have simply failed to show that all, or a portion, of the expenses in question were directly or proximately related to the ‘diagnosis, cure, mitigation, treatment, or prevention of disease’ in the unborn child. It is possible that some of these expenses were so related. However, from the evidence presented we are unable to identify such expenses or estimate the amount thereof.

Id.

deduction, because the embryos/fetuses were not the taxpayer's "dependent[s]."¹²⁹

Denying dependent deductions to a parent until the child's birth makes sense.¹³⁰ However, whether the tax law should disaggregate intended parents, a surrogate, and an embryo/fetus—for purposes of determining *whose medical expenses* were paid by the intended parents—is a harder question. The intended parents would not be paying the prenatal and obstetric medical expenses of the surrogate "but for" the surrogacy relationship and the parents' desire to protect the health of both the surrogate and their child. In addition, the surrogate would have no prenatal or obstetric medical expenses "but for" the surrogacy relationship. The same cannot be said of prenatal and obstetric expenses of a birth mother whose child will be adopted after birth. Whether the birth mother's child is adopted or not, the birth mother would incur prenatal and obstetric medical expenses.

Also, in the adoption context, the IRS reasonably could expect situations in which a birth mother and adoptive parents both claim the same adopted child for tax purposes.¹³¹ This type of dispute is similar to the type of disputes that arise in the divorce context, where each of the newly divorced parents might want to claim their child. In the divorce context, a default rule applies, but can be overridden by agreement of the parties.¹³² The default rule is that the custodial parent claims the child.¹³³ The parties can agree in writing, however, for the noncustodial parent to claim the child.¹³⁴ In the adoption context, the tax rule is that the child is claimed, for tax purposes, by the birth mother, unless the child is legally adopted by the intended parents.¹³⁵ An adoption is thus a condition of the intended parents' ability to claim the adopted child as a dependent.

¹²⁹ See *Magdalin*, 96 T.C.M. (CCH) at 493. In the context of determining when a parent can take a dependent exemption for a child, tax cases hold that an unborn child becomes a taxpayer's "dependent" beginning on the day the child is born alive, but is not a taxpayer's "dependent" prior to birth. Medical care for a taxpayer's fetus, thus, is not care of the taxpayer's "dependent" for purposes of § 213. Treas. Reg. 1.213-1(e)(3) (as amended in 1979).

¹³⁰ See *supra* text accompanying note 120.

¹³¹ At the time the adoption cases arose, parents were allowed an exemption for each dependent child, but the exemption amount now is zero. I.R.C. § 151(a), (d)(1), (5) (West, Westlaw through Pub. L. No. 115-442, 2012). Claiming the child also enables the parent to claim head-of-household filing status and, if the parent earns wages but has low income, the Earned Income Tax Credit. *Id.* §§ 2(b), 32(a). Parents also can claim a child tax credit for their dependent children, subject to certain limitations. *Id.* § 24.

¹³² *Id.* § 152(c)(4), (e)(2).

¹³³ *Id.* § 152(c)(4).

¹³⁴ *Id.* § 152(e)(2).

¹³⁵ To take a dependency exemption for a child, a taxpayer must be related to the child by blood, marriage or adoption. *Id.* §§ 151(c), 152(c)(1)(A), (c)(2)(A), (f)(1)(B). The birth mother is related

The surrogacy context is distinguishable. For example, in many states, the intended parents can be listed on the child's birth certificate as the child's legal parents.¹³⁶ The gestational surrogate enters into the surrogacy arrangement, in effect, as an agent of the intended parents.¹³⁷ Moreover, the intended parents pay (either through the purchase of insurance or through direct payment) expenses incurred for prenatal and obstetric medical procedures performed *on* the surrogate *for* the intended parents and their future child.¹³⁸ The medical expenses in this context are the medical expenses *of* the intended parents, not the surrogate.

Family law has accommodated collaborative ARTs by aligning the legal rights of intended parents with their intentions to parent through ARTs. As reproductive medical care incorporated third parties into ARTs, family law developed new tests to define parent-child relationships.¹³⁹ Today, "intentional" and "functional" parentage tests in state family law legally recognize the parent-child relationship of "intended" parents whose children are conceived, gestated, and born via ARTs.¹⁴⁰ The tax law, similarly, should adopt an "intentional" or "functional" test to determine whether medical and ancillary costs incurred by intended parents for

to the child by blood. The intended adoptive parents are related to the child only after they legally adopt the child. *Id.* § 152(f)(1)(B). Under § 151(d)(5), the current exemption amount is zero, but the structural rules of § 152 have not been repealed.

¹³⁶ See, e.g., 750 ILL. COMP. STAT. ANN. 46 / 709 (West, Westlaw through P.A. 100-1179 of the 2018 Reg. Sess.) (allowing intended parents' names to appear on birth certificate of a child gestated by a surrogate and allowing the surrogate's name to be omitted from the birth certificate).

¹³⁷ Many states treat the intended parents as the child's legal parents from birth. The intended parents can obtain a court order prior to the child's birth, which instructs the relevant local authorities to issue the child's birth certificate in the names of the intended parents. See *id.* See also *Surrogacy*, ILL. DEP'T PUB. HEALTH, <http://www.idph.state.il.us/vitalrecords/surrogacy/Pages/default.htm> (last visited Sept. 3, 2018) (specifying the procedure for intended parents to obtain a pre-birth court order, pursuant to which the intended parents' names are listed on the child's birth certificate and the surrogate's name is omitted from the birth certificate). For a list of states that grant pre-birth orders and post-birth orders declaring the intended parents the legal parents of the child, see *Surrogacy Laws, SURROGACY EXPERIENCE*, <http://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> (last visited Sept. 3, 2018). See generally *Surrogacy Laws and Legal Considerations*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/surrogacy-laws-and-legal-considerations> (last visited Sept. 1, 2018) (outlining the general legal process involved in surrogacy).

¹³⁸ See, e.g., *What We Do*, ART RISK, <https://artrisksolutions.wordpress.com/what-we-do/> (last visited Apr. 20, 2019) (noting intended parents "are contractually responsible for the medical bills of their surrogate for pregnancy and childbirth" and that the company provides insurance plans for intended parents to cover such expenses).

¹³⁹ Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187-88 (2016).

¹⁴⁰ *Id.* at 1188-89.

inherently medical procedures performed *on* a surrogate *for* the intended parents are treated as medical expenses *of* the intended parents.

b. *Aggregation and Disaggregation in the “Disease” Context*

In addition, separate physical bodies are sometimes aggregated for purposes of I.R.C. § 213(d)(1)(A), even if one of the bodies being aggregated with the taxpayer’s body is not the body of the taxpayer’s spouse or dependent. For example, the IRS interprets § 213 to aggregate separate physical bodies in the context of organ donation, either where (1) the taxpayer needs a donated organ and a prospective donor requires medical procedures, or (2) the taxpayer is a prospective donor for another person who needs a donated organ.¹⁴¹ In such cases, the party who pays the organ-donation medical expenses is allowed the medical expense deduction, regardless of whether the care is performed on the body of the taxpayer, the taxpayer’s spouse, or the taxpayer’s dependent.¹⁴² In these organ donor cases, the medical procedures satisfy the “disease” prong of the §213(d)(1)(A) definition of medical care.¹⁴³

In *Magdalin*, Judge Wherry characterized Dr. Magdalin as medically fertile and analyzed Dr. Magdalin’s IVF, ICSI, egg donation, and surrogacy expenses *solely* under the “structure or function” prong.¹⁴⁴ Judge Wherry concluded that, since Dr. Magdalin did not suffer from medical infertility,

We therefore need not answer lurking questions as to whether (and, if so, to what extent) expenditures for IVF procedures and associated costs (e.g., a taxpayer’s legal fees and fees paid to, or on behalf of, a surrogate or gestational carrier) would be deductible in the presence of an underlying condition. We leave such questions for another day.¹⁴⁵

¹⁴¹ Rev. Rul. 68-452, 1968-2 C.B. 111 (ruling that a kidney transplant patient could deduct amounts he paid for a third-party kidney donor’s medical and transportation costs); I.R.S. PUB. 502, *supra* note 27, at 13 (stating that amounts paid for medical care received in connection with donating an organ or tissue are deductible).

¹⁴² *See* Rev. Rul. 68-452, 1968-2 C.B. 111 (stating that the surgical and hospital care expenses of the donor were “for the ‘medical care’” of the donee-taxpayer and that the donor’s transportation costs were “primarily for and essential to medical care of [the donee-taxpayer].”).

¹⁴³ The purpose of the organ donation is to treat “disease,” within the first prong of the I.R.C. § 213(d)(1)(A) definition of medical care.

¹⁴⁴ *See* *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491, 493 (2008), *aff’d*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009).

¹⁴⁵ *Id.* (footnotes omitted) (citations omitted).

Although Dr. Magdalin was not medically infertile, he was “dysfertile” due to his sexual orientation.¹⁴⁶ This raises the question of whether the inability to have a child due to sexual orientation can be within the “disease” prong of the medical care definition. Homosexuality is not treated as a “disease” by the medical or psychiatric community.¹⁴⁷ Recall, however, that the term “disease” is defined extremely broadly in § 213 to encompass *conditions* for which taxpayers seek medical assistance.¹⁴⁸ The concept is that § 213 medical expense deductions encompass the costs of “inherently medical” care, including the costs of surgical procedures, prescription drugs, office examinations, blood tests, and hospitalizations.¹⁴⁹

Inherently medical reproductive care *for* the taxpayer, including ARTs, thus could qualify as medical care, regardless of whether the medical care is performed *on* the taxpayer, the taxpayer’s spouse or the taxpayer’s dependent. In addition, necessary ancillary expenses would meet the “but for” test to qualify for the deduction. Lest this seem overbroad, consider the application of the “disease” prong to reproductive care for a different-sex married couple. A different-sex couple receives a default “disease” diagnosis of medical infertility by failing to conceive after a year of unprotected sex,¹⁵⁰ even if the reproductive care specialist cannot identify any cause of infertility. A “disease” diagnosis makes it easier for a couple to deduct the costs of their reproductive care, including collaborative ARTs, under the “disease” prong of § 213 and the organ donor rulings.¹⁵¹ Similarly, a gay man (but not a heterosexual, unmarried man) could argue that dysfertility is a form of reproductive “condition” or “disease,” for purposes of the “disease” prong of § 213. However, Treasury Regulation § 1.213-

¹⁴⁶ Dysfertility refers to individuals who cannot bear children because they are single or in a same-sex relationship, not because the intended parents suffer from diagnosable forms of medical infertility. *See, e.g.,* Ikemoto, *In/Fertile, Too Fertile, Dysfertile*, *supra* note 108, at 1029, 1033 (observing that “infertile” different-sex married couples are generally treated more sympathetically than “dysfertile” gay and lesbian intended parents and “too fertile” low-income women of color).

¹⁴⁷ Psychiatrists have not treated homosexuality as a mental disorder since 1973. *See* Benjamin C. Morgan, *Adopting Lawrence: Lawrence v. Texas and Discriminatory Adoption Laws*, 53 EMORY L.J. 1491, 1493 (2004) (noting that in 1973 “the American Psychiatric Association deleted homosexuality from its list of mental disorders”).

¹⁴⁸ *See supra* note 44 and accompanying text.

¹⁴⁹ The only statutory exception is for “cosmetic surgery,” which is medical care that is undertaken to improve the taxpayer’s appearance. I.R.C. § 213(d)(9)(B) (Deering, LEXIS through Pub. L. No. 115-385 (excluding Pub. L. No. 115-344) 2012).

¹⁵⁰ *See supra* notes 15–16 and accompanying text.

¹⁵¹ *See supra* notes 141–143 and accompanying text.

1(e) situates obstetric medical procedures within the “structure or function” prong of § 213, not the “disease” prong.¹⁵²

If a man incurred IVF, ISCI, egg donation, and surrogacy expenses to ameliorate medical infertility and bear a child, the “disease” prong would apply, but it is unclear how it would apply. Under the substitute for normal functioning test, the man might be able to deduct the costs of ICSI with IVF, because that is a standard medical approach to bypass male subfertility or infertility.¹⁵³ He would have a more difficult time arguing that the egg donation and surrogacy costs mitigate his male infertility. This sex-based distinction, which is implicit in the substitute for normal functioning argument (and later features in the *Morrissey* case), is consistent with the wording of the definition of medical care in § 213, but it produces distinctions that seem unfair. The only way that men, women, same-sex couples, and infertile different-sex couples are put on the same tax footing to form families via ARTs is to treat dysfertility as comparable to “disease” for purposes of the disease prong and to treat medical substitutes for sexual reproduction—including IVF, ICSI, egg donation, and surrogacy—as “medical care.” The current law very likely does not permit that result, although men might be able to deduct their ART expenses for ICSI with IVF under current law.

2. Generalizing *Magdalin*

The extent to which the *Magdalin* holding is generalizable to taxpayers other than unmarried men is not clear. Judge Wherry’s *Magdalin* opinion is a “memorandum” decision of the U.S. Tax Court, which limits its precedential force.¹⁵⁴ Decisions of the Tax Court can be division (“regular”) decisions or memorandum decisions.¹⁵⁵ Although regular Tax Court

¹⁵² Treas. Reg. § 1.213-1(e)(ii) (as amended in 1979) (stating that obstetrical expenses are “deemed to be for the purpose of affecting any structure or function of the body”).

¹⁵³ See *supra* note 5 and accompanying text.

¹⁵⁴ See HAROLD DUBROFF & BRANT J. HELLWIG, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 752 & n.189 (2d. ed. 2014) (“Although memorandum opinions still do not have binding precedential value, the court nonetheless has recognized that memorandum opinions constitute persuasive authority that aid in the disposition of present cases.”). Although the First Circuit Court of Appeals affirmed the Tax Court memorandum opinion in *Magdalin*, it did so without issuing an opinion. *Magdalin v. Comm’r*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009).

¹⁵⁵ See generally DUBROFF & HELLWIG, *supra* note 154, at 753–54 (discussing the distinction and difference in weight between the Tax Court’s division opinions and memorandum opinions).

decisions have controlling precedential force under the principle of stare decisis,¹⁵⁶ memorandum decisions do not have controlling weight.¹⁵⁷

The U.S. Tax Court creates and follows its own precedents as a national court for resolving federal tax disputes.¹⁵⁸ (The vast majority of federal income tax litigation occurs in the U.S. Tax Court).¹⁵⁹ Even if a federal court of appeals reaches a decision that is contrary to binding precedent in the U.S. Tax Court, the Tax Court generally can follow or ignore the contrary federal appellate court precedent, because the Tax Court is free to “decide all cases as it [thinks] right.”¹⁶⁰ The exception, commonly referred to as the “Golsen Rule,” is that the Tax Court will follow decisions of the federal court of appeals to which a taxpayer’s appeal would lie.¹⁶¹ (A Tax Court decision is appealable to the federal court of appeals for the geographic area where the taxpayer resides.)¹⁶² The rationale for the Golsen Rule is not the principle of stare decisis, but judicial efficiency; it simply would be inefficient for the Tax Court to ignore precedent that the relevant federal appellate court would apply in a specific case, because the appellate court would reverse the Tax Court decision.¹⁶³

Although memorandum decisions are not binding precedent, they may be cited in litigation before the Tax Court.¹⁶⁴ In addition, the Tax Court has increasingly cited memorandum decisions and treated them as highly

¹⁵⁶ See, e.g., *Security State Bank v. Comm’r*, 111 T.C. 210, 213 (1998) (“The doctrine of stare decisis generally requires that we follow the holding of a previously decided case, absent special justification.”), *aff’d*, 214 F.3d 1254 (10th Cir. 2000); *Allen v. Comm’r*, B.T.A.M. (P-H) para. 33,071 (1933) (“Under the doctrine of stare decisis we follow our own decisions until reversed by some appellate court, or until we conclude we were in error.”).

¹⁵⁷ Memorandum decisions are not treated as binding precedent in the Tax Court. See, e.g., *Nico v. Comm’r*, 67 T.C. 647, 654 (1977) (memorandum opinions are not “controlling precedent”).

¹⁵⁸ James S. Halpern, *What Has the U.S. Tax Court Been Doing? An Update*, 151 TAX NOTES 1277, 1286 (2016).

¹⁵⁹ If a taxpayer does not want to pay an asserted federal income tax deficiency, as computed by the IRS, the taxpayer can litigate in the U.S. Tax Court. If the taxpayer pays the asserted deficiency, the taxpayer can file a refund suit in federal district court or in the U.S. Court of Federal Claims. Most litigants prefer to litigate their tax controversy before paying the asserted deficiency, which is why most tax litigation is in the U.S. Tax Court. See, e.g., Elizabeth Chao & Andrew R. Roberson, *Overview of Tax Litigation Forums*, TAX CONTROVERSY 360 (Apr. 21, 2017), <https://www.taxcontroversy360.com/2017/04/overview-of-tax-litigation-forums/> (observing, based on IRS data, that “approximately 97 percent of tax claims are instituted in the Tax Court”).

¹⁶⁰ *Lawrence v. Comm’r*, 27 T.C. 713, 717 (1957), *rev’d*, 258 F.2d 562 (9th Cir. 1958).

¹⁶¹ *Golsen v. Comm’r*, 54 T.C. 742, 756–57 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

¹⁶² See I.R.C. § 7482(a) (Westlaw through Pub. L. No. 115–223, 2012) (noting that the U.S. Court of Appeals has jurisdiction to review Tax Court decisions).

¹⁶³ Halpern, *supra* note 158, at 1287.

¹⁶⁴ J. Edgar Murdock, *What Has the Tax Court of the United States Been Doing?*, 31 A.B.A. J. 297, 299 (1945) (noting that memorandum opinions have no formal precedential value but inviting counsel to cite such decisions if counsel consider them meritorious).

persuasive authority.¹⁶⁵ Opinions vary regarding the weight the Tax Court should give to memorandum decisions. For example, Andy Grewal argues that memorandum decisions and regular decisions should have the same precedential force.¹⁶⁶ U.S. Tax Court Judge James Halpern argues, to the contrary, that the Tax Court generally should not cite memorandum opinions as precedential because the designation of an opinion as a regular decision or memorandum decision serves an important signaling function.¹⁶⁷

Although a decade has passed since *Magdalin* was decided, it is still unclear whether the *Magdalin* holding and result are generalizable to other cohorts of taxpayers who incur fertility treatment expenses. For example, the *Magdalin* decision did not resolve the question of the tax deductibility of various types of fertility treatment costs incurred by married or unmarried women, medically infertile married or unmarried men, or different-sex married couples. The IRS conceded in *Magdalin* that some ART expenses “might” be deductible as medical expenses.¹⁶⁸

For example, even if courts follow the memorandum decision in *Magdalin*, the case left open the question of whether a medically infertile taxpayer can deduct IVF, ICSI, egg donation, and surrogacy expenses under the “disease” prong of §213(d)(1)(A). Language in the subsequent *Longino* case suggests that ART expenses would be deductible by a medically infertile taxpayer, but that language is dictum.¹⁶⁹

In addition, the *Magdalin* case left open the question of whether a medically fertile taxpayer can deduct IVF and egg donation expenses where the “taxpayer” or the taxpayer’s “spouse” intend to gestate the child. Logically, satisfying either prong of the I.R.C. § 213(d)(1)(A) definition of medical care is sufficient because the definition is written in the disjunctive.¹⁷⁰ If the purpose of a medical procedure is to allow the “taxpayer” or the taxpayer’s “spouse” to gestate the child, the procedure is

¹⁶⁵ Halpern, *supra* note 158, at 1278, 1287.

¹⁶⁶ Amandeep S. Grewal, *The Un-Precedented Tax Court*, 101 IOWA L. REV. 2065, 2096–99 (2016).

¹⁶⁷ Halpern, *supra* note 158, at 1278.

¹⁶⁸ *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491, 493 (2008), *aff’d*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009).

¹⁶⁹ See *Longino v. Comm’r*, 105 T.C.M. (CCH) 1491, 1499 (2013), *aff’d*, 593 Fed. Appx. 965 (11th Cir. 2014) (unpublished opinion) (“[A] taxpayer cannot deduct the IVF expenses of an unrelated person if the taxpayer does not have a defect which prevents him or her from naturally conceiving children.”).

¹⁷⁰ See I.R.C. § 213 (d)(1)(A) (Deering, LEXIS through Pub. L. No. 115-385 (excluding Pub. L. No. 115-344) 2012) (defining medical care as expenses “for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body”) (emphasis added).

directed at changing the “structure or function” of the “body” of the “taxpayer” or the taxpayer’s “spouse.” This analysis would apply to: (1) a different-sex married couple, where the wife will gestate the child; (2) a same-sex female married couple, where either wife will gestate the child; and (3) an unmarried female taxpayer, where the taxpayer will gestate the child. No court has addressed and resolved these issues squarely, although dictum in the trial court decision in *Morrissey v. United States*¹⁷¹ is consistent with this interpretation.¹⁷² Before discussing *Morrissey* in detail, the intervening *Longino* case is worth noting.

3. *Longino v. Commissioner*¹⁷³

Notwithstanding the controversy about the weight the Tax Court should give its memorandum opinions, the Tax Court cited *Magdalin* approvingly in *Longino*,¹⁷⁴ a memorandum decision in which Judge Morrison held that an unmarried heterosexual man could not deduct the expenses he incurred for an IVF procedure to conceive and bear a biological child with his fiancée.¹⁷⁵ Judge Morrison based his conclusion on the taxpayer’s failure to establish the claim that he suffered from medical infertility:

As we explained in *Magdalin v. Commissioner* . . . a taxpayer cannot deduct the IVF expenses of an unrelated person if the taxpayer does not have a defect which prevents him or her from naturally conceiving children. *Longino* has not proven that he has a defect preventing him from naturally conceiving children. Therefore, he is not entitled to deduct [the expenses he incurred] for his former fiancée’s [sic] IVF treatments.¹⁷⁶

This language creates a negative inference that an unmarried male taxpayer who can establish his own medical infertility might be able to

¹⁷¹ *Morrissey v. United States*, 226 F. Supp. 3d 1338, 1342–44 (M.D. Fla., 2016), *aff’d*, 871 F.3d 1260 (11th Cir. 2017).

¹⁷² See *infra* text at note 205.

¹⁷³ *Longino v. Comm’r*, 105 T.C.M. (CCH) 1491, *aff’d*, 593 Fed. Appx. 965 (11th Cir. 2014) (unpublished opinion).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1499 (holding that a male taxpayer could not take a medical expense deduction for expenses he incurred for his fiancée’s IVF treatment, noting that the taxpayer and his fiancée were not married at the time of treatment and the taxpayer failed to prove that he suffered from medical infertility).

¹⁷⁶ *Id.*

deduct ICSI and IVF expenses he paid to conceive a child. That conclusion in *Longino* is nonbinding dictum, however.

Part III discusses two developments that potentially could limit the ability of taxpayers to deduct IVF, ICSI, egg donation, and surrogacy expenses.

III. DEVELOPMENTS THAT POTENTIALLY LIMIT CLASSIFICATION OF THE COSTS OF IVF, ICSI, EGG DONATION, AND SURROGACY AS “MEDICAL CARE”

A. THE IRS ARGUMENT TO NARROW THE MEDICAL EXPENSE DEDUCTION

Over the past decade, the IRS has tried to reduce the scope of the medical expense deduction in litigation. For example, in *Magdalin*, the IRS argued that “an expense must be directly or proximately related to a medical condition to be deductible under section 213,” even if an expense satisfies the “structure or function” prong.¹⁷⁷ This construction of the I.R.C. § 213(d)(1)(A) “medical care” definition would require a taxpayer to satisfy the “disease” prong *and* the “structure or function” prong, notwithstanding the use of the disjunctive “or” between the “disease” prong and the “structure or function” prong of the definition. The argument is that the 1990 cosmetic surgery amendment to § 213 nullified the “structure or function” prong of the medical care definition, unless the medical change to “structure or function” is to treat a “disease.”¹⁷⁸ (A “condition”—perhaps including pregnancy—could suffice as proof of a “disease,” consistent with longstanding IRS interpretation of the §213(d)(1)(A) term “disease”).

In *O’Donnabhain v. Commissioner*, the IRS argued for an even narrower medical expense deduction.¹⁷⁹ The IRS again argued that a taxpayer who satisfies the “structure or function” prong must also satisfy the “disease” prong.¹⁸⁰ In addition, the IRS argued for a new, extremely narrow construction of the § 213(d)(1)(A) term “disease.”¹⁸¹ Ms. O’Donnabhain, a transgender woman who had been diagnosed with gender

¹⁷⁷ Respondent’s Opening Brief, *Magdalin*, *supra* note 106, at 16–19 (emphasis added) (citing various authorities to support argument that, even if an expense satisfies the “structure or function” prong, “an expense must be directly or proximately related to a medical condition to be deductible under section 213”).

¹⁷⁸ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11342(a), 104 Stat. 1388-471 (amending I.R.C. § 213 to add § 213(d)(9), the cosmetic surgery exception, to the § 213(d)(1) definition of medical care).

¹⁷⁹ *O’Donnabhain v. Comm’r*, 134 T.C. 34, 52–53 (2010) (reviewed decision), *acq.* 2011-47 I.R.B. 4 (2011).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 53.

identity disorder (“GID”), claimed a medical expense deduction for the costs of feminizing hormones, breast surgery, and gender confirmation surgery.¹⁸² The IRS argued that Ms. O’Donnabhain did not suffer from a “disease”—notwithstanding a medical diagnosis of GID—because the §213(d)(1)(A) term “disease” requires taxpayer proof of a scientifically established disease pathology or etiology *within* the individual, and “abnormal structure or function of the body at the gross, microscopic, molecular, biochemical, or neuro-chemical levels.”¹⁸³

This narrow interpretation would have excluded from the definition of “disease” traumatic injuries, physical conditions, mental conditions, and disorders for which internal disease pathology and etiology have not been established.¹⁸⁴ The Tax Court in *O’Donnabhain* correctly rejected this extreme IRS argument and held that Ms. O’Donnabhain was allowed a medical expense deduction for the costs of the feminizing hormones and gender confirmation surgery.¹⁸⁵

The IRS argument that (1) no §213 deduction is allowed absent “disease,” and (2) “disease” is pathology would exclude from the definition of medical care all reproductive care (absent pathology).¹⁸⁶ It makes no sense for inherently medical reproductive care, including prenatal care and obstetric care, to be excluded from the definition of medical care. In addition, the IRS’s narrowing argument is flatly inconsistent with Treasury Regulation §1.213-1(e)(1), which has provided for decades that obstetric care is tax-deductible “medical care.”¹⁸⁷ Also, Revenue Rulings dating back to the early 1970s conclude that various reproductive medical procedures—whether to facilitate conception, prevent conception, or end a pregnancy—all qualify as §213(d)(1)(A) “medical care.”¹⁸⁸ Pregnancy is a physiological

¹⁸² *Id.* at 41–42.

¹⁸³ Brief for Respondent at 160, *O’Donnabhain v. Comm’r*, 134 T.C. 34 (2010) (No. 7717-10) (Dietz testimony).

¹⁸⁴ *Id.* at 160–61 (distinguishing between “disease,” “illness,” and “disorder”).

¹⁸⁵ *O’Donnabhain*, 134 T.C. at 55–59.

¹⁸⁶ Pratt, *Definition of Medical Care*, *supra* note 58, at 351–52, 387–88. In *O’Donnabhain*, an IRS expert witness, Dr. Dietz, stated that he would define the § 213(d)(1)(A) term “disease” narrowly to require that the taxpayer establish that the taxpayer’s condition results from “a pathological process,” adding that “[i]t’s not necessary that this process be fully known or understood, but it is necessary that the pathology occur within the individual and reflect abnormal structure or function of the body at the gross microscopic, molecular, biochemical, or neurochemical levels.” Transcript of Record at 828–29, *O’Donnabhain v. Comm’r*, 134 T.C. 34 (2010), (No. 6402-06) (on file with author) (Dietz testimony).

¹⁸⁷ Treas. Reg. § 1.213-1(e)(1)(ii) (as amended in 1979) (“Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses . . . are deemed to be for the purpose of affecting any structure or function of the body.”).

¹⁸⁸ See, e.g., Rev. Rul. 73-200, 1973-1 C.B. 140 (ruling that the cost of birth control pills is medical care); Rev. Rul. 73-201, 1973-1 C.B. 140 (ruling that the cost of a legal abortion or vasectomy is

condition for which patients seek “inherently medical” care from medical professionals, which is the concept behind the historically broad administrative interpretation of the term “disease” in § 213(d)(1)(A).

Why did the IRS make such an extreme argument, which was inconsistent with 50 years of IRS administrative practice? One can only speculate that the argument was result driven: the IRS did not want Ms. O’Donnabhain to be able to deduct the costs of medically transitioning from male to female. The statutory construction argument, which seems motivated by moral and ethical objections to the medical procedures involved, would have eliminated from the definition of medical care many types of garden variety inherently medical reproductive care. The IRS might make similar arguments, also based on moral and ethical objections, to deductions for IVF, ICSI, egg donation, and surrogacy. This narrowing argument would fail however, for the same reason it failed in *O’Donnabhain*: it makes no sense.

B. MORRISSEY V. UNITED STATES¹⁸⁹

1. The Federal District Court Opinion¹⁹⁰

In *Morrissey v. United States*, an unmarried gay man incurred and paid medical expenses for IVF, ICSI, egg donation, and surrogacy expenses in an unsuccessful attempt to have a child with his partner.¹⁹¹ Mr. Morrissey did not claim these medical expenses on his original 2011 tax return, but deducted them on an amended tax return he filed soon after filing his original return.¹⁹² After the IRS denied his claim for refund, Mr. Morrissey filed a suit for refund in the federal district for the middle district of Florida.¹⁹³ He argued that (1) he was entitled to a § 213 medical expense deduction for the IVF, ICSI, egg donation, and surrogacy expenses, and (2) not allowing him such a § 213 deduction would violate his Fifth Amendment due process and equal protection rights because heterosexuals are allowed § 213 deductions for IVF, ICSI, egg donation, and surrogacy

medical); Rev. Rul. 73-603, 1973-2 C.B. 76 (ruling that the cost of a sterilization procedure is medical care); I.R.S. PUB. 502, *supra* note 27, at 5, 7, 12, 13, 14 (stating that deductible medical expenses include the costs of abortion, prescription birth control pills, pregnancy test kits, sterilization, vasectomy, and surgical reversal of vasectomy).

¹⁸⁹ *Morrissey v. United States*, 226 F. Supp. 3d 1338, (M.D. Fla., 2016), *aff’d*, 871 F.3d 1260 (11th Cir. 2017).

¹⁹⁰ *Morrissey v. United States*, 226 F. Supp. 3d 1338 (M.D. Fla., 2016).

¹⁹¹ *Id.* at 1340.

¹⁹² *Id.* at 1341.

¹⁹³ *Id.*

expenses they incur.¹⁹⁴ Morrissey and the IRS both filed motions for summary judgment.¹⁹⁵ Federal District Court Judge Lazarra granted the IRS's motion for summary judgment.¹⁹⁶

Judge Lazarra analyzed Morrissey's ART expenses solely under the "structure or function" prong of the definition of medical care.¹⁹⁷ He admitted that the processes performed on Mr. Morrissey's sperm constituted medical care, as they affected the "structure or function" of Mr. Morrissey's body,¹⁹⁸ but concluded that medical processes (including IVF, egg donation, and surrogacy) performed on the bodies of the unrelated female egg donors and gestational surrogate were not medical care.¹⁹⁹ Judge Lazarra acknowledged that Mr. Morrissey "is effectively infertile," as a gay man,²⁰⁰ and that "IVF" is "necessary" to Mr. Morrissey's "ability to reproduce."²⁰¹ However, Judge Lazarra concluded the "IVF" costs did not affect the structure or reproductive "function" of Mr. Morrissey's body.²⁰² Note that Judge Lazarra used the term "IVF" as a global term to encompass various parts of *collaborative* ARTs—including IVF, ICSI, egg donation, and surrogacy.²⁰³ IVF and ICSI may, but often do not, involve third-party egg donation and surrogacy. The precise tax analysis regarding deductions for the costs of collaborative and non-collaborative ARTs can vary under current law, making Judge Lazarra's global reference to the tax consequences of "IVF" unfortunate and confusing.

As support for the proposition that a *man* cannot deduct "IVF" costs, Judge Lazarra cited the Tax Court Memorandum decisions in *Magdalin* and *Longino*.²⁰⁴ According to Judge Lazarra, the rule is different for female taxpayers; if IVF and egg donation are undertaken to enable a *female taxpayer to conceive and gestate a child*, the IVF and egg donation costs

¹⁹⁴ *Id.* at 1340.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1346.

¹⁹⁷ *Id.* at 1342.

¹⁹⁸ *See id.*

¹⁹⁹ *See id.*

²⁰⁰ *Id.* at 1343. Judge Lazarra disregarded the organ donor rulings as irrelevant because he did not think the "disease" prong of the medical care definition applied. *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See id.* (stating that "IVF is the only way [Mr. Morrissey] can pass on his genetic material to another" without mentioning the ICSI, egg donation, and surrogacy that also would have been necessary for Mr. Morrissey to have a biological child).

²⁰⁴ *Id.* (citing *Magdalin v. Comm'r*, 96 T.C.M. (CCH) 491, 493 (2008), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009); *Longino v. Comm'r*, 105 T.C.M. (CCH) 1491, *aff'd*, 593 Fed. Appx. 965 (11th Cir. 2014) (unpublished opinion)).

are deductible medical expenses.²⁰⁵ As support for this proposition, he cited the egg donation private letter ruling²⁰⁶—despite the fact that a private letter ruling is not legal precedent²⁰⁷ (although it might be persuasive).²⁰⁸

Nor is an IRS Information Letter legal precedent.²⁰⁹ Nevertheless, Judge Lazarra cited the 2002 gestational surrogacy Information Letter for the proposition that no medical expense deduction is allowed for ARTs if a female taxpayer cannot (or can but will not) *gestate a child*.²¹⁰ Just because

²⁰⁵ *Morrissey*, 226 F. Supp. 3d at 1340 (“[W]hen a taxpayer who pays to have fertilized eggs of a donor implanted into *her* body, *she* is entitled to a deduction under 213 because the amounts paid undisputedly affect the structure or function of the taxpayer’s body.” (emphasis added)).

²⁰⁶ *Id.* (citing I.R.S. Priv. Ltr. Rul. 200318017 (Jan 9, 2003)).

²⁰⁷ I.R.C. § 6110(k)(3) (Deering, LEXIS through Pub. L. 116-8, 2012) (“Precedential status. Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent.”). See also MICHAEL SALTZMAN & LESLIE BOOK: IRS PRACTICE AND PROCEDURE ¶ 3.05 (Thomson Reuters, Rev. 2nd ed. 2002, with updates through February 2019), Westlaw:

A letter ruling is a written determination issued by an Associate office in response to a taxpayer’s written inquiry, filed prior to the filing of the taxpayer’s return or any other document required by the tax law, about the taxpayer’s status for tax purposes or the tax effects of its acts or transactions. A letter ruling interprets and applies the tax laws to the taxpayer’s specific set of facts and is given when appropriate in the interest of sound tax administration. . . .

Unlike revenue rulings, letter rulings may not be used or cited by any officer or employee of the Service as a precedent in the disposition of other cases and may not be relied upon by taxpayers other than the one to whom it was issued.

²⁰⁸ See SALTZMAN & BOOK, *supra* note 207, at ¶ 3.05[6][a] (notwithstanding the “lack of precedential effect of private letter rulings,” some “cases acknowledge that a private letter ruling can be used as ‘persuasive authority’ or an ‘instructive tool.’”) (citations omitted).

²⁰⁹ BORIS I. BITTKER & LAWRENCE LOKKEN: FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 110.6[1] (Thomson Reuters, 2d/3d ed. 1993–2018, updated Nov. 2018), Westlaw (“An information letter is advisory only and has no binding effect on the Service.”).

²¹⁰ *Morrissey*, 226 F. Supp. 3d at 1344–45.

Section 213 does not permit any taxpayer, regardless of sex, sexual orientation, or gender to deduct the kinds of IVF expenditures Plaintiff claims here. The parties have stipulated that the IRS has interpreted § 213 to deny taxpayers deductions for the kinds of costs associated with surrogacy, without respect to a taxpayer’s sexual orientation. As Defendant correctly points out, a single, heterosexual female who was medically infertile and incapable of carrying a child to term . . . would not be able to deduct IVF expenses she paid for treatment of a donor and/or gestational surrogate who was neither her spouse, or [sic] her dependent. Likewise, a heterosexual couple in which the wife was medically infertile and medically incapable of carrying a child to term . . . who used a similar method as Plaintiff, would not be entitled to deduct the expenses of contracting with and having the necessary procedures for a third-party gestational carrier, or any egg donor if the donated egg is not implanted in the taxpayer, spouse, or dependent. The same result would hold for a lesbian couple in which neither partner

the IRS takes a position in informal advice does not make that advice the law.²¹¹ To the contrary, the IRS *allowed* taxpayers to deduct gestational surrogacy expenses in two cases it settled,²¹² presumably to avoid an adverse decision that would have created a legal precedent in favor of allowing a medical expenses deduction for surrogacy expenses.²¹³ These two settlements are not legal precedent, but neither is the Information Letter Judge Lazarra cited as authority for denying a medical expense deduction for surrogacy expenses. Judge Lazarra cited *Kilpatrick v. Commissioner*,²¹⁴ an adoption case, as “consistent” with his holding in *Morrissey*.²¹⁵ Presumably he cited the case for the proposition that no medical expense deductions are allowed for unborn children who are not the taxpayer’s “dependent.” As noted earlier in this Article, however, the adoption cases are distinguishable in the context of ART expenses.²¹⁶ Consistent with his conclusions that no taxpayers can deduct surrogacy costs and no men can deduct fertility treatment other than sperm tests and treatment, Judge Lazarra concluded that disallowing Mr. Morrissey’s medical expense deduction was not a constitutional violation.²¹⁷

2. The Eleventh Circuit Court of Appeals Opinion

In 2017, a three-judge Eleventh Circuit Court of Appeals panel affirmed the *Morrissey* district court’s denial of the medical expense deduction.²¹⁸ Judge Newsom, writing for the panel, held that Mr. Morrissey could not take a medical expense deduction on the grounds that the disputed ART treatment costs were for “female” reproductive functioning—not for

could . . . carry a child to term and who utilized a third-party surrogate to carry their child.

Id. (citing I.R.S. Information Ltr. 2002-0291 (Dec. 31, 2002)).

²¹¹ *Morrissey*, 226 F. Supp. 3d at 1344–45. Judge Lazarra highlights that the parties “stipulated that the IRS has interpreted § 213 to deny taxpayers deductions for the kinds of costs associated with surrogacy.” Stipulating to the *fact* the IRS has taken a position and issued informal advice on an issue does not mean that the IRS is correct as to the *law*. Judge Lazarra seemed to think—incorrectly—that the factual stipulation meant that Mr. Morrissey had conceded that the IRS advice was correct as a matter of law.

²¹² *Sedgwick v. Comm’r*, No. 10133-94, (T.C. filed June 14, 1994); *Osius v. Comm’r*, No. 15472-11S (T.C. filed June 30, 2011).

²¹³ See Pratt, *Inconceivable*, *supra* note 1, at 1161 (describing the meeting in chambers following Mrs. Sedgwick’s tearful testimony, after which the IRS settled the case in favor of the taxpayers).

²¹⁴ *Kilpatrick v. Comm’r*, 68 T.C. 469 (1977).

²¹⁵ *Morrissey*, 226 F. Supp. 3d at 1344 (citing *Kilpatrick*, 68 T.C. at 470–71).

²¹⁶ See *supra* pp. 142–44.

²¹⁷ *Morrissey*, 226 F. Supp. 3d at 1342, 1344–45.

²¹⁸ *Morrissey v. United States*, 871 F.3d 871, 1272 (11th Cir. 2017).

medical care that affected the “structure or function of the body of the taxpayer, [the taxpayer’s] spouse, or a dependent.”²¹⁹

a. *The “Primer” on “Human Sexual Reproduction”*

Judge Newsom drew a sharp distinction between “biological” *natural* human reproduction, through heterosexual intercourse, and ARTs, which he characterized as “the stuff of science fiction.”²²⁰ Judge Newsom began his opinion “of necessity, with a primer” on such biological sexual reproduction, after noting that “[s]ome of this must surely seem so obvious as not to require restatement.”²²¹ He ostensibly included the primer because “the circumstances of the case—and the parties’ competing contentions—demand a brief refresher. So here goes.”²²² The opinion not only assumes that natural biological reproduction is wholly preferable to “science fiction” ARTs; it also views that assumption as uncontroversial—even if it means that same-sex intended parents never have an opportunity to parent children. Judge Newsom’s primer neatly divides intended parents into two groups: (1) those who can parent because they can have children through biological sexual intercourse; and (2) those who cannot parent because they cannot have children through biological sexual intercourse.²²³

Although the process of human reproduction is collaborative, Judge Newsom’s primer on biological “human sexual reproduction” and the rest of his opinion divide human reproductive functioning into distinct male and female functions: “Critically here, within the human reproductive process, the male and female bodies have different roles and purposes—each has an

²¹⁹ *Id.* at 1265–67 (concluding that medical expenses for diagnostic tests of the taxpayer’s sperm and for sperm treatment and storage would be medical care, but expenses for IVF, egg donation, and surrogacy were not for the male taxpayer’s medical care). Most federal income tax cases are heard in the U.S. Tax Court because taxpayers do not have to pay the asserted tax deficiency before litigating there. *See* DUBROFF & HELLWIG, *supra* note 154, at 422, 545. A taxpayer who pays the contested tax and files a claim for refund, which the IRS denies, can file a suit for refund in the federal district court where the taxpayer resides or in the United States Court of Federal Claims in Washington DC. *See id.* at 559. Mr. Morrissey brought his suit for refund in the U.S. District Court for the Middle District of Florida. *See Morrissey*, 226 F. Supp. 3d at 1338. Taxpayers sometimes choose to litigate in the district court, for example, where there is unfavorable precedent in the U.S. Tax Court. *See* Donald B. Tobin, *The Tax Court Revisits the Golsen Rule: Lardas v. Commissioner*, 47 TAX LAWYER 559, 564 (1994) (stating that precedent is “one of the primary factors” considered by litigants deciding the forum in which to litigate).

²²⁰ *Morrissey*, 871 F.3d at 1269.

²²¹ *Id.* at 1266.

²²² *Id.*

²²³ *Id.*

activity ‘for which [it] is specifically fitted, used, or responsible,’ and thus, in statutory terms, serves a distinct ‘function.’”²²⁴

b. *The Characterization of Reproductive Functioning and ARTs as Essentially “Female”*

Stating that Mr. Morrissey was medically fertile, the Court of Appeals focused on the “structure or function” prong of the I.R.C. § 213 tax definition of medical care.²²⁵ The court concluded that only very limited “male” types of reproductive care (i.e., care related to the *production* of sperm) would be undertaken “for the purpose of affecting any structure or function of the body” of an unmarried male taxpayer.²²⁶ The court distinguished between the human reproductive “process” and the exclusively female and male “*functions*” that are a part of that process.²²⁷ According to the court, “the male body’s distinctive function in the reproductive process is limited and discrete. With the provision . . . of healthy sperm, the male body’s role is complete.”²²⁸

In the court’s view, the taxpayer’s payments for egg donation, IVF, and gestational surrogacy were for a *female*—not *male*—reproductive *function* and thus did not affect the structure or function of the male taxpayer’s “body.”²²⁹ Under this reasoning, a different-sex married couple seemingly could deduct the costs of ARTs because § 213 in effect aggregates the bodies of a husband and wife (the bodies of “the taxpayer” and the taxpayer’s “spouse”)—thus aggregating the reproductive functioning of their two bodies.²³⁰ In addition, a different-sex married couple can receive a formal medical diagnosis of infertility if the couple has unprotected sex for a year without becoming pregnant.²³¹ A “disease” diagnosis increases the likelihood of being able to deduct reproductive care

²²⁴ *Id.*

²²⁵ *Id.* at 1264.

²²⁶ *Id.* at 1265.

²²⁷ *See id.* at 1266 (“Critically here, within the human reproductive process, the male and female bodies have different roles and purposes – each has an activity ‘for which [it] is specifically fitted, used, or responsible,’ and thus, in statutory terms, serves a distinct ‘function.’”).

²²⁸ *Id.* at 1267.

²²⁹ *See id.* at 1267–68 (“Because the human reproductive process entails distinct male and female functions, because Mr. Morrissey’s body’s own function within that process is to produce and provide healthy sperm, and because Mr. Morrissey was and remains capable of performing that function without the aid of IVF-related treatments, those treatments did not “affect[]” any “function of [his] body” within the meaning of Section 213(d) – and accordingly do not qualify as deductible “medical care” within the meaning of Section 213(a).”).

²³⁰ *Infanti, supra* note 114, at 164–66.

²³¹ *See Ikemoto, In/Fertile, Too Fertile, Dysfertile, supra* note 108, at 1027.

costs under the first “disease” prong of the § 213 definition of medical care.²³²

The narrow holding of *Morrissey*—denying a man a tax deduction for “female” reproductive medical care—seemingly applies to IVF, egg donation, and surrogacy expenses incurred by a medically fertile, unmarried man.²³³ Judge Newsom cites *Magdalin* and *Longino* for the proposition that a medically fertile unmarried man—whether gay or straight—cannot deduct the costs of IVF, egg donation, and surrogacy.²³⁴

The court’s reasoning and classification of reproductive functioning as “female” or “male” leave some questions unanswered, even with respect to an unmarried male taxpayer. Judge Newsom concludes that the male “function” is “complete” when “healthy” sperm is produced—but completing the “male” reproductive function requires that the sperm penetrate and fertilize an egg.²³⁵ Production of live sperm alone is insufficient. Sperm can fail to fertilize eggs for various reasons; the medical assessment of sperm is not a simple, binary “healthy” or “unhealthy” assessment.²³⁶ Instead, the medical assessment measures *many* characteristics of sperm.²³⁷

²³² See Katherine Pratt, *Commentary on Magdalin v. Commissioner*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINION 243, 247–48 (Bridget J. Crawford & Anthony C. Infanti eds., 2017) [hereinafter Pratt, FEMINIST JUDGMENTS] (noting that a diagnosis of “medical infertility,” a disease, is relevant in a court’s analysis of § 213 deductions).

²³³ Mr. Morrissey had no diagnosis of medical infertility. See *Morrissey*, 871 F.3d at 1268.

²³⁴ Although Judge Newsom characterizes Mr. Longino as medically fertile, the *Longino* opinion states only that Mr. Longino did not establish, as an evidentiary matter, his medical infertility. *Longino v. Comm’r*, 105 T.C.M. (CCH) 1491, 1499 (2013), *aff’d*, 593 Fed. Appx. 965 (11th Cir. 2014). Judge Newsom may have assumed that Mr. Longino was medically fertile because the Tax Court opinion indicates that the taxpayer had children, for whom Mr. Longino claimed dependent exemptions, with his ex-wife. However, that fact does not establish that Mr. Longino was medically fertile at the time he paid the IVF expenses.

²³⁵ See, e.g., Pratt, *Inconceivable*, *supra* note 1, at 1132–33 (listing *characteristics* of sperm that may prevent it from fertilizing an egg during sexual intercourse, result in male factor infertility).

²³⁶ See *id.*

²³⁷ See, e.g., Pratt, *Inconceivable*, *supra* note 1, at 1132–33.

The workup for male patients begins with the man submitting a semen sample to determine whether each of the following is normal or abnormal: (1) the total *volume* of semen; (2) the sperm *count*; (3) sperm *motility* and *velocity*; (4) *morphology* (maturity, shape, and size of the sperm or the sperm head); (5) *liquefaction* and *viscosity* of the semen; (6) *white blood cell count*; and (7) *seminal fructose levels*. Semen is also tested for: (1) infections, such as chlamydia; (2) sperm *antibodies*; and (3) the *ability of the sperm to penetrate an egg*. Male patients also submit blood samples so the laboratory can determine whether the man’s hormone levels are normal or abnormal. In more severe cases, doctors may perform a testicular biopsy to evaluate sperm production.

Id.

According to conventional wisdom, infertility is a “female” problem; however, infertility is equally attributable to male factors and female factors.²³⁸ As Lisa Ikemoto observes, people think of infertility as a female problem because the most obvious ARTs are performed *on* women—even if the intended father, not the intended mother, is the infertile intended parent.²³⁹ Male factor infertility that cannot be corrected with surgery or medication is often treated with a combination of ICSI and IVF.²⁴⁰ ICSI “dramatically increases” the odds of sperm successfully fertilizing an egg.²⁴¹ ICSI thus serves a “male” function in conjunction with IVF. Interestingly, neither the trial court nor the appellate court in *Morrissey* addressed the fact that Mr. Morrissey’s medical team used ICSI to fertilize the donated eggs in the IVF procedure. The resulting embryos were later implanted in the uterus of the gestational surrogate.²⁴² Nothing was said in the *Morrissey* case about this “male” ICSI-with-IVF procedure that was part of the ART that Mr. Morrissey used to try to bear a child.

The rationale of *Morrissey* seems to apply to a married gay couple as well as an unmarried man. Even if a man suffered from medical infertility, medical procedures for “female” reproductive functioning would not be deductible under the reasoning of *Morrissey*.²⁴³ The implication in *Morrissey* is that the costs of “female” assisted reproductive medical procedures never would be deductible as medical care unless a woman is “the taxpayer,” or the taxpayer’s “spouse” or “dependent.”

Perhaps, however, a medically infertile man could distinguish *Morrissey* by arguing that the distinction it draws between “male” and “female” reproductive functioning applies for purposes of the “structure or function” prong, but not for purposes of the “disease” prong of the § 213 definition of medical care, where a man suffers from medical infertility. On the other hand, the gist of the *Morrissey* opinion is that men cannot deduct the medical costs of assisted reproductive care other than diagnostic care and the costs of sperm production and storage.²⁴⁴ Again, however, the *Morrissey* court’s conclusions seem to be based on the erroneous

²³⁸ See *id.* at 1130; Pratt, *Implications of Magdalin*, *supra* note 55, at 1325 n. 254; Ikemoto, *In/Fertile, Too Fertile, Dysfertile*, *supra* note 108, at 1037 (“[M]en comprise half of those diagnosed as infertile.”).

²³⁹ Ikemoto, *In/Fertile, Too Fertile, Dysfertile*, *supra* note 108, at 1037 (“[W]hether it is a man or a woman who is infertile, the technology is used on the woman . . . Therefore, as a normative matter, it is the woman who is in/fertile.”).

²⁴⁰ Pratt, *Inconceivable*, *supra* note 1, at 1134.

²⁴¹ *Id.* (“ICSI dramatically improves fertilization rates, and doctors have hailed it as a revolutionary treatment for sperm disorders.”).

²⁴² *Morrissey v. United States*, 871 F.3d 1260, 1263 (11th Cir. 2017).

²⁴³ See *Morrissey*, 871 F.3d at 1266–68.

²⁴⁴ *Id.*

assumption that “infertility” is an essentially female problem, not a male problem.

It seems odd that inherently medical care undertaken by a taxpayer for the purpose of conceiving and delivering a dependent child would not be treated as a medical expense of the taxpayer-family unit—including the intended parent and the child—simply because adoption cases treat the fetus and child as outside the family unit of the taxpayer-adoptive parents until the child is born and the taxpayers adopt the child.²⁴⁵ In the context of determining which of two different taxpayers (the birth mother or the intended adoptive parents) qualify for a dependent exemption for a child that is adopted, one can understand from a tax compliance perspective why the tax law allows a dependent exemption for a dependent child only after the child is born and adopted by a taxpayer.

In the context of the collaborative reproductive care, however, it makes more sense to treat inherently medical expenses for reproductive care and care performed *on* the surrogate (and implicitly, the fetus) as medical expenses *of* the intended parents—even if the fetus is gestated by a woman who is unrelated to the intended parents. Collaborative ART procedures are inherently medical while adoption procedures are not. In donor and surrogate procedures, the intended parents initiate a medical procedure. In adoptions (at least adoptions that do not result from ARTs), the adoptive parents do not initiate a medical procedure; instead, they initiate a nonmedical legal process to adopt a child who already was conceived by the child’s biological parents. Although adoption expenses are not medical expenses under § 213, adoptive parents can claim a § 23 adoption tax credit for their adoption expenses, including medical expenses.²⁴⁶ Collaborative ARTs, including egg donation and surrogacy, are medical procedures that qualify for the medical expense deduction and thus are excluded from the adoption tax credit. The legislative history of the adoption tax credit “indicates that members of Congress specifically excluded surrogacy expenses from the scope of § 23 precisely because they assumed that those surrogacy expenses would be deductible under § 213 as medical expenses.”²⁴⁷

²⁴⁵ See *Kilpatrick*, 68 T.C. 469, 473 (ruling that adoptive parents could not take a medical expense deduction for expenses they incurred and paid for medical treatment of the birth mother and the child they adopted).

²⁴⁶ I.R.C. § 23 (Westlaw 2012).

²⁴⁷ Pratt, *Inconceivable*, *supra* note 1, at 1160, quoting the legislative history:

The question of fairness is raised when we compare the treatment of adoption costs to those expenses related to the conception, delivery, and birth of a child—or high technology medical expenses for in-vitro conception, etc. *Parents could in most cases itemize and deduct the latter costs as medical expenses.* No similar relief is currently available for adoptive families.

Forming a family is critical to the life plans of many adults. Intended parents go to great lengths to finance the high costs of ARTs.²⁴⁸ Many intended parents in the U.S. are excluded from treatment because they cannot afford it.²⁴⁹ Judith Daar refers to the inability of intended parents to fund family formation with ARTs as the “eugenics of cost.”²⁵⁰ ARTs are less common in the United States than they are in other developed countries, in large part because of the relatively high out-of-pocket costs for ARTs in the United States.²⁵¹ Instead of allowing intended parents to reduce the net costs of ARTs, however, *Magdalin* and *Morrissey* deny intended parents tax benefits for the out-of-pocket costs they incur for ARTs.²⁵²

c. *The Conflated “IVF-Related Expenses” Term*

In his *Morrissey* opinion, Judge Newsom erroneously asserts that the IRS has not allowed deductions for IVF, egg donation, and surrogacy costs incurred by heterosexuals.²⁵³ The most confusing aspect of this portion of the *Morrissey* opinion is the court’s use of the term “*IVF-related expenses*” to refer to an entire series of fertility treatment procedures. Judge Newsom uses this term repeatedly, particularly in the portion of the opinion in which he addresses Mr. Morrissey’s constitutional claim.²⁵⁴ The court denied Mr.

Id. (emphasis in original).

²⁴⁸ Bahadur, *supra* note 8 (detailing how intended parents spent their savings and inheritances, borrowed against their retirement plans, took early withdrawals from their retirement plans, took out personal bank loans, and charged treatment expenses on credit cards to finance costly fertility treatment).

²⁴⁹ *Id.* (noting disappointment intended parents feel when they run out of money to continue treatment).

²⁵⁰ JUDITH DAAR, *THE NEW EUGENICS: SELECTIVE BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES* 70 (2017) [hereinafter DAAR, *NEW EUGENICS*].

²⁵¹ See Dmitry M. Kissin, et al., *Fertility Treatments in the United States: Improving Access and Outcomes*, 128 *OBSTETRICS & GYNECOLOGY* 387, 388 (2016) (noting that the net cost of ARTs is higher in U.S. than in other developed countries); David Sable, *How Entrepreneurs Will Move IVF into the Future*, *FORBES* (Feb. 3, 2018, 11:07 AM), <https://www.forbes.com/sites/davidsable/2018/02/03/how-entrepreneurs-will-move-ivf-into-the-future/#6a17eafe554a> (“[T]he United States’ utilization of IVF is substantially lower than that of other developed economies. [The United States] perform[s] far fewer cycles per capita than most European countries and Japan; IVF accounts for 1.5 percent of babies born in the [United States] versus over 4 percent in Australia.”).

²⁵² *Morrissey v. United States*, 871 F.3d 1260, 1268 (11th Cir. 2017); *Magdalin v. Comm’r*, 96 T.C.M. (CCH) 491, 493 (2008), *aff’d*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009).

²⁵³ *Morrissey*, 871 F.3d at 1267 (“[The Tax Court] has consistently rejected efforts by male taxpayers to deduct IVF-related expenses that were paid to cover the care of unrelated female egg donors and gestational surrogates.”). See also *id.* at 1270 (“As a matter of both policy and practice, the IRS has consistently refused deductions sought by heterosexual taxpayers for IVF-related expenses similar to Mr. Morrissey’s.”).

²⁵⁴ *Morrissey*, 871 F.3d at 1262, 1263, 1264–65, 1270–72.

Morrissey's constitutional claim on the grounds that the IRS does not allow heterosexuals medical expense deductions for "IVF-related expenses."²⁵⁵

However, the term "IVF-related expenses" erroneously conflates different types of medical fertility procedures, each of which is analyzed separately under the § 213 definition of medical care. Under pre-*Morrissey* IRS administrative practice and prior cases (including *Magdalin*), whether "the taxpayer or [the taxpayer's] spouse" could take a tax deduction for the cost of each type of medical procedure seemingly depended on the facts of the case, such as whether the patient had a medical diagnosis of infertility or perhaps the sex and marital status of the patient receiving the care.²⁵⁶ By aggregating a whole series of reproductive medical procedures in a case in which the court denied a medically fertile, unmarried gay man a tax deduction, the *Morrissey* court muddled what were thought to be settled tax consequences for various types of fertility treatment. For example, the IRS routinely allows medically infertile different-sex married couples to deduct the costs of IVF.²⁵⁷

An unmarried woman or a same-sex female married couple also probably could deduct the costs of IVF and egg donation, notwithstanding the *Morrissey* court's broad language about denying "IVF-related expenses." If egg donation and IVF were followed by implantation of the resulting embryos in "the body of the taxpayer or [the taxpayer's] spouse," the medical procedures would affect the structure or function of "the body of the taxpayer or [the taxpayer's] spouse" and thus would be for medical care. Footnote eight of the *Morrissey* opinion supports this interpretation.²⁵⁸ The court notes there that the IRS has allowed tax deductions for egg donor costs where the resulting embryos were implanted in the body of the taxpayer or the taxpayer's spouse.²⁵⁹

The *Morrissey* court flatly states that "[a]s a matter of both policy and practice, the IRS has consistently refused deductions sought by heterosexual taxpayers for IVF-related expenses similar to Mr. Morrissey's."²⁶⁰ This statement is, at best, confusing and, at worst, simply false. The IRS has consistently allowed different-sex married couples deductions for IVF and

²⁵⁵ *Id.* at 1270–72 (concluding there was no Constitutional violation, since "[a]s a matter of both policy and practice, the IRS has consistently refused deductions sought by heterosexual taxpayers for IVF-related expenses similar to Mr. Morrissey's,")

²⁵⁶ See generally Pratt, *Implications of Magdalin*, *supra* note 55, at 1311–44 (analyzing the implications of *Magdalin* based on a taxpayer's sex, marital status, and fertility or infertility).

²⁵⁷ See I.R.S. PUB. 502, *supra* note 27, at 2, 8 (stating that IVF "to overcome your inability to have a child" is a deductible medical expense).

²⁵⁸ *Morrissey*, 871 F.3d at 1270 n.8 (citing I.R.S. Priv. Ltr. Rul. 200318017 (Jan. 9, 2003)).

²⁵⁹ *Morrissey*, 871 F.3d at 1270 n.8.

²⁶⁰ *Id.* at 1270.

egg donor costs.²⁶¹ In addition, although the IRS consistently has challenged tax deductions for surrogacy expenses, it has never won a case on this issue and has settled two surrogacy cases in favor of medically infertile different-sex married taxpayers who deducted their surrogacy expenses.²⁶²

In *Morrissey*, Judge Newsom noted that settlements are not “evidence of the validity of underlying claims.”²⁶³ In addition, he discounted the IRS allowance of surrogacy expenses in the settled cases because there were only two such cases: “the fact that the IRS settled *two* IVF-related disputes in the last 23 years (during which time thousands upon thousands of babies were conceived using artificial reproductive technologies) doesn’t establish a pattern” of allowing heterosexual taxpayers to deduct “IVF-related expenses.”²⁶⁴ In those same 23 years, however, *zero* cases—reported or settled—have *denied* medically infertile different-sex married couples or single or married women a medical expense deduction for IVF, ICSI, egg donation, or *surrogacy* expenses. The complete absence of decided cases denying the deduction for ART costs is the tax analogue of the “dog that didn’t bark,” in the famous Sherlock Holmes story, *Silver Blaze*.²⁶⁵ The lack of decided cases in which the IRS denied different-sex married couples medical expense deductions for ART expenses creates a negative inference that the IRS is allowing these couples such deductions. In the reproductive care context, during four decades of ARTs, including collaborative reproductive medical care, the IRS has failed to generate any reported decisions in which a court has denied taxpayers, other than medically fertile unmarried men, a medical expense deduction for IVF, ICSI, egg donation, and surrogacy.

As noted earlier, I have argued that the costs of surrogacy to mitigate medical infertility qualify as deductible “medical care.”²⁶⁶ I reasoned by analogy because, while there is no direct binding precedent to support this proposition, neither is there any direct binding precedent to support the IRS view that a tax deduction for surrogacy expenses is never allowed. Although the IRS did express this view in a 2002 Information Letter, such guidance

²⁶¹ Compare I.R.S. PUB. 502, *supra* note 27, at 7 with *supra* note 83 and accompanying text.

²⁶² *Sedgwick v. Comm’r*, No. 10133-94, (T.C. filed June 14, 1994); *Osius v. Comm’r*, No. 15472-11S (T.C. filed June 30, 2011).

²⁶³ *Morrissey*, 871 F.3d at 1270 (citing FED. R. EVID. 408).

²⁶⁴ *Id.* (emphasis in original).

²⁶⁵ ARTHUR CONAN DOYLE, *SILVER BLAZE: THE MEMOIRS OF SHERLOCK HOLMES* (1894), <https://sherlock-holm.es/stories/pdf/a4/1-sided/silv.pdf> (Holmes infers that a missing race horse was stolen by someone familiar to the dog in the barn, because no one heard the dog bark during the night on which the horse was stolen from the barn).

²⁶⁶ Pratt, *Inconceivable*, *supra* note 1, at 1156–58, 1161.

is not binding precedent.²⁶⁷ The *Morrissey* court nonetheless cited the IRS guidance on *surrogacy* for the erroneous assertion that “the IRS has consistently refused deductions” for “*IVF-related expenses*.”²⁶⁸

d. *The Court’s Moral and Ethical Concerns About “Science Fiction” ARTs*

The *Morrissey* court also expressed ethical and moral concerns about ARTs when it rejected the taxpayer’s claim that allowing different-sex married couples—but not an unmarried gay man—to deduct IVF, egg donation, and surrogacy expenses was unconstitutional.²⁶⁹ Note that the tax definition of medical care in § 213 does not turn on whether a medical expense is universally accepted as “moral” and “ethical.” The § 213 classification of an expense, as either “medical care” or not “medical care,” is binary. It takes into account the legality or illegality of a medical procedure, but otherwise does not attempt to police ethical or moral judgments.²⁷⁰ For example, in *O’Donnabhain v. Commissioner*, the U.S. Tax Court held that the taxpayer’s expenses for feminizing hormones and gender confirmation surgery to treat Gender Identity Disorder were medical care,²⁷¹ notwithstanding the ethical and moral controversies surrounding such medical procedures.²⁷²

In addition, the costs of legal abortions are “medical care,” notwithstanding moral and ethical controversy regarding abortions.²⁷³ As Tax Court Judge Gustafson observed in his *O’Donnabhain* dissent, “neither the tax collector nor the Tax Court passes judgment on the ethics of legal medical procedures, since otherwise deductible medical expenses are not rendered non-deductible on ethical grounds.”²⁷⁴

²⁶⁷ I.R.S. Information Ltr. 2002-0291 (Dec. 31, 2002); BITTKER & LOKKEN, *supra* note 209, at ¶ 110.6[1] (“An information letter is advisory only and has no binding effect on the Service”).

²⁶⁸ *Morrissey*, 871 F.3d at 1270.

²⁶⁹ *Id.* at 1271–72.

²⁷⁰ *See, e.g.*, Rev. Rul. 73-201, 1973-1 C.B. 140 (ruling that the cost of a *legal* abortion is a deductible medical expense) (emphasis added).

²⁷¹ *O’Donnabhain v. Comm’r*, 134 T.C. 34, 70 (2010) (reviewed decision), *acq.* 2011-47 I.R.B. 4 (2011).

²⁷² The majority opinion concluded that Gender Identity Disorder (“GID”) is a “disease” and hormone therapy and gender confirmation surgery are “medical care” because they are medically accepted—albeit morally and ethically controversial—“treatments” for severe GID. *Id.* at 59–63, 70.

²⁷³ *Id.* at 110 (Gustafson, J., dissenting) (citation omitted) (noting, as an example, that the cost of a legal abortion is deductible notwithstanding controversy regarding the morality of abortions).

²⁷⁴ *Id.*

3. The Constitutional Implications of *Obergefell v. Hodges*

Allowing some intended parents, but not unmarried men, to deduct IVF, egg donation, and surrogacy expenses under I.R.C. § 213 raises constitutional due process and equal protection issues.²⁷⁵ Constitutional scholars have debated whether due process (1) protects only negative rights, such as the right to be free from state deprivation of liberty, or (2) also protects some positive rights, including a right to procreate.²⁷⁶ As Susan Appleton notes, Justice Kennedy's majority opinion in *Obergefell v. Hodges* can be interpreted to recognize positive rights or to recognize only negative rights.²⁷⁷ One interpretation of the opinion is that due process protects negative liberty where the state has provided state benefits to some, but fails to provide those benefits to others.²⁷⁸ This approach protects negative liberty rights on equality grounds, in effect grafting equal protection concerns onto liberty rights.²⁷⁹ Justice Kennedy also "merge[s] marriage with the protected rights to be free from unwarranted state intrusion in matters of sex, reproduction, and childrearing, calling all of these interests together a 'unified whole.'"²⁸⁰ This interpretation might support a constitutional argument that the federal tax law, which provides reproductive benefits (in the form of federal income tax deductions for ART expenses) to different-sex married couples, must also provide these benefits to individuals and same-sex married couples.

A different interpretation of Justice Kennedy's *Obergefell* opinion might weigh against recognizing a right to procreate. Appleton expresses concern that Justice Kennedy's opinion, depicting marriage as "natural" and "conjoining marriage with sex, reproduction, and childrearing," might marginalize "*nonmarital* sex, reproduction, and childrearing."²⁸¹ Consistent with this interpretation, Judge Newson's *Morrissey* opinion draws sharp legal distinctions between "natural" sexual reproduction and "science fiction" reproduction via ARTs.²⁸² The natural law argument against ARTs is similar to the discredited natural law argument in favor of anti-

²⁷⁵ Courtney Megan Cahill, *Obergefell and the "New" Reproduction*, 100 MINN. L. REV. HEADNOTES 1, 6–8 (2016) [hereinafter Cahill, *Obergefell and the "New" Reproduction*].

²⁷⁶ Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 958–59, 963 (2016).

²⁷⁷ *Id.* at 939–41 (framing various interpretations, in terms of both the public/private distinction in family law and the negative right/positive right distinction in constitutional law).

²⁷⁸ *Id.* at 943–44.

²⁷⁹ *Id.* at 944–45.

²⁸⁰ *Id.* at 944.

²⁸¹ *Id.* at 952, 955 (emphasis in original).

²⁸² *See supra* Part III(B)(2)(a).

miscegenation statutes (of the sort declared unconstitutional in *Loving v. Virginia*²⁸³).²⁸⁴ Judge Newsom’s use of the conflated term “IVF-related expenses” also signals disapproval of reproduction other than “natural” human sexual reproduction. His disapproval of a man forming his family with ARTs aligns with the conservative view²⁸⁵ “that gay and lesbian couples should not be allowed to parent, because such couples cannot ‘procreate’ unassisted and lead deviant lifestyles that are harmful to children.”²⁸⁶

Applying Judge Newsom’s reasoning, a married man and woman are the only “bodies” that § 213 aggregates for reproductive functioning. If a different-sex married couple can “prove” medical infertility by failing to conceive for a year, they can deduct the costs of treating or mitigating their “disease.” The costs of the exclusively “female” procedures of IVF and egg donation are deductible if the woman is the wife of “the taxpayer.” The result of this reasoning is that the high costs of collaborative ARTs, with no offsetting tax benefits, will prevent many same-sex couples and individuals from having children. As Anne Bloom notes,

American Law continues to enforce sex- and gender-based distinctions which are believed to be grounded in “nature” or a pre-political biological reality. . . . [T]he law itself is playing a part in both enforcing and generating norms of sexual identity. The emphasis on “natural” or biological sex differences in American jurisprudence reveals an important way in which the law plays a role in shaping what it means to be a man or a woman. Furthermore, these cases indicate the importance of the body in the enforcement and reproduction of legal norms.²⁸⁷

Although Mr. Morrissey argued that there is a fundamental right to procreate, the court skirted that issue by significantly narrowing the

²⁸³ *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that law prohibiting interracial marriage was unconstitutional).

²⁸⁴ Pratt, FEMINIST JUDGMENTS, *supra* note 232, at 250.

²⁸⁵ See, e.g., *id.* (noting that “[c]onservative writers oppose compensated egg donation and surrogacy on religious grounds or based on the view that ARTs are not ‘natural’ procreation.”).

²⁸⁶ *Id.* See also Cahill, *Obergefell and the “New” Reproduction*, *supra* note 275, at 6 (noting that the Supreme Court, in *Obergefell*, rejected “hoary stereotypes about sexual minorities as sterile pedophiliacs prone to unfamiliar, and unfamiliar, behavior”).

²⁸⁷ Anne Bloom, *Rupture, Leakage, and Reconstruction: The Body as a Site for the Enforcement and Reproduction of Sex-Based Legal Norms in the Breast Implant Controversy*, 14 COLUM. J. GENDER & L. 85, 88 (2005). See also David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1034 (2002) (making similar points about invocation of (gendered) “nature”).

inquiry.²⁸⁸ Judge Newsom “declined” to conclude that an unmarried man has “a fundamental right to procreate via an IVF process that necessarily entails the participation of an unrelated third-party egg donor and gestational surrogate,”²⁸⁹ reasoning that collaborative procreation achieved through medical procedures is not “deeply rooted in this Nation’s history and tradition”:²⁹⁰

History and tradition provide no firm footing—let alone “deep[] root[ing]”—for the right that underlies Mr. Morrissey’s claim. To the contrary, IVF, egg donation, and gestational surrogacy are decidedly modern phenomena. Indeed, not all that long ago, IVF was still (literally) the stuff of science fiction. *See* Aldous Huxley, *Brave New World* 1 (1932) (“‘And this,’ said the Director opening the door, ‘is the Fertilizing Room.’”).²⁹¹

Although conceding that ARTs are “revolutionary biomedical advances,” Judge Newsom countered that procreation involving egg donors and surrogates “raise[s] moral and ethical issues.”²⁹² As support for this assertion, Judge Newsom cited state statutes that variously allow, prohibit, or criminalize surrogacy contracts.²⁹³

Peter Nicolas notes, however, that surrogacy, “although sometimes thought of as a relatively new phenomenon brought about by . . . medical science, has been around . . . for much of recorded history” and is mentioned in the Bible in the book of Genesis.²⁹⁴ “[S]urrogacy was treated as an unregulated private matter” until the 1980s, when a highly publicized controversy between intended parents and a *traditional* surrogate (who both

²⁸⁸ *See* *Morrissey v. United States*, 871 F.3d 1260, 1268–69 (11th Cir. 2017) (“The pertinent question here, therefore, is not whether the Constitution protects a right to ‘procreation’ generally—the Supreme Court has held that it does, at least in certain circumstances—but rather, more specifically, whether a man has a fundamental right to procreate via an IVF process that necessarily entails the participation of an unrelated third-party egg donor and a gestational surrogate.”).

²⁸⁹ *Id.* at 1269.

²⁹⁰ *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

²⁹¹ *Id.* (citation and omissions in original).

²⁹² *Id.* at 1269 (quoting Robert W. Rebar, M.D., *Assisted Reproductive Techniques*, MERCK MANUAL, <http://www.merckmanuals.com/home/women-s-healthissues/infertility/assisted-reproductive-techniques> (last visited Apr. 21, 2019)).

²⁹³ *Id.* at 1269–70 (citing a New Hampshire law that sanctions surrogacy, a Louisiana statute that subjects it to rigorous regulations, a North Dakota statute that prohibits surrogate agreements, and a Michigan law that criminalizes surrogacy).

²⁹⁴ Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1282, 1284 (2015).

gestated the fetus and provided the oocyte) generated anti-surrogacy sentiment.²⁹⁵ After tracing the subsequent history of state surrogacy regulation, Nicolas concludes:

[S]urrogacy has taken place for so much of history free of any governmental interference, and . . . even at the peak of anti-surrogacy sentiment only a handful of states enacted legislation restricting surrogacy, [making] its claim to being a practice deeply rooted in history and tradition far more compelling than virtually any other claimed fundamental right that the Court has considered.²⁹⁶

Judge Newsom nonetheless reached the opposite conclusion in *Morrissey*, dismissing Mr. Morrissey’s constitutional claim in the process. Eliding Mr. Morrissey’s argument that reproduction is a fundamental right, Judge Newsom concluded that Mr. Morrissey’s “asserted right to IVF-and-surrogacy-assisted reproduction” is not a fundamental right, “[p]articularly in view of the ethical issues implicated by IVF, egg donation, and gestational surrogacy, as well as the ongoing political dialogue about those issues.”²⁹⁷

Judge Newsom’s constitutional focus on the history and tradition of surrogacy ignored the actual history of surrogacy regulation,²⁹⁸ as well as recent developments in family law, which could establish an “emerging

²⁹⁵ *Id.* at 1283, 1285–90 (classifying state surrogacy statutes, across a spectrum, from state statutes that facilitate surrogacy to state statutes that criminalize compensated surrogacy). Nicolas notes that no federal legislation to criminalize surrogacy has been introduced since 1989, and the trend since the 1980s has been to liberalize state surrogacy statutes. *Id.* at 1287–90.

²⁹⁶ *Id.* at 1290–91 (citation omitted). Nicolas notes that surrogacy—like abortion (and unlike sodomy and suicide)—was permitted and “freely exercised” at the time the Constitution was adopted:

Thus, for example, in *Roe*, the Court found that the right to abortion was deeply rooted in history and tradition despite the fact that states began to restrict the right as early as 1821; that by the time the Fourteenth Amendment was ratified, thirty-six states and territories had enacted laws restricting the right; and that in the 1950s a large majority of states prohibited abortion in most instances. In finding the right to procure an abortion to be a protected one, the *Roe* Court focused on the fact that the right was freely exercised at common law at the time the Constitution was adopted and early in the nineteenth century.

Id. at 1291 (citations omitted). In addition to “longstanding history and tradition,” courts can take into account “emerging awareness” of liberty interests in private matters. Increasing state law recognition of intended parents as the legal parents of a child gestated by a surrogate illustrates the “emerging awareness” regarding the privacy interests at stake in the surrogacy context. *Id.* at 1304–1305 (quoting *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003)).

²⁹⁷ *Morrissey*, 871 F.3d at 1270.

²⁹⁸ See Nicolas, *supra* note 294, at 1285–90.

awareness”²⁹⁹ that due process protects intended parents regarding their decisions about how to form their families. Susan Appleton argues that “family law principles, assumptions, and values have infiltrated and shaped doctrine, including doctrine disputed in *Obergefell*.”³⁰⁰ Family law has developed new “intentional” and “functional” parentage doctrines to recognize the parental rights of intended parents who use ARTs to form their families.³⁰¹ Peter Nicolas argues that these legal developments signal an “emerging awareness” that supports constitutional protection of family formation and parenting through ARTs.³⁰²

Courtney Cahill takes the position that “reproductive binarism”—distinguishing between sexual reproduction and alternative reproduction—is constitutionally deficient following *Obergefell v. Hodges*.³⁰³ In her view, *Obergefell* “suggests that constitutional parity exists between sexual and alternative reproduction not only with respect to the right to marry, but also with respect to the right to procreate.”³⁰⁴

Cahill argues that “*Obergefell* renders procreative mechanics irrelevant with respect to the right to procreate.”³⁰⁵ She makes a constitutional argument for rejection of reproductive binarism in favor of a unitary legal approach to reproduction, with a focus on procreative intent instead of procreative mechanics.³⁰⁶ There is no reason to deny same-sex intended parents children. Despite negative stereotyping of same-sex parents, evidence indicates that they can parent well, and their children are fine.³⁰⁷

²⁹⁹ *Id.* at 1276–77 (explaining the Supreme Court’s approach to recognizing rights in *Lawrence v. Texas*, which considered “deeply rooted history and tradition” and more recent legal developments “showing ‘an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.’” (quoting *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003))).

³⁰⁰ Appleton, *supra* note 276, at 922 (framing various interpretations, in terms of both the public/private distinction in family law and the negative right/positive right distinction in constitutional law).

³⁰¹ See NeJaime, *supra* note 139, at 1188–89.

³⁰² Nicolas, *supra* note 294, at 1305–1307.

³⁰³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015); Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 624–44 (2016) [hereinafter Cahill, *Reproduction Reconceived*].

³⁰⁴ Cahill, *Obergefell and the “New” Reproduction*, *supra* note 275, at 6.

³⁰⁵ *Id.* at 10.

³⁰⁶ Cahill, *Reproduction Reconceived*, *supra* note 303, at 624–44.

³⁰⁷ See, e.g., Pratt, FEMINIST JUDGMENTS, *supra* note 232, at 250–51 (noting that “many same-sex couples provide loving and nurturing homes to their children”).

IV. REDEFINING “MEDICAL CARE”

A. THE LIKELY CONSEQUENCES OF *MORRISSEY*

Morrissey creates new uncertainty about the deductibility of various ARTs incurred by single women, same-sex female married couples, and different-sex married couples. The court’s misuse of the term “IVF-related expenses” will likely confuse tax scholars, lawyers, judges, and taxpayers. The *Morrissey* opinion’s use of the term conflates the discrete, and distinct, medical procedures of IVF, ICSI, egg donation, and surrogacy, and signals disapproval of all forms of ARTs, as compared to reproduction through sexual intercourse. The court also overtly expressed ethical and moral reservations about ARTs in the context of resolving a federal income tax issue.³⁰⁸

Contrary to the *Morrissey* opinion, the IRS in fact *has* allowed different-sex married couples to deduct the costs of various ARTs including IVF costs, egg donor costs (in the context of issuing a Private Letter Ruling),³⁰⁹ and surrogacy costs (in cases it settled).³¹⁰ This history makes it likely that, in the future, a same-sex married couple that incurs fertility treatment expenses to procreate will challenge the constitutionality of any IRS denial of tax deductions for those costs.

Magdalin, *Longino*, and *Morrissey*—the only three cases that produced opinions on the tax-deductibility of ARTs—all held that unmarried men cannot deduct IVF, egg donation, and surrogacy expenses. However, other courts might reach different results. From a practical perspective, the two Tax Court “memorandum” decisions in *Magdalin* and *Longino* are authority in the Tax Court—albeit weak authority. The First Circuit Court of Appeals affirmed *Magdalin* without an opinion,³¹¹ and the Eleventh Circuit Court of Appeals affirmed *Longino* with an unpublished opinion.³¹² Judge Newsom’s Eleventh Circuit Court of Appeals opinion in *Morrissey* is stronger authority but is currently limited to taxpayers in the Eleventh Circuit.

Even if a court adopts the *Morrissey* “male” and “female” classification for IVF, ICSI, egg donation, and surrogacy, an unmarried man still could argue that IVF is essential to perform ICSI, which would be a

³⁰⁸ *Morrissey v. United States*, 871 F.3d 1260, 1269–70 (11th Cir. 2017).

³⁰⁹ I.R.S. Priv. Ltr. Rul. 200318017, at 2 (Jan. 9, 2003) (ruling that egg donor expenses and related costs are deductible medical expenses under I.R.C. § 213).

³¹⁰ *Sedgwick v. Comm’r*, No. 10133-94, (T.C. filed June 14, 1994); *Osius v. Comm’r*, No. 15472-11S (T.C. filed June 30, 2011).

³¹¹ *Magdalin v. Comm’r*, No. 09-1153, 2009 WL 5557509, at *1 (1st Cir. Dec. 17, 2009).

³¹² *Longino v. Comm’r*, 593 Fed. Appx. 965 (11th Cir. 2014).

“male” procedure under the *Morrissey* court’s mutually exclusive, gender-based classification system.

If the family formation rights of same-sex intended parents are to be taken seriously, under *Obergefell v. Hodges*,³¹³ treating dysfertility the same as medical infertility for purposes of I.R.C. § 213 would further that constitutional goal. Such an approach would prevent § 213 from exacerbating the “eugenics of cost”³¹⁴ based on sexual orientation and gender.

B. PROPOSAL TO AMEND THE § 213(D)(1)(A) DEFINITION OF “MEDICAL CARE”

Medically infertile different-sex married couples can deduct their expenses for IVF, ICSI, and egg donor expenses, probably without having to fight the IRS to do so. If the couple can document the woman’s inability to gestate a child, such couples can probably deduct surrogacy expenses as well, although they would likely have to fight the IRS on the issue. The result is likely the same for a single woman or a same-sex female married couple, although the IRS may not allow them to deduct the costs of sperm donation, which the IRS might view as for “male” function, not “female” function.

Three cases have held that unmarried men cannot deduct any of their expenses for IVF, egg donation, or surrogacy. Under the reasoning of these cases, men might be able to deduct the costs of ICSI, performed with IVF, as a “male” reproductive procedure. One problem with this argument is that judges view reproduction as a female function and “infertility” as a “female” problem. In addition, there may be unspoken resistance to letting single men or same-sex married men parent children.³¹⁵ We should reject these stereotypes and view men as capable parents, just as we rejected the earlier argument that anti-miscegenation laws were “natural.”³¹⁶

Allowing everyone except single men and same-sex married male couples to deduct the costs of IVF, ICSI, egg donation, and surrogacy is unfair to men and creates a “eugenics of cost,”³¹⁷ making it less likely for men who are not married to women to be able to reproduce. *Obergefell*

³¹³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

³¹⁴ DAAR, NEW EUGENICS, *supra* note 250, at 70.

³¹⁵ See, e.g., Clifford J. Rosky, *Like Father Like Son: Homosexuality, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 260 (2009) (“Opponents [of adoption by homosexuals] claim that children should not be exposed to the ‘homosexual lifestyle,’ and they ask gay men and lesbians to choose between homosexuality and parenthood.”).

³¹⁶ See *supra* notes 283–286 and accompanying text.

³¹⁷ See DAAR, NEW EUGENICS, *supra* note 250.

elevates this moral concern to a constitutional concern about the ability to form a family.

The core concept in I.R.C. § 213 is that *inherently medical* procedures and treatments are medical care, unless they are for cosmetic surgery. Inherently medical reproductive procedures, including IVF, ICSI, egg donation, and surrogacy, all should qualify as medical care. Ancillary expenses for egg donation and surrogacy also should qualify as medical care. Expenses for human or other replacements for human functioning, such as expenses for a seeing eye dog for a blind person, are medical care.³¹⁸ The difficult § 213 line-drawing issues relate to expenses for items that generally are not purchased for medical reasons, such as dancing lessons and pools. Where a taxpayer can show that the primary motivation for incurring the expense is medical, under a “but for” test, the taxpayer can deduct the expense as medical care.³¹⁹ Otherwise the taxpayer cannot deduct such expenses, which generally are nondeductible personal consumption expenses.³²⁰

The division of the § 213(d)(1)(A) “medical care” definition into the “disease” prong and the “structure or function” prong dates back to a time before ARTs and assumes that reproductive care is not collaborative. The reference to “the taxpayer, [the taxpayer’s] spouse, or a dependent” is outmoded today. In light of current reproductive medical care, § 213(d)(1)(A) should be amended to clarify the classification of reproductive care—including collaborative reproductive care. The § 213(d)(1)(A) definition should be amended to replace the current definition with the following definition:

- (1) The term “medical care” means amounts paid—
 - (A)
 - (i) for lawful, inherently medical services, goods, diagnostic tests, surgeries, and procedures, other than cosmetic surgery, and for necessary ancillary expenses, or
 - (ii) beyond normal living expenses, for the primary purpose of mitigating a disease, injury, or condition, to help the taxpayer and their dependents restore or approximate typical human functioning . . .

This new definition would clarify that all reproductive medical care, including diagnostic tests, prescription medication, surgeries, and other inherently medical procedures—including IVF, egg donation, and

³¹⁸ Treas. Reg. 1.213-1(e)(1)(iii) (as amended in 1979) (ruling that a taxpayer can deduct the cost of a seeing eye dog to mitigate blindness).

³¹⁹ *Gerstacker v. Comm’r*, 414 F.2d 448, 453 (6th Cir. 1969).

³²⁰ I.R.C. § 262 (2012).

surrogacy, as well as necessary ancillary expenses—qualify as “medical care,” regardless of the taxpayer’s gender or marital status.

V. CONCLUSION

Prior to *Morrissey*, the IRS seemingly allowed a medical expense tax deduction for the costs of IVF and egg donation, at least with respect to medically infertile different-sex married couples. Although the IRS asserted in an administrative pronouncement that surrogacy expenses are not deductible medical expenses,³²¹ the IRS allowed taxpayers to deduct surrogacy expenses in two cases it settled. Interpreting § 213(d)(1)(A), the result seemed to be the same for a woman (whether single or in a same-sex marriage) who planned to gestate her child. The 2008 decision in *Magdalin* indicated that a fertile, unmarried man could not deduct the costs of IVF, ICSI, egg donation, and surrogacy. However, part of the court’s analysis in *Magdalin* might be wrong.

The IRS recently tried to narrow the scope of the medical expense tax deduction by arguing that no medical expense deduction is allowed absent a showing of “disease,” construed very narrowly. This new approach probably will not succeed because it is inconsistent with the core concept of § 213(d)(1)(A), which treats inherently medical expenses as “medical care.” Also, the narrow approach is inconsistent with decades of administrative pronouncements on deducting the costs of reproductive medical care.

The 2017 appellate decision in *Morrissey* muddles fertility treatment deduction issues that generally were thought to be clear, in part by erroneously asserting that the IRS does not allow heterosexuals to deduct “IVF-related expenses.”³²² The *Morrissey* decision likely will lead to widespread confusion among accountants, lawyers, and taxpayers regarding medical expense deductions for ART expenses.

The deductibility of ART expenses is critical for LGBTQ taxpayers who want to form a family, as well as for different-sex married couples and unmarried taxpayers with medical infertility. As LGBTQ scholars have observed, developments in state family law and the 2015 marriage equality decision in *Obergefell v. Hodges*³²³ increasingly support procreation and family formation by same-sex married couples—including procreation via ARTs.³²⁴ Within this context, the Constitutional claims skirted by the *Morrissey* court are likely to resurface in a future case involving the tax

³²¹ I.R.S. Information Letter 2002-0291 (Dec. 31, 2002).

³²² *Morrissey v. United States*, 871 F.3d 1260, 1270–72 (11th Cir. 2017).

³²³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

³²⁴ See, e.g., Cahill, *Obergefell and the “New” Reproduction*, *supra* note 275, at 6.

deductibility of fertility treatment costs.

All intended parents should know with greater certainty whether they will be able to take a medical expense deduction for their out-of-pocket costs for IVF, ICSI, egg donation, and surrogacy. The dollar amounts involved are large, per taxpayer, and many thousands of taxpayers incur such expenses annually. It is time to settle the issue of whether taxpayers can take a medical expense tax deduction for the costs of IVF, ICSI, egg donation, and surrogacy. This Article argues that all inherently medical reproductive care is “medical care” for tax purposes, and proposes a conforming amendment to Internal Revenue Code § 213(d)(1)(A).