Navigating the Child Dependency Exemption

By Carol G. Cooper

Which parent can claim the child as a dependent for income tax purposes is a disputed issue in custody and child support cases. The child dependency exemption can be valuable: often significantly more valuable to one parent than the other.

Pursuant to the Internal Revenue Code (IRC), the parent with whom the child resides for the longest period of time during a given tax year is entitled to claim the child as a tax exemption.

Therefore, if the allocation of the dependency exemption is not addressed either in an agreement between the parties or by the court, then, under the IRC, the primary custodial parent is entitled to claim the child as an exemption by default.

On the other hand, if the allocation of the dependency exemption is included in an agreement, or is decided by the Court in a contested case, it is absolutely necessary that the language of the agreement and/or the court order does more than merely state that the non-custodial parent is entitled to the exemption.

Under the IRC, the primary custodial parent is always entitled to the dependency exemption *unless he or she executes a written declaration* (IRS form 8332 Release) that he or she will not claim the child as a dependent for the current year or future years. 26 U.S.C.A. §152(e)(2)(A) (Supp.II, 1984). Signing the necessary release is the critical piece in transferring the exemption.

Federal law permits a state court to order the primary custodial parent to execute the statutory release in favor of the non-custodial parent who is paying child support. *Wassif v. Wassif,* 77 Md. App. 750, 761 (1989).

Yet, if the court order merely states that the dependency exemption shall be awarded to the non-custodial parent, then such an order is not sufficient to transfer the dependency exemption. The necessary release must be signed by the primary custodial parent.

Under the IRC, the primary custodial parent is always entitled to the dependency exemption unless he or she executes a written declaration.

Thus, it is imperative to make sure that the court, in its Judgment of Absolute Divorce or other Order, requires the primary custodial parent to sign the release each year in which the non-custodial parent is entitled to claim the exemption.

In a recent Court of Special Appeals case, *Reichert v. Reichert*, 210 Md. App. 282 (2013), the appellate court engaged in a lengthy discussion regarding the allocation of the tax dependency exemption when the parents had equal time with the child (50/50 custody).

Disagreeing with the trial court, which had ordered that the parties alternate each year claiming the child as a dependent, the *Reichert* court stated: "Where both parents share joint physical custody of the child on an essentially 50/50 basis", Section 152(e) of the IRC does not apply and the Circuit Court is required to award the exemption to the parent with the higher income pursuant to U.S.C.A. § 152(c)(4)(B)(ii). *Reichert*, 210 Md. App. at 346-348.

Besides reaffirming the *Wassif* holding (that a court must order the primary custodial parent to execute a yearly declaration releasing his or her right to the tax dependency exemption in order for the transfer to the non-custodial parent to be effective), the *Reichert* court also made clear that:

- any allocation of the tax dependency exemption pursuant to 26 U.S.C.A. §152 is an element of the parties' child support calculation;
- the tax dependency exemption may be allocated to the non-custodial parent only if doing so enhances the child's best interest;
- the court's order should provide that the duty to execute the release is contingent on the non-custodial parent being current in his or her child support payments;
- the general principles regarding the exemption remain constant whether the parents share custody or if one parent is the primary custodial parent; and
- when the court allocates the

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Revisiting the Parental Rights of Same-Sex Parents in Maryland Following the Downfall of DOMA

By Tracey J. Coates

The past year has seen significant advancement and reasons for celebration in the fight for legal equality in the gay and lesbian communities.

On November 6, 2012, Maryland voters passed referendums legalizing same-sex marriage, which took effect on January 1, 2013, making Maryland one of 14 states and the District of Columbia to allow same-sex couples to legally marry. That local victory was soon followed by an even more significant national achievement. On June 26 of this year, in *US v. Windsor,* the Supreme Court struck down the discriminatory Defense of Marriage Act (DOMA), which denied government benefits to same-sex spouses and prohibited the federal government from recognizing same-sex marriages in states that legally recognized their union.

As a result of the DOMA decision, same-sex couples are now entitled to receive equal treatment under the laws of the federal government and access to more than 1,000 federal protections, previously granted only to heterosexual spouses. Even with the Supreme Court's recent ruling, the quest for equality under the eyes of the law remains a work in progress, since there are still certain liberties not automatically granted to same-sex married couples, particularly those planning to have children and raise a family.

Maryland law provides that "a child born or conceived during a marriage is presumed to be the legitimate child of both spouses." (MD Code, Estates and Trusts, §1-206.) In 2011, the state began permitting women to be named as a parent on the birth certificate of a child born to her same-sex spouse, without the necessity of a court order, even prior to same-sex couples being allowed to marry in the state. (The same is not true of two married fathers who must still seek a court order to have both of their names listed on a child's birth certificate.)

Yet despite this significant step and the recent legalization of same-sex marriage, which provides a certain level of legal protection for same-sex parents, it is still important and highly recommended for non-biological parents to adopt the child of their same-sex partner in a second-parent adoption. About half of the states, including Maryland, and the District of Columbia, permit second-parent adoptions for same-sex couples.

In *Windsor*, the Court stated the "recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." Thus, it continued, "the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce… [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce."

While the Supreme Court's ruling struck down a key DOMA provision, it did not invalidate the entire Act. A critical piece that was unchallenged and is still valid law is Section Two, which "allows states to refuse to recognize same-sex mar-

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riages performed under the laws of other States."

Article IV, §1 of the Constitution, otherwise known as the *Full Faith and Credit Clause* provides that "full, faith, and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." However, the same deference and recognition is not necessarily extended to the laws, benefits, or protections of states that run afoul to that state's public policies. In 2003, the Supreme Court, in *Franchise Tax Board v. Hyatt*, reiterated that "[o]ur precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." (538 U.S. 488, 494 (2003), quoting *Baker v. General Motors*, 522 U. S. 222, 232 (1998).)

In considering one's parental status based solely on marriage – an area of law reserved exclusively for the states – it is likely that a state and/or federal government will *not* recognize the non-biological spouse as the child's parent.

Conversely, a court-ordered adoption decree, based on the child's best interest and the suitability of the non-biological spouse to be a parent, is one of the best measures to ensure that other states and/or the federal government recognize the non-biological spouse as the legal parent of an adopted child.

While the legal status of a parent is automatically conveyed to the biological parent of that child, a second-parent adoption protects the non-biological parent's relationship with the child and ensures that his or her rights are legally protected. In a second-parent adoption, the non-biological parent, with the consent of the birth mother, legally adopts the child without the biological or "first parent" losing any parental rights. Even though a birth and marriage certificate offers certain emotional and legal protections in Maryland, they do not offer the same level of protection and reciprocity that a court-ordered adoption does. In a majority of states whose laws do not recognize same-sex marriages, there is a real possibility that any protections resulting merely from the benefits of Maryland domestic laws will be ignored and invalidated.

So, until DOMA is struck down in its entirety and deemed wholly unconstitutional, a full-fledged celebration may be premature. Absent judicial determinations based on the *Full, Faith and Credit Clause*, states do not have to recognize laws of other states that directly contradict their own public policies.

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This latest *Supplement* brings the book's *Fifth Edition* (published in 2008) up to date through October 2013, replete with recent case law and statutory amendments relevant to areas including probate; asset appraisal/filing of inventory; Maryland estate tax; and administration expense and claims, as well as much more. New material addresses matters such as the expanded definition of allowable funeral expenses, the recognition of same-sex marriages and domestic partnerships, posthumous conception, and much more. The book also includes copious samples of official forms, including updates for more than 50 outdated forms.

For more information about the 2013 Cumulative Supplement to Gibber on Estate Administration, Fifth Edition, or to purchase any of MSBA's CLE publications, visit www.msba.org, or call the MSBA CLE Department at (410) 685-7878.

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marijuana. The suspension imposed under the school district's zero tolerance policy was very lengthy and, ultimately, gave rise to another teen suicide.

The proposed changes in our public school student discipline regulations are both welcome and long overdue. Under the current timeline, Maryland schools will be required to adapt their policies before the start of the 2014-2015 school year.

The Maryland State Board of Education will take final action on the proposal at a public meeting. The meeting will take place on Dec. 10, 2013 at 200 West Baltimore Street, Baltimore, Maryland 21201.

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and in fashioning your soft skills as an attorney. Quality family law attorneys, more so than many other areas of the law, place significant emphasis on soft skills. Hard skills are necessary, of course, in that every attorney needs to be able to properly draft documents, correctly find and state case and statutory law, and argue a case on the merits. But it is the soft skills that separate high caliber attorneys from mediocre advocates to lackluster lawyers. Child custody disputes, divorces, cases involving children and the Department of Social Services, and many other scenarios require a certain approach – sometimes delicate, sometimes firm – to best resolve a situation to your client's liking. The power to mediate, in a general sense, and more formal mechanisms of alternative dispute resolution like Mediation, are powerful tools. It is not difficult to see how this skill, in the emotional landscape in which family law operates, can be translated to many other areas of the practice of law.

An education in family law is a prime vehicle for developing these skills, and there is certainly a current need in Maryland for skilled family law practitioners.

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WHAT HAVE YOU DONE LATELY? Send your latest news to Bryan Nichols, Maryland State Bar Association, 520 West Fayette Street, Baltimore, Maryland 21201, or e-mail bnichols@msba.org.