

UNEQUAL TAXATION AND UNDUE BURDENS FOR LGBT FAMILIES

April 2012



A Supplemental Report to *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families*
This report contains updated information and supersedes tax-related content from the original October 2011 report.

This report was authored by:

Movement Advancement Project

The Movement Advancement Project (MAP) is an independent think tank that provides rigorous research, insight and analysis that help speed equality for LGBT people. MAP works collaboratively with LGBT organizations, advocates and funders, providing information, analysis and resources that help coordinate and strengthen their efforts for maximum impact. MAP also conducts policy research to inform the public and policymakers about the legal and policy needs of LGBT people and their families. For more information, visit www.lgbtmap.org.

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Family Equality Council works to ensure equality for LGBT families by building community, changing public opinion, advocating for sound policy and advancing social justice for all families. Family Equality Council provides support and resources to LGBT-headed families, and leverages the power of families by sharing their stories and driving change in communities and states across the nation. Family Equality Council educates members of government, schools, faith-based communities, healthcare institutions and other social systems about how they can promote family equality. Family Equality Council also partners with other LGBT and broader social justice organizations to provide the greatest positive impact and to maximize resources. For more information, visit www.familyequality.org.

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About This Report

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INTRODUCTION

The federal government provides important tax credits and deductions that are designed to help families ease the financial burdens of raising children. In 2010, combined expenditures for family-related tax credits and deductions comprised approximately one-third of all federal spending on children, and totaled more than \$133 billion dollars.¹ The Tax Foundation estimates that an average-income American family receives approximately \$16,781 in such tax relief from the federal government each year.²

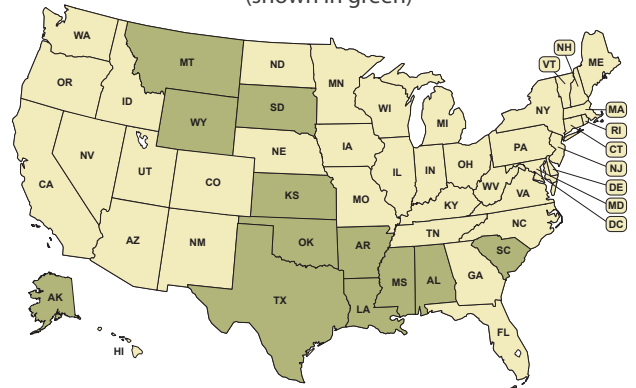
Unfortunately, federal tax law has not kept up with contemporary families, including households where children are raised by single parents, unmarried couples, extended family members or parents who are lesbian, gay, bisexual or transgender (LGBT).

In October 2011, the Movement Advancement Project, the Family Equality Council, and the Center for American Progress released the report, "All Children Matter: How Legal and Social Inequalities Hurt LGBT Families."³ The report offers one of the most comprehensive portraits to date of LGBT families in America and details ways in which antiquated laws and stigma harm children.

This report, "Unequal Taxation and Undue Burdens for LGBT Families," is an updated supplement to the "All Children Matter" report.⁴ Focusing specifically on the income tax inequity faced by LGBT families, this companion report also includes recommendations for amending, repealing, or overturning archaic and discriminatory tax laws that create disparate economic impact for children, simply because their parents are LGBT.

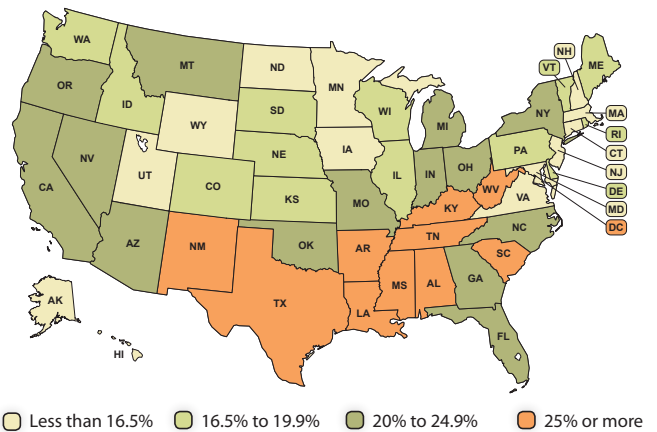
This report is divided into three main sections. In the introduction, we provide an overview of the diversity of LGBT families: who they are, where they live, and the economic and legal realities they face. The next section highlights how federal tax laws and definitions of family contribute to unequal taxation and undue tax burdens for LGBT families. The final section provides common-sense recommendations for ensuring that all families, regardless of whether parents are heterosexual or LGBT, are treated equally and can access the full array of child and family-related tax exemptions, deductions, and credits designed to benefit taxpaying families raising children.

Figure 1: Top 12 States Where Same-Sex Couples are Raising Children
(shown in green)



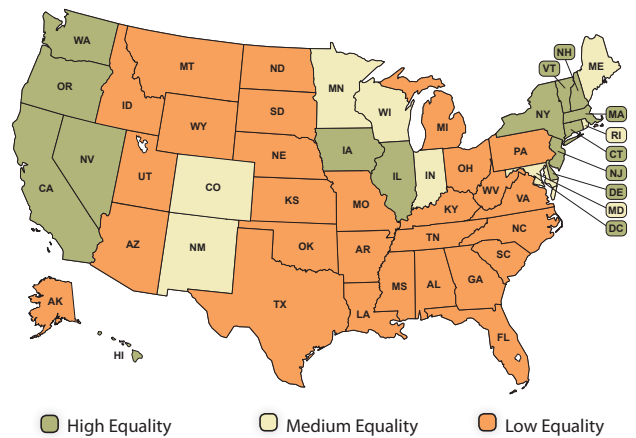
Source: Gary J. Gates and Abigail M. Cooke, Census 2010 Snapshot Series, The Williams Institute, 2011.

Figure 2: Percentage of Children in Poverty in the Past 12 Months by State: 2010



Source: U.S. Census Bureau, 2010 American Community Survey.

Figure 3: LGBT Legal Equality by State



Source: Equality Maps, Movement Advancement Project.

Terminology: “LGBT Families”

This report uses “LGBT families” to refer to families in which a same-sex couple is raising children because this is where most dependency-related federal tax inequities occur. Our more restricted use of the term “LGBT families” is not meant in any way to diminish families in which a single LGBT adult is raising children or LGBT families without children who may also experience tax inequity. We also recognize that many LGBT adults who do not have children form families with life partners, close friends and other loved ones who provide support and that tax law may be inadequate in these areas as well.

LGBT Families are Part of the American Fabric

America’s families are changing. Today, just 67% of children live with married heterosexual parents, down from 83% in 1970.⁵ Of the 33% of children who do not live with married, heterosexual parents, approximately two million children are being raised by LGBT parents, and that number is expected to grow in the coming years.⁶

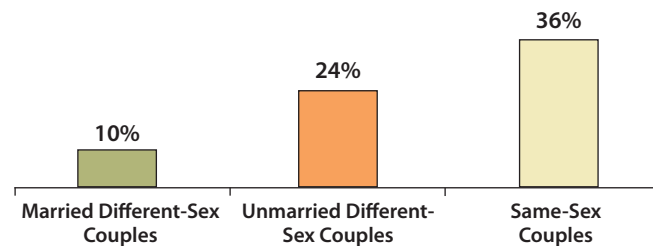
Geographically Diverse

LGBT families are geographically dispersed, living in 93% of all U.S. counties.⁷ Although states like California and New York have high numbers of same-sex couples, same-sex couples are most likely to raise children in Mississippi, followed by Wyoming, Alaska, Arkansas, Texas, Louisiana, Oklahoma, Kansas, Alabama, Montana, South Dakota and South Carolina (see *Figure 1* on previous page). It is also important to note that half of these are states where more than one in four children live in poverty⁸ (see *Figure 2* on previous page) and that all of these states rank among the very lowest in terms of LGBT legal equality (see *Figure 3* on previous page).

Racially and Ethnically Diverse

LGBT families are racially and ethnically diverse—more so than married, heterosexual couples raising children. Same-sex couples of color are more likely to be raising children than white same-sex couples.⁹ For example, 33% of Black male same-sex couples and 23% of Latino male same-sex couples are raising children

Figure 4: Households with Adopted Children, Stepchildren, and/or Unrelated Children



Source: Kristy M. Krivickas and Daphne Lofquist, “Demographics of Same-Sex Couple Households with Children,” U.S. Census Bureau, 2011.

compared to only 6% of white male same-sex couples. Forty-seven percent of Black female same-sex couples and 42% of Latina same-sex couples are raising children compared to only 23% of white female same-sex couples raising children.¹⁰

Lower Income, Higher Poverty

In 2010, 22% of all American children lived in poverty, with the same percentage of children living in “food insecure” households (homes in which families worried about having enough food). Contrary to stereotypes, children being raised by same-sex couples are twice as likely to live in poverty as those being raised by married heterosexual parents.¹¹

Difficulty Securing Legal Ties

More LGBT families live in households with adopted children, stepchildren, and non-related children than married heterosexual couples (see *Figure 4*). Why? Depending on how LGBT families are formed and where they live, LGBT parents may not be able to secure legal relationships with their children, or in some circumstances, may only be able to do so by adopting their own children. By contrast, when a child is born to a married heterosexual couple, that child is generally recognized by all 50 states as the legal child of both parents.

Adoptive Families

While all states allow married heterosexual couples to adopt jointly, same-sex couples (and unmarried heterosexual couples) face uncertainty in 28 states and are effectively banned from adopting jointly in five states (see *Figure 5* on next page). In states that prohibit joint adoption by same-sex couples, one LGBT parent may adopt as a single person, but this leaves the child with only one legal parent. In some cases, the other parent may be

able to secure legal ties using a process called stepparent or second-parent adoption. However, these mechanisms are only available in 19 states—the vast majority of which already support joint adoption by same-sex couples (see *Figures 5 and 6*). States which ban joint adoption by same-sex couples also do not offer stepparent or second-parent adoption for same-sex parents.

Blended Families & Stepfamilies

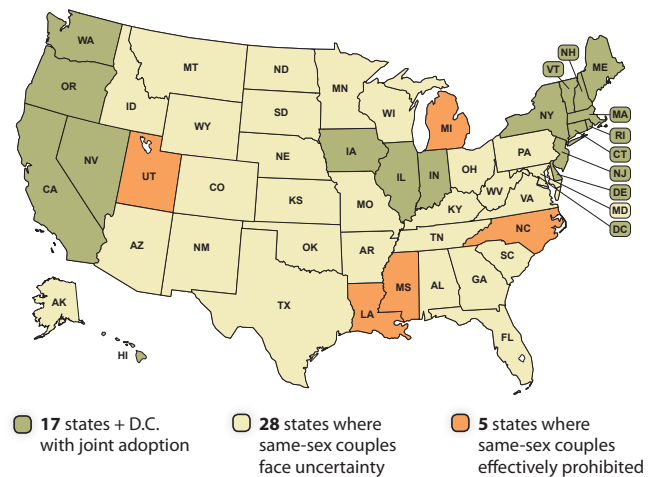
LGBT families, like many other families, may be blended families that include children from earlier partnerships and marriages. Yet, an LGBT adult who partners with an existing parent may fully function as a “stepparent” and may even provide the majority of economic resources for the family, but may not be recognized as a legal parent by law. This is because, in most states, LGBT stepparents are banned from adopting their non-biological children using the legal process for a stepparent adoption or a second-parent adoption, leaving children in blended LGBT families with legal ties to only one of their two parents (see *Figure 6*).

Assisted Reproduction

When a child is conceived by a married heterosexual couple using assisted reproduction such as donor insemination, the child is automatically considered the legal child of both the mother and her husband, even though the husband is not biologically related to the child. When same-sex couples use assisted reproduction to bring a child into the world together, often the non-biological parent does not receive the same presumption of parentage extended to married heterosexual couples. The non-biological parent is instead a legal stranger to the child. As with adoptive families and stepfamilies, the options for securing legal ties via court judgments like a second-parent adoption are limited, leaving the child with ties only to one parent (see *Figure 6*).

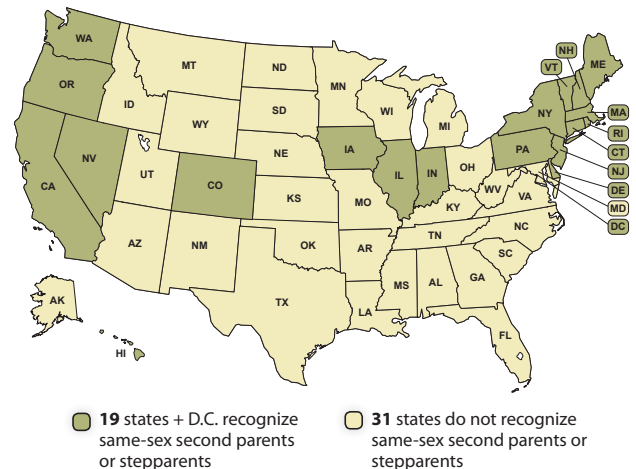
The next section of this report highlights how the lack of legal ties detailed above combines with lack of federal recognition of LGBT families to reduce access to tax benefits designed to improve opportunities for children, particularly children living in low-income families. It also provides an overview of the federal income tax return and discusses the exemptions, credits and deductions designed to help families who are raising children—which are often denied to LGBT families. Together, these limitations mean that LGBT families pay higher taxes resulting in fewer resources and reduced economic stability for children living in LGBT families.

Figure 5: Joint Adoption by Couples



NOTE: In some cases, access to joint adoption may require being in a marriage, civil union or domestic partnership.

Figure 6: Stepparent or Second-Parent Adoption



THE FEDERAL TAX RETURN: AN ANNUAL ENCOUNTER WITH INEQUALITY

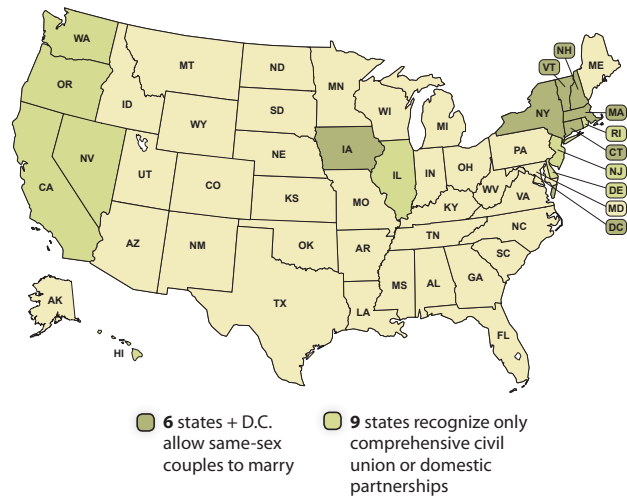
The federal income tax system began incorporating marriage and family-based incentives and tax credits as early as the Revenue Act of 1913,¹² which included a \$1,000 deduction for married couples. Since that time, federal law has continued to establish additional tax benefits for families:

- The Revenue Act of 1948¹³ allowed married couples to file a joint tax return and aggregate their incomes, even when one spouse did not have any gross income.¹⁴ The Act also created gift and estate tax benefits for married couples to allow them to easily transfer assets tax-free.
- The Tax Reduction Act of 1975¹⁵ created the Earned Income Credit (EIC) to serve as an incentive for working low-income families.
- The Tax Reform Act of 1976¹⁶ established the Child and Dependent Care credit, which allows working families to claim credits for a portion of their child care expenditures.
- In 1996, the Adoption Credit was created as part of the Small Business Job Protection Act¹⁷ to allow families to receive a tax credit toward expenses incurred for adopting children.
- The Taxpayer Relief Act of 1997¹⁸ established the Child Tax Credit to provide tax relief to families at all income levels as family size increased. Subsequent laws have increased annual per-child credit amounts, and made portions of the credit refundable to families. The Act also introduced higher education-related tax credits for families to help defray costs of college tuition and fees.
- The 2004 Working Families Tax Relief Act¹⁹ expanded the tax code's existing income tax exemption for employer-provided health insurance for workers, spouses and their children to also include "qualified relative" dependents.

LGBT Families Not Recognized Under Federal Tax Law

Although the federal tax code has continued to provide tax incentives for married heterosexual couples and families, there is no unified definition of family within

Figure 7: Marriage & Relationship Recognition Laws



federal tax law. As a result, the Internal Revenue Service (IRS) has historically deferred to state law determinations of marital status and legal parentage. For example, under current law, couples who live together in states that recognize common-law marriage are considered "married" by the IRS if the state recognizes the marriage.²⁰

The Defense of Marriage Act (DOMA), passed in 1996, prohibits the federal government from recognizing the legal marriages of same-sex couples. It also allows states to refuse to recognize the marriages, domestic partnerships and civil unions of same-sex couples secured in other states. DOMA specifically defines "marriage" as "a legal union between one man and one woman as husband and wife." Likewise, it defines the word "spouse" as "a person of the opposite sex who is a husband or a wife."²¹ Several federal courts have ruled the law unconstitutional, yet it remains in effect until repealed by Congress or struck down by the United States Supreme Court.²² As a result, federal tax law is also subject to DOMA's definition of "marriage" and "spouse,"²³ meaning the federal government does not recognize the legal relationships of same-sex couples, even in the 15 states and the District of Columbia that now offer marriage equality or comprehensive relationship recognition (See *Figure 7*).

For many LGBT families, this lack of recognition creates a yearly encounter with inequality that amplifies the economic burdens for their families.

- **LGBT families pay more.** From taxation on family health insurance benefits to incurring additional gift and estate tax liability, LGBT families pay more taxes

Figure 8: 2011 Form 1040 U.S. Individual Tax Return: Challenges for LGBT Families

=Challenges

Form **1040** Department of the Treasury—Internal Revenue Service (99) **2011** OMB No. 1545-0074 IRS Use Only—Do not write or staple in this space.

For the year Jan. 1–Dec. 31, 2011, or other tax year beginning _____, 2011, ending _____, 20

Your first name and initial _____ Last name _____ Your social security number _____

If a joint return, spouse's first name and initial _____ Last name _____ Spouse's social security number _____

Home address (number and street), if you have a P.O. box, see instructions. Apt. no. _____

City, town or post office, state, and ZIP code. If you have a foreign address, also complete spaces below (see instructions).

Foreign country name _____ Foreign provincial/country _____ Foreign postal code _____

Filing Status
 1 Single
 2 Married filing jointly (even if only one had income)
 3 Married filing separately. Enter spouse's SSN above and full name here. ▶
 4 Head of household (with qualifying person). (See instructions.) If the qualifying person is a child but not your dependent, enter this child's name here. ▶
 5 Qualifying widow(er) with dependent child

Exemptions
 6a Yourself. If someone can claim you as a dependent, do not check box 6a.
 b Spouse
 c **Dependents:**
 (1) First name _____ Last name _____
 (2) Dependent's social security number _____
 (3) Dependent's relationship to you _____
 (4) If child under age 17 qualifying for child tax credit (see instructions)

Income
 7 Wages, salaries, tips, etc. Attach Form(s) W-2 7
 8a Taxable interest. Attach Schedule B if required 8a
 8b Tax-exempt interest. Do not include on line 8a 8b
 9a Ordinary dividends. Attach Schedule B if required 9a
 9b Qualified dividends 9b
 10 Taxable refunds, credits, or offsets of state and local income taxes 10
 11 Alimony received 11
 12 Business income or (loss). Attach Schedule C or C-EZ 12
 13 Capital gain or (loss). Attach Schedule D if required. If not required, check here ▶ 13
 14 Other gains or (losses). Attach Form 4797 14
 15a IRA distributions 15a b Taxable amount 15b
 15b Pensions and annuities 15a b Taxable amount 15b
 16 Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E 16
 17 Farm income or (loss). Attach Schedule F 17
 18 Unemployment compensation 18
 19 Social security benefits 20a b Taxable amount 20b
 20a Social security benefits 20a b Taxable amount 20b
 21 Other income. List type and amount 21
 22 Combine the amounts in the far right column for lines 7 through 21. This is your **total income** ▶ 22

Adjusted Gross Income
 23 Educator expenses 23
 24 Certain business expenses of reservists, performing artists, and fee-basis government officials. Attach Form 2106 or 2106-EZ 24
 25 Health savings account deduction. Attach Form 8889 25
 26 Moving expenses. Attach Form 3903 26
 27 Deductible part of self-employment tax. Attach Schedule SE 27
 28 Self-employed SEP, SIMPLE, and qualified plans 28
 29 Self-employed health insurance deduction 29
 30 Penalty on early withdrawal of savings 30
 31a Alimony paid b Recipient's SSN ▶ 31a
 32 IRA deduction 32
 33 Student loan interest deduction 33
 34 Tuition and fees. Attach Form 8917 34
 35 Domestic production activities deduction. Attach Form 8903 35
 36 Add lines 23 through 35 36
 37 Subtract line 36 from line 22. This is your **adjusted gross income** ▶ 37

For Disclosure, Privacy Act, and Paperwork Reduction Act Notice, see separate instructions. Cat. No. 11320B Form 1040 (2011)

Form 1040 (2011) Page 2

Tax and Credits
 38 Amount from line 37 (adjusted gross income) 38
 39a Check You were born before January 2, 1947. Blind. Total boxes checked ▶ 39a
 if: Spouse was born before January 2, 1947. Blind.
 b If your spouse itemizes on a separate return or you were a dual-status alien, check here ▶ 39b
 40 **Itemized deductions** (from Schedule A) or your **standard deduction** (see left margin) 40
 41 Subtract line 40 from line 38 41
 42 **Exemptions.** Multiply \$3,700 by the number on line 6d. 42
 43 **Taxable income.** Subtract line 42 from line 41. If line 42 is more than line 41, enter -0- 43
 44 **Tax** (see instructions). Check if any from: a Form(s) 8814 b Form 4972 c 962 election 44
 45 **Alternative minimum tax** (see instructions). Attach Form 6251 45
 46 Add lines 44 and 45 46
 47 **Foreign tax credit.** Attach Form 1116 if required 47
 48 **Credit for child and dependent care expenses.** Attach Form 2441 48
 49 **Education credits** from Form 8863, line 23 49
 50 **Retirement savings contributions credit.** Attach Form 8880 50
 51 **Child tax credit** (see instructions) 51
 52 **Residential energy credits.** Attach Form 5695 52
 53 **Other credits** from Form: a 3800 b 8901 c 52 53
 54 Add lines 47 through 53. These are your **total credits** 54
 55 Subtract line 54 from line 46. If line 54 is more than line 46, enter -0- 55

Other Taxes
 56 Self-employment tax. Attach Schedule SE 56
 57 Unreported social security and Medicare tax from Form: a 4137 b 8919 57
 58 Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5329 if required 58
 59a Household employment taxes from Schedule H 59a
 59b First-time homebuyer credit repayment. Attach Form 5405 if required 59b
 60 Other taxes. Enter code(s) from instructions 60
 61 Add lines 55 through 60. This is your **total tax** ▶ 61

Payments
 62 Federal income tax withheld from Forms W-2 and 1099 62
 63 2011 estimated tax payments and amount applied from 2010 return 63
 64a **Earned income credit (EIC)** 64a
 b Nontaxable combat pay election 64b
 65 Additional child tax credit. Attach Form 8812 65
 66 **American opportunity credit** from Form 8863, line 14 66
 67 First-time homebuyer credit from Form 5405, line 10 67
 68 Amount paid with request for extension to file 68
 69 Excess social security and tier 1 RRTA tax withheld 69
 70 Credit for federal tax on fuels. Attach Form 4136 70
 71 Credits from Form: a 2930 b 8839 c 8901 d 8885 71
 72 Add lines 62, 63, 64a, and 65 through 71. These are your **total payments** ▶ 72

Refund
 73 If line 72 is more than line 61, subtract line 61 from line 72. This is the amount you **overpaid** 73
 74a Amount of line 73 you want **refunded to you**. If Form 8888 is attached, check here ▶ 74a
 b Routing number _____ c Type: Checking Savings
 d Account number _____

Amount You Owe
 75 Amount of line 73 you want **applied to your 2012 estimated tax** ▶ 75
 76 **Amount you owe.** Subtract line 72 from line 61. For details on how to pay, see instructions 76
 77 Estimated tax penalty (see instructions) 77

Third Party Designee
 Do you want to allow another person to discuss this return with the IRS (see instructions)? Yes. Complete below. No

Sign Here
 Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Your signature _____ Date _____ Your occupation _____ Daytime phone number _____
 Joint return? See instructions. Keep a copy for your records.
 Spouse's signature. If a joint return, both must sign. Date _____ Spouse's occupation _____ If the IRS sent you an Identity Protection PIN, enter it here (see instructions).

Paid Preparer Use Only
 Print/type preparer's name _____ Preparer's signature _____ Date _____ Check if self-employed
 Firm's name _____ Firm's EIN _____
 Firm's address _____ Phone no. _____

Form 1040 (2011)

because they do not count as “spouses” under the federal definition.

- **LGBT families are denied joint filing status and accompanying tax relief.** Same-sex couples cannot receive the significant tax advantages of the “Married Filing Jointly” tax status, which means they have less money to meet the financial needs of their family. LGBT families can only file as “Single” or at best, “Head of Household,” even when they are married or in other legally-recognized unions and partnerships.
- **LGBT families lose important deductions, exemptions, and credits.** Many states make it hard or impossible for two mothers or two fathers to both be recognized as legal parents of their children. This in turn makes it hard, and sometimes impossible, to claim important child-related deductions and credits, particularly when the non-recognized parent is the primary wage earner in the family.
- **LGBT families must misrepresent and “carve up” their families.** Parents are forced to decide which

parent “claims” their children for exemptions. To gain tax relief, some families must split their children between different tax returns. Other LGBT parents can only claim their children as “qualifying relatives” or cannot claim them at all. Heterosexual married families can simply file jointly, account for all children on one form, and check the exemption boxes.

- **LGBT families face heightened scrutiny, extra costs, and refund delays.** LGBT families must run multiple tax scenarios, create “dummy” federal returns, submit extra paperwork, and face audits and denials of legitimate tax credits.

On Figure 8, we’ve highlighted the federal tax form lines that create challenges for LGBT families when preparing their annual returns. Table 1, which follows, provides a line-by-line summary of these problem areas. It should be noted that, although much of our analysis focuses on federal tax inequities, many of these same challenges also exist for LGBT families when paying state tax in states that do not provide comprehensive relationship recognition.²⁴

Table 1: A Line-by-Line Look at 2011 Federal 1040 Tax Return Inequity for LGBT Families²⁵

Category	Line(s)	Tax Importance	Married Heterosexual Couples Raising Children	Same-Sex Couples Raising Children
Filing Status and Standard Deductions				
Filing Status²⁶	1-4	<p>Taxpayers completing federal returns can choose from five primary filing statuses: "Single," "Married Filing Jointly," "Married Filing Separately," "Head of Household," and "Qualifying Widow(er) with Dependent Child."</p> <p>For families with children, generally the "Married Filing Jointly" status has the lowest tax rate and allows families to access the most deductions and credits.</p>	<p>✔ Can choose from two filing statuses: "Married Filing Jointly" or "Married Filing Separately."</p>	<p>✘ Cannot file a joint federal tax return, and must instead file separately as "Single" or as "Head of Household."</p>
Standard Deduction	40	<p>The standard deduction, which varies based on filing status, allows filers claiming the standard deduction to deduct a set amount for expenses that they incurred during the year.²⁷</p> <p>For tax year 2011, the standard deduction was \$5,800 for those who file as "Single" or "Married Filing Separately." For "Head of Household" filers, the deduction was \$8,500 and for "Married Filing Jointly" filers, the deduction was \$11,600.</p>	<p>✔ Can file jointly and take the highest level of deduction at \$11,600 in tax year 2011.</p>	<p>✘ Cannot file jointly and must take the \$5,800 "Single" deduction or when qualified, the \$8,500 "Head of Household" deduction in tax year 2011.</p>
Tax Impact for LGBT Families			<p>✘ Negative. The most advantageous "Married Filing Jointly" federal filing status is not available to the majority of LGBT families.²⁸</p>	
Family Exemptions				
Spousal and Dependency Exemptions²⁹	6 b-d, 42	<p>Family tax exemptions increase with a family's size and reduce taxable income on tax returns.</p> <p>For tax year 2011, each exemption excluded \$3,700 of income from taxation, reducing the taxable income for a family of four by \$14,800.</p>	<p>✔ Allowed one exemption for self and one for an opposite sex spouse when filing jointly (even if the spouse had no income).</p> <p>✔ Allowed one exemption for each qualifying dependent child who is the taxpayer's legal child or stepchild.³⁰</p>	<p>✘ Denied the spousal exemption (though allowed the exemption for self).</p> <p>✘ Limited access to "qualifying child" exemption because many LGBT parents are not able to create legal ties to their children via joint or second-parent adoption.³¹</p>
Tax Impact for LGBT Families			<p>✘ Negative. Most LGBT families are denied the spousal exemption and face difficulty accessing dependency exemptions.</p>	
Non-Refundable Family-Related Tax Credits				
Child and Dependent Care Credit³²	48	<p>This credit allows taxpayers who pay someone to care for a qualifying child, spouse, or other relative so they can work or look for work to reduce the amount of tax they owe by a percentage of total care costs (up to \$3,000 for the care of one child or spouse and up to \$6,000 for two or more children or a spouse and children in tax year 2011).</p> <p>To be eligible, the child must be under age 13, or the spouse, older child, or "qualifying relative" must be physically or mentally incapable of self-care.</p>	<p>✔ Allowed credit for care for a mentally or physically incapacitated spouse, when filing jointly.</p> <p>✔ Allowed credit for care for dependent children when filing jointly.</p>	<p>✘ Denied credit for care for a mentally or physically incapacitated spouse unless the spouse meets the narrow guidelines of a qualifying relative.</p> <p>✘ Limited access for dependent children because the other parent may have claimed the child as a "qualifying child" or "qualifying relative" on a separate tax return.</p>

Table 1: A Line-by-Line Look at 2011 Federal 1040 Tax Return Inequity for LGBT Families (Continued)				
Education Deductions and Credits ³³	34,49,66	Federal taxpayers who pay for educational expenses for themselves, spouses, or dependents can use multiple deductions and credits to reduce taxable income.	✓ Allowed education deductions and credits for self, spouse, and children on the joint return.	✗ Limited access to credit for spouses and children unless they can be claimed as “qualifying children” or “qualifying relatives.”
Child Tax Credit ³⁴	51	The child tax credit reduces the amount of tax owed by up to \$1,000 for each child under the age of 17.	✓ Allowed child tax credit.	✗ Limited access to credit because only a legal parent can claim the credit, even if that parent owes no taxes or cannot benefit from the credit.
Tax Impact for LGBT Families			✗ Negative. Most LGBT families are denied child and dependency-related credits that are available to heterosexual married families.	
Refundable Family-Related Tax Credits				
Earned Income Credit (EIC) ³⁵	64a	The earned income credit is a tax benefit for moderate and low-income working individuals and families. As a refundable tax credit, it not only reduces the amount of taxes a filer owes, but may also contribute to a tax refund. The EIC is one of the largest sources of tax-related cash assistance to low-income working families.	?	Variable for all families because the EIC is based on income and household size. Individual family circumstances will determine if LGBT families face additional hurdles to qualify and/or receive a smaller or larger credit relative to other families.
Adoption Credit ³⁶	71	The adoption credit allows families who adopt a child under the age of 18 to receive a refundable tax credit for qualified adoption expenses (up to \$13,360 per child for tax year 2011). Families can use the credit to offset the expenses for joint adoption, but cannot use the credit when adopting the children of a spouse. Note: As of tax year 2012, the adoption credit will lower taxable income but will not generate a refund payment.	?	Variable. Although married heterosexual families who file jointly can access the credit for joint adoption expenses, the credit cannot be used for stepparent adoption.
Tax Impact for LGBT Families			?	Variable. For all families, earned income credits and adoption credits involve the interplay of many complex factors and specific family situations.

When State Law Trumps Federal Tax Law for LGBT Families: Community Property States

Since same-sex couples are prevented from filing joint federal tax returns, most LGBT parents end up filing separate tax returns and claiming their own individual income, deductions and credits. For LGBT families in registered domestic partnerships or marriages in the community property states of California, Nevada, and Washington, there is an entirely different IRS filing process based on state community property rules. Although each state defines community property slightly differently, the impact for LGBT families filing taxes is the same. Beginning with the 2010 tax year, same-sex couples who are registered domestic partners in these states (or in the case of California, who are married under state law) must divide up any property and income acquired during the year, including wages and other earned income, and split them in half. Each partner/spouse is then required to report their half of the community property and income on their "Single" filing form, and each partner/spouse is taxed based on that amount.³⁷

Depending on a family's circumstances, community property rules can either create tax savings or cause families to incur more taxes than they would if they were claiming only individual assets instead of marital assets. As is true for married heterosexual couples filing jointly, the ability to pool income is most beneficial for LGBT families when one parent earns significantly more than the other. A recent journal article by UC Davis School of Law Professor Dennis Ventry provides an example:

"Even though the federal Defense of Marriage Act (DOMA) prohibits [same-sex] couples from filing federal income taxes as spouses (the filing status with the most favorable rates), [same-sex couples in California, Nevada and Washington] can now take advantage of tax savings associated with income splitting. For example, as a result of the 2010 ruling, a domestic partnership in California with one partner earning \$100,000 and the other earning \$30,000 would now report two incomes of \$65,000 when filing federal income taxes, resulting in tax savings of \$942."³⁸

Although the ruling currently applies only to the states above, in the future it could also be extended to LGBT families in other community property states. These states would need to extend marriage to same-sex couples, or enact domestic partnership laws and extend state marital property laws to these partnerships. Other community property states include Wisconsin, which has a limited domestic partnership law but does not extend the marital property law to domestic partners, and Arizona, Idaho, Louisiana, New Mexico and Texas.

LGBT Families Denied Joint Filing Status

Taxpayers filing federal returns must choose from one of five filing statuses: "Single," "Married Filing Jointly," "Married Filing Separately," "Head of Household," and "Qualifying Widow(er) with Dependent Child." How a taxpayer files depends on marital status and family circumstances.

Married heterosexual couples must file as either "Married Filing Jointly" or "Married Filing Separately." When filing a joint return, a heterosexual married couple's income is combined and deductions and credits are taken together. When filing separately, each spouse reports his or her own income and relevant deductions and credits.³⁹ Having two filing statuses for married couples allows families to choose which status is most beneficial to them. In most cases, married couples will

pay less tax when filing jointly. This is especially true for families with just one earner or families in which there are large differences in earnings between parents. The tax rate is lower for joint filers, and some credits and deductions (discussed below) are only available to heterosexual married couples when they file jointly.

Because the IRS does not recognize the relationships of same-sex couples, most LGBT families⁴⁰ cannot file a joint federal tax return, even when they are legally married, and they instead must file separate returns without a married filing status. Both definitions for the remaining "Single" and "Head of Household" filing statuses require married same-sex parents to misrepresent themselves as unmarried,⁴¹ which is a growing cause for concern as more same-sex couples marry (see sidebar on the next page). Filing as "unmarried" also has a significant tax impact.

The following simple example demonstrates the problem. An LGBT family has one parent earning approximately \$60,000 per year and the other parent has no income. The parent earning \$60,000 could face a marginal tax rate of 25%—or a tax burden of approximately \$10,275. But if this family was able to file jointly as a married couple, they could instead face a marginal tax rate of 15%—or a tax burden of approximately \$8,150. Because of their inability to file a federal tax return as a married couple, the LGBT family may pay as much as \$2,125 more in taxes. Additionally, the family cannot jointly claim the credits associated with raising a family, and some tax credits are available only to a parent who is legally-related to her children by birth or adoption (See “Lost Exemptions, Deductions and Credits for LGBT Families,” below and “Family of Five Pays \$1,490 More in Taxes” for examples of LGBT families affected by unfair taxation.)

Are Married LGBT Families Committing Perjury or Fraud When Filing As “Single”?

The federal 1040 income tax return requires a taxpayer’s signature beneath the declaration, “Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.” For many LGBT taxpayers who are married or in a recognized domestic partnership or civil union, this is problematic; they actually have official documents that indicate that they are not, in fact, “Single.”⁴² As a result, LGBT advocacy and legal organizations recommend that taxpayers place an asterisk next to the check box on the form, and either note on the form or in a cover letter that the taxpayer is married but is filing as “Single” in light of DOMA. Lambda Legal, an LGBT legal advocacy organization, suggests that married LGBT taxpayers include an attachment to the federal tax return that indicates that DOMA is the only reason that the taxpayer has not filed as married and that the taxpayer is not disavowing his/her existing legal relationship.

Source: Lambda Legal, “Tax Considerations for Same-Sex Couples, last updated 1/18/2012, <http://www.lambdalegal.org/publications/tax-considerations>.

Splitting the LGBT Family to Gain Tax Relief

Although most federal and state policies are designed to promote family unity, the lack of federal tax recognition for LGBT families does just the opposite. It forces parents that share a home, meals, and parenting responsibilities to break their family apart to file separate tax forms.

Filing as “Single” or “Head of Household”

Filing as “Head of Household” contains some tax advantages over the “Single” filing status; it also comes with specific requirements.⁴³ In addition to being unmarried or “considered unmarried” on the last day of the year, a taxpayer must have paid more than half the cost of keeping up a home for the year⁴⁴ and had a “qualifying person” living in the home for more than half the year.⁴⁵ A “qualifying person” for “Head of Household” status is (1) a taxpayer’s “qualifying child” (defined below), (2) a taxpayer’s parent who meets the requirements of a “qualifying relative” (defined below), or (3) A “qualifying relative” that is otherwise related to the taxpayer (descendent of a child or brother, sister, stepbrother, stepsister or any of their descendants).⁴⁶ Once these requirements are met, the taxpayer benefits from a higher standard deduction (in 2011 - \$8,500 v. \$5,800 for single filers) and lower tax rates than the “Single” filing status.

For some LGBT families, restrictive definitions mean that neither parent can claim “Head of Household” status and the accompanying higher standard deduction. For example, a lesbian mother with legal ties to her children (either biological or through adoption) who stays at home to provide care likely would not qualify as “Head of Household” because she provides less than half of the household income. A lesbian mother who does not have legal ties to her children but provides the majority of support for the household would not be able to file as “Head of Household” because her children are not considered to be related and would therefore not be counted as “qualifying persons.”

It should be noted that, because the tests are slightly different, LGBT parents who cannot claim “Head of Household” status still may be able to claim dependency-related exemptions, and depending upon family circumstances, several family-related deductions and credits which can reduce taxes due.

“Qualifying Child” as a Dependent

Among other criteria, a “qualifying child” must be the taxpayer’s biological or adoptive child, stepchild, foster child, minor sibling or stepsibling, or a descendent of any of these, such as a grandchild.⁴⁷ Like heterosexual married parents, LGBT parents who have legal ties to their children can claim their children as dependents using the “qualifying child” category. LGBT parents who do not have a legal parent-child relationship cannot do so and are excluded from claiming important credits and exemptions designed to help defray the cost of raising children (See “Difficulty Securing Legal Ties” above).⁴⁸ This means that many LGBT families may be unable to access the Child Tax Credit and the Earned Income Credit, both of which can provide significant tax relief, particularly for low-income families (See “Lost Exemptions, Deductions and Credits for LGBT Families,” below).

“Qualifying Relative” as a Dependent

In addition to claiming a “qualifying child,” some taxpayers can claim certain exemptions or credits for a “qualifying relative.” A “qualifying relative” must be legally related to the taxpayer or must live with the taxpayer for the full year as a member of his or her household. The “qualifying relative” also must have a gross income for the year that is less than the personal exemption of \$3,700, must receive half or more of his or her support for the year from the taxpayer, and must not be considered to be the “qualifying child” or “qualifying relative” of another taxpayer.

Restrictions on Claiming Dependents

Married heterosexual families filing jointly can claim a “qualifying child” or “qualifying relative” as long as either parent can claim the dependency exemption. The related deduction (\$3,700 in tax year 2011) can be used to reduce their aggregate taxable income.

LGBT families face several hurdles:

- A dependent can only be claimed on one tax return, so the exemption can only be used to reduce the income of one parent. In LGBT families where both parents are legal parents, the parents must calculate which parent is best positioned to claim the exemption so that the accompanying deduction is maximized.
- For LGBT families where only one parent has legal ties to a child, usually the legally-recognized parent will have to claim the child, regardless of whether s/he can

Family of Five Pays \$1,490 More in Taxes



Suzanne and Geraldine Artis, along with their three boys, paid \$1,490 more in taxes in 2009 because they could not file a joint tax return.

The Artis Family—Suzanne and Geraldine and their three boys, Geras, Zanagee and Gezani—lives in Clinton, Connecticut. Suzanne and Geraldine have been together for more than 16 years, and in 2009 they were legally married. They are both legal parents of their boys. While they can file a joint return in Connecticut, DOMA prevents them from filing a joint federal tax return. As a result, they have to “carve up” their family on their tax forms, because they can’t both claim their children as dependents. In some years, Suzanne claims all three boys, while in others, Geraldine claims all three boys. There have been also been years where Suzanne has claimed one of the boys, while Geraldine has claimed the other two. “I don’t like to have to divide them up. They’re not property, they’re my family,” said Suzanne.

Because they can’t file joint returns, the couple paid an extra \$1,490 to the federal government in 2009—money that they would like to have put toward college funds for the boys. Additionally, the family worries about having a paper trail linking only one of them to their children; Suzanne wonders, “If the papers say that I’m the only parent, or vice versa, I worry that if something happened to one of us, would there be an issue?”

Adapted from GLAD, “They’re Not My Property, They’re My Family,” <http://www.glad.org/doma/stories/theyre-not-property-theyre-my-family>.

benefit the most from the exemption. This is because, if a legal parent of a child is required to file a return or does so for reasons other than solely to request a refund, that child is considered to be a “qualifying child” of that taxpayer, and cannot be claimed by another taxpayer as a “qualifying relative” even if the legal parent does not herself claim the child.⁴⁹

- For LGBT families who have one parent who earns significantly more income than the other, the inability to have the exemption apply to both incomes often means making a trade between maximizing the benefit of exemptions (which are usually most helpful for the higher paying taxpayer) and claiming refundable child-related deductions and credits (which are usually more beneficial to lower-income parents).

The example below illustrates the challenge.

A lesbian couple, Mary and Jane, are raising their six-year-old son Jonathan, and only Mary is recognized as Jonathan’s legal parent (Jane has been unable to adopt). Assuming that Mary is not required to file a return or does so only to receive a refund of taxes owed, and that Jane provides more than half of the support for Jonathan, Jane may be able to claim Jonathan as a dependent using the “qualifying relative” dependent status. While this will give her access to some tax exemptions and credits, it does not allow her to claim the Child Tax Credit or the Earned Income Credit (which are only granted to those who claim a “qualifying child.”) Although claiming Jonathan as a “qualifying relative” may reduce Jane’s income, it may also mean that the family forfeits the Child Tax Credit and Earned Income Credit because only Mary (as Jonathan’s legally recognized parent) can claim them, which could provide the family with more benefit than reducing Jane’s higher salary. As a result, Mary and Jane are forced to run multiple tax scenarios to figure out the best way to create the greatest tax relief. And, regardless of who claims Jonathan, since the couple can’t file jointly, they’ll likely pay more taxes than a married heterosexual couple under the same financial circumstances. This is true even when Mary and Jane have the full benefits of marriage under state law.

Lost Exemptions, Deductions and Credits for LGBT Families

The primary exemptions, tax credits and deductions for most American families include:

- **The tax exemption for dependents**, which, in tax year 2011, reduced taxable income by \$3,700 for each dependent a taxpayer could claim.⁵⁰
- **The Credit for Child and Dependent Care Expenses**, which allows taxpayers to reduce their taxes by taking a credit for a portion of actual expenses for care for dependents under age 13 or who are otherwise unable to provide care for themselves. The maximum expense that can be considered for the credit is \$3,000 per dependent and the maximum credit (sliding scale based on income) is 35% of the actual expense, for a maximum credit of \$1,050 per child or dependent.⁵¹
- **Multiple education-related deductions and credits**, which include tuition and fees deductions, education credits that reduce the amount of tax owed, and the partially-refundable American Opportunity credit, which can result in a refund, even if no tax is owed. These benefits are capped in the range of \$2,500-\$4,000 per return.⁵²
- **The Child Tax Credit and the Additional Child Tax Credit**, which reduces income tax due by \$1,000 for each child under the age of 17.⁵³
- **The Earned Income Credit (EIC)**, which provides assistance to low-income working individuals and families. The credit is “refundable,” so it can both reduce the amount of tax owed and result in a refund.⁵⁴
- **Credits for adoption-related expenses**, which reduce taxes by actual out-of-pocket expenses related to adopting a child. In tax years 2010 and 2011, this credit reduced tax owed and could generate a refund. In tax year 2012, the adoption credit no longer generates a refund.

Tax Exemptions for Spouses and Dependents

In general, a taxpayer is allowed to claim one exemption for herself, one for a heterosexual spouse (if filing jointly and regardless of the spouse’s income) and one for each “qualifying child” or “qualifying relative” (see discussion above). For the 2011 tax year, each person claimed (self, spouse and dependents) reduced the taxpayer’s taxable income by \$3,700, lowering the

taxable income of a family of four by \$14,800. For a family of four with an income of \$45,000, tax savings would be about \$2,220.⁵⁵

LGBT families can be at a significant disadvantage when it comes to claiming exemptions. Unlike married heterosexual couples, an LGBT parent cannot claim an exemption for a same-sex partner/spouse unless that person meets the narrow definition of “qualifying relative” above. An LGBT parent with legal ties can claim a child as a “qualifying child” but a parent without legal ties can only claim a child as a “qualifying relative” or may be unable to claim the child at all if the other parent files a tax return and could have claimed the child as a “qualifying child.” This results in limited access to the exemption for LGBT families.⁵⁶

The following example illustrates this challenge. A lesbian couple has a child, a legally-recognized parent works part-time and earns \$5,000 per year, and a non-recognized parent works full-time and earns \$45,000 per year. If this family could file a joint tax return, the family’s total income of \$50,000 would be reduced by \$11,100 in 2011 (three exemptions). Assuming the legal parent is required to file (or does so to obtain refundable tax credits) and claims the child as a “qualifying child,” her \$5,000 income is already reduced from her \$3,700 personal exemption, leaving only \$1,300 of income that could be reduced by the exemption for her child. And since the legal parent is required to file, the non-legally recognized parent cannot claim the child – the legal parent must do so. For this family, dependency exemptions only cumulatively reduce their taxable income by \$8,700 v. \$11,100 (\$3,700 for each of the parents on separate returns, plus \$1,300 for the child). Unlike a married heterosexual family which could use the exemption to offset their aggregate income, this family must forfeit \$2,400 of the \$3,700 dependent exemption for their child.

Credit for Child and Dependent Care Expenses

Working or job-searching heterosexual taxpayers who pay someone to care for a “qualifying child,” “spouse” or other “qualifying relative” may be eligible for the Child and Dependent Care Credit.⁵⁷ These taxpayers can reduce the amount of tax they owe by a percentage of total care costs (for tax year 2011, up to \$3,000 for the care of one child or spouse and \$6,000 for the care of two or more children or a spouse and children). To be eligible, the “qualifying child” must be under the age of 13 and be the legal child of the filer. Because many LGBT parents are unable to obtain legal

ties to their children and therefore unable to claim their children as “qualifying children,” access to the credit for child-related care expenses is limited for LGBT families in which a non-legally recognized parent pays for child care costs. If the filer is claiming the credit for care for an older child, spouse, or other “qualifying relative,” the person receiving care must be physically or mentally incapable of self-care.⁵⁸

Education-Related Deductions and Credits

The IRS offers a variety of tax credits, deductions and savings plans to assist families with the expense of education. Several mechanisms are available for taxpayers, including reducing the amount of income tax that a taxpayer may have to pay (via tuition and fees deductions or credits such as the American Opportunity Credit), accumulating tax-free interest for education-related savings plans, or receiving tax-free education benefits (for instance, from an employer).⁵⁹ As an example, a married heterosexual couple filing jointly for tax year 2011 could reduce their taxable income by deducting up to \$4,000 in tuition expenses and mandatory enrollment fees for any family member. Because LGBT families cannot file jointly, only a parent who is able claim a “qualifying child” or “qualifying relative” could claim a similar deduction. This is true for many of the other credits as well. This means, in LGBT families where both parents are required to file, if a “Single” filing parent claiming no children or spouse has paid the education expenses for the other parent or for their child, these deductions and credits are completely unavailable.

Child Tax Credit and Additional Child Tax Credit

The Child Tax Credit reduces taxes due by up to \$1,000 for each child under the age of 17. The amount of the credit is reduced for those who earn more than a certain income level; a single person’s tax credit begins to decline once his or her income reaches \$75,000, while a married couple’s credit declines once their combined income reaches \$110,000. For lower-income families who are unable to use the full credit to offset tax due, the Additional Child Tax Credit allows a portion of the credit to be refundable, even when no tax is owed.⁶⁰

LGBT families face two primary hurdles when it comes to the Child Tax Credit. First, because LGBT families are not recognized by the IRS, it is possible that a family may not receive the full Child Tax Credit even though their combined household income is less than

\$110,000. The following example illustrates this problem. An LGBT family has one parent that makes \$80,000—making him ineligible for the full Child Tax Credit when filing as “Single.” The other parent has no income. If they were able to file as a married couple, this couple would be eligible for the full Child Tax Credit, with a total household income of \$80,000, well under the \$110,000 limit. Instead, neither parent can access the credit.

Second, because this credit is only available for “qualifying children,” a parent who has not been able to establish legal ties may not claim the Child Tax Credit, even if this parent has claimed the child as a dependent using the “qualifying relative” status. Both of these obstacles decrease the availability of the credit and increase the family’s overall tax burden. A married heterosexual family filing jointly with the same income encounters none of these barriers.

Earned Income Credit

According to the U.S. Census Bureau, the Earned Income Credit (EIC) lifted more than three million children out of poverty in 2010.⁶¹ With a maximum credit amount of \$5,751 in tax year 2011 for a family with three or more qualifying children, the EIC is a significant source of tax relief for low- or moderate-income working families. The EIC is a fully refundable credit, which means that even when a family has no taxable income, the EIC can result in a refund check from the IRS. In addition to the federal EIC, 23 states and D.C. have state EIC programs, and a recent study found that half of all families with children receive the EIC at some point.⁶²

The limits for the EIC are much lower than for the Child Tax Credit. Families at or under the income limit receive a credit based on the number of people in their household and their income level. Families over the income limit receive nothing. For tax year 2011, an individual filing “Single” or “Head of Household” was eligible for the EIC if her adjusted gross income was less than \$13,660. The limit increased to \$36,052 for a taxpayer with one “qualifying child,” \$40,964 for two “qualifying children,” and \$43,998 for three “qualifying children.” For married heterosexual couples in tax year 2011, the couple’s adjusted gross income had to be less than \$18,740 in households with no children and less than \$49,078 for households with three children.⁶³

As with the Child Tax Credit (above), LGBT families cannot combine their incomes on a joint return which means they must use the “Single” or “Head of Household”

Emerging Research Shows Tax Credits Improve Long-Term Success for Children in Low-Income Families



One of the primary policy reasons for offering refundable family-related tax credits like the Earned Income Credit is to improve opportunities for children living in low-income families. In a recently released study of combined data from children in a large urban school district and IRS tax records, researchers from Harvard, Columbia, and the National Bureau of Economic Research studied the impact of the partially refundable Child Tax Credit and the Earned Income Credit on children. They found that increases in tax credits are highly correlated with improved student test scores and that higher scores also increase students’ probability of college attendance, raise earnings, reduce teenage birth rates, and improve the quality of the neighborhood in which students live in adulthood. The results also suggest that much of the cost of tax credits may be offset by earnings gains as children grow into adulthood.

Source: Raj Chetty, John N. Friedman, Jonah Rockoff, “New Evidence on the Long-Term Impacts of Tax Credits,” National Bureau of Economic Research Working Paper Series #17699, December 2011, <http://www.nber.org/papers/w17699>.

limits to determine eligibility. Depending on the family’s financial situation, an LGBT parent filing as “Single” or “Head of Household” may find it easier or more difficult to qualify for the credit than to qualify if the family filed jointly. Because this credit is only for “qualifying children” (not “qualifying relatives”), only a parent with legal ties (biological parent, adoptive parent, or stepparent) may claim the credit. This means that low-income LGBT parents who do not have legal ties to their children cannot access this critical tax relief when filing.

Adoption Credit

In tax years 2010 and 2011, the adoption credit was the largest refundable tax credit available to taxpayers. For tax year 2011, a family adopting a child under the age of 18 could deduct all qualified adoption expenses up to \$13,360 from the family’s taxable income, including state-imposed fees, attorney costs and fees, home evaluation

fees and filing fees.⁶⁴ In 2012, the credit changed to a non-refundable credit, which means that while it can reduce the amount of taxes owed, it cannot result in a refund.

Married heterosexual couples must file a joint return in order to claim the credit, which cannot be used for expenses associated with the adoption of a spouse's child (stepparent adoption). LGBT parents cannot file jointly, but since their relationships are not federally recognized as "married" and "spouse," they can still access the credit when filing as "Single" and "Head of Household." For LGBT families, the credit can be used to offset the costs for both joint adoption and a second-parent adoption, but must meet the following requirements: the claimed costs could not exceed a total of \$13,360 per child (in tax year 2011), the person seeking the credit must have incurred the expenses directly, and the adoption decree must have the filer's name listed as the adoptive parent. This tax credit is not available to parents who complete an adoption through a surrogate parenting arrangement.

It is important to note that the rules allow an LGBT parent to use the credit for second-parent adoptions but do not allow heterosexual parents to access the credit for stepparent adoptions. Although this seems to give a benefit to LGBT families that married heterosexual families cannot access, this is not necessarily true. LGBT parents are often forced to spend additional funds to adopt their own children to secure the same parenting rights that married heterosexual couples receive automatically and for free.

Beyond the 1040

Although much of the federal tax inequity for LGBT families can be seen in a side-by-side comparison of a federal 1040 income tax return for a heterosexual family and an LGBT family (see *Table 2* on page 17), there are a few areas of tax inequity for LGBT families that require delving beyond the 1040 form:

- **LGBT families with health benefits have higher taxable wages.** If LGBT families receive family health benefits from an employer, they pay federal tax on the value of those benefits, even if the employer provides them at no cost. Married heterosexual families receive these same benefits tax-free.
- **LGBT families face extra tax liability for gift and estate transfers between spouses.** As of tax year 2011, LGBT families who transfer more than \$5 million cumulatively during either their life and/or upon death can incur significant additional tax liability.

Family Health Benefits Equal Higher Taxable Wages

Because LGBT families are not recognized under federal law, when any member of an LGBT family enrolls a same-sex partner/spouse (or a child with whom he has no legal ties) in insurance through his or her employer, the LGBT worker must pay federal taxes on the portion of the premium paid by the employer for the additional coverage just as though it were paid as additional taxable income.⁶⁵ This taxation of family health benefits occurs at the federal level even when LGBT families are married or in recognized partnerships/unions under state law. This means that LGBT families must pay an average of \$1,069 extra in taxes (just for the spouse/partner) on a healthcare benefit that is provided to married heterosexual families tax-free.⁶⁶

Additionally, if an LGBT employee pays a portion of the insurance premium for non-federally recognized family members, he does so with after-tax dollars. Yet, when a heterosexual married employee pays a portion of the health insurance premium for his spouse and other dependents, he can do so with pre-tax dollars. In 2011, the average annual cost to an employee of adding a spouse and/or other dependents to health insurance was \$3,208.⁶⁷ Assuming that an LGBT employee uses after-tax dollars (as most LGBT workers must), the LGBT employee would pay an additional \$481 in taxes over the course of one year compared to a married, heterosexual employee who can pay the additional cost (\$3,208) using pre-tax dollars. See also, "Family of Four Pays \$3,332 More in Taxes" on the following page.

Extra Tax Liability for Gift and Estate Transfers

Each American taxpayer has a cumulative lifetime gift and estate tax exemption (\$5 million in tax year 2011, increasing to \$5.12 million in tax year 2012), meaning that amounts given during life or transferred upon death that total less than this amount will not be taxed. Additionally, taxpayers are allowed to make annual gifts of up to \$13,000 per recipient to any individuals they wish and these gifts do not count toward the \$5.12 million lifetime maximum exemption. Any gift amount to an individual recipient that exceeds \$13,000 is considered a taxable gift, and the taxpayer who made the gift is required to file a gift tax return. Gift amounts that exceed the annual \$13,000 gift exemption also accumulate from year to year and count toward the \$5 million lifetime maximum exemption,

as do any assets that are part of an inheritance. Once the maximum is reached, the taxpayer (or his estate) is taxed on each of his or her transfers.

Heterosexual married spouses enjoy an unlimited marital deduction, which means the gifts they make to each other during their lifetimes do not count toward the maximum lifetime exemption, even when they exceed the \$13,000 annual limit. Similarly, when a heterosexual spouse dies, the assets transfer to the surviving spouse tax-free. Same-sex partners and spouses do not receive the marital deduction for gifts during their lifetimes, which means that they begin to accumulate tax liability toward the lifetime limit when making gifts larger than \$13,000 to their partners/spouses. Since an LGBT family is also unable to use the marital deduction to transfer assets upon death tax-free, LGBT families with large estates can face significantly more tax exposure from accumulated gift liability and estate transfers.⁶⁸

Note that payments for tuition or allowable medical expenses made directly to schools or medical providers are not subject to the gift tax. This means that both legally-recognized and non-legally recognized parents can pay for a child's college tuition or medical care without incurring tax liability.

Family of Four Pays \$3,332 More in Taxes

Photo courtesy of GLAD



Mary and Dorene Bowe-Shulman along with their two daughters, paid \$3,332 more in taxes because of extra taxation on health benefits and an inability to file a joint tax return.

Mary, an attorney at the Massachusetts Court of Appeals, and Dorene, a stay-at-home mom, part-time acupuncturist, and cancer survivor met in their book club in 1996 and were legally married in Massachusetts in 2004. They are raising two daughters, 12-year-old Emma Jae, and 10-year-old Olivia.

As soon as they were married, they added Dorene to Mary's family health plan at work rather than pay for an expensive individual policy for Dorene. They were relieved—until Mary got her first paycheck after adding Dorene to her family plan. "It was as if I had added a total stranger to my insurance, not my spouse," says Mary. "I already had a family insurance plan through work, but the federal government had withdrawn taxes for Dorene's coverage. My married colleagues just aren't penalized in the same way." Mary's family health plan costs her employer the same whether Dorene is added or not.

Mary and Dorene also cannot file federal taxes as a married couple. Just these two areas of inequity have cost them thousands of dollars. In just one year, the family paid \$3,332 more in taxes than they would have if they had not been taxed on health benefits and had been able to file jointly - money they could be saving for their girls' education.

"We do everything we can to protect our children," says Dorene. "But, by discriminating against us, the federal government tells our girls that we're not worthy of the same rights as everyone else. They are too young to understand that now, but we know our girls will see this discrimination soon enough."

Adapted from GLAD, "Gill et al. v. Office of Personnel Management et al.," Mary and Dorene Bowe-Shulman, <http://www.glad.org/uploads/docs/cases/plaintiff-bios/bowe-shulman-bio.pdf>.

Calculating the Impact of an Unequal Tax Code

In order to see how the tax code's different treatment of LGBT families impacts economic security, *Table 2* on the next page provides a side-by-side comparison. In our example:

- Karen and Lee live in Jackson, Mississippi⁶⁹ and have wages equivalent to the median household income of \$34,555.⁷⁰
- Lee is the primary wage earner and makes \$29,000 a year.
- Karen provides care for their children, Carolyn, age 5 and Chris, age 3. Karen works part-time (earning the remaining \$5,555 of income) and attends community college part-time (Lee's salary pays the \$1,000 in tuition and the \$2,800 they spend on childcare while Karen works and attends school).
- To simplify the scenario, Karen and Lee do not have any non-wage income, do not own a home, and do not have any significant expenses that would cause them to itemize their deductions.
- In the first scenario, Karen and Lee are a married heterosexual couple. Karen and Lee file a joint return. Carolyn and Chris are their biological children.
- In the second and third scenarios, Karen and Lee (a nickname for Julie) are a lesbian couple, who have raised their children together since birth. Karen is the biological mother of both Carolyn and Chris. Since Mississippi does not permit joint or second-parent adoption for LGBT families, Lee has been unable to secure legal ties to either child.

In *Table 2*, the cumulative tax inequity faced by LGBT families is clear. The heterosexual married family (scenario 1) realizes all of the benefits of the family's joint filing status and family-related exemptions, deductions, and credits, and receives a tax refund of \$4,815. Depending on how the LGBT family files, either they receive a small net refund of \$109 (scenario 2) or they owe \$1,394 in taxes (scenario 3), leaving them with either \$4,706 or \$6,209 less cash available than the heterosexual family to provide for their household. In this example, an LGBT family of four with income of less than \$35,000 would have 14-16% less financial resources than the married heterosexual family to meet their household's present day needs or to save for their family's future, simply because of the existing inequities in the federal tax code.

Extra Costs, Heightened Scrutiny & Refund Delays

For many LGBT families, the inequities in this example (See *Table 2* and *Figure 9*) are compounded by extra tax preparation time and expenses, and heightened scrutiny of their tax returns that can cause unexpected delays and impact the timing of a family's refund.

- **Most LGBT families must run multiple tax scenarios.** Because most LGBT families cannot file jointly, many families end up creating several variations of their federal taxes in order to reduce the inequity as much as possible. When the option is available, this can include choosing who files as "Head of Household," deciding who claims the children and under what status, and figuring out the allocation of deductions and exemptions. Most online "do-it-yourself" tax preparation software isn't designed to help families navigate these challenges⁷¹ and free or low-cost tax preparation professionals may not be prepared for the challenges faced by same-sex couples who must file separate returns, especially if they are families seeking tax relief via the Earned Income Credit or Child and Dependent Care Credit.
- **Some married LGBT families must create "dummy" federal returns to meet state tax requirements.** Many married LGBT taxpayers (and those in other recognized relationships such as civil unions and domestic partnerships) actually have to complete the federal 1040 form twice—once to meet the requirements of the federal tax filing process and once to meet the requirements of the state in which they file. Why? Many states that have state income tax use calculations on

Figure 9: Net Cash Per Household

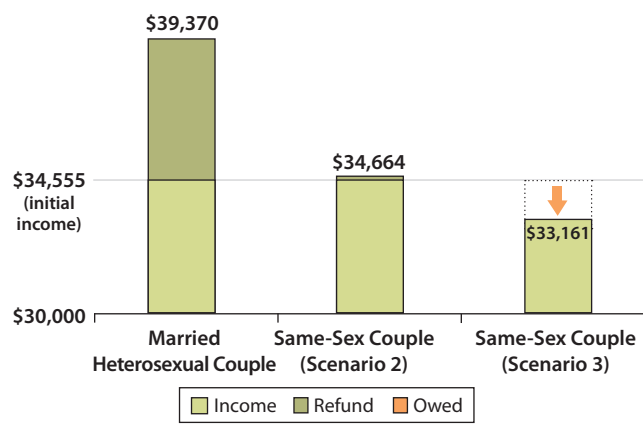




Table 2: A Side-by-Side Look at Tax Inequity for LGBT Families in 2011

Table 2: A Side-by-Side Look at Tax Inequity for LGBT Families in 2011					
On the 2011 1040 Form	 Heterosexual Married Couple – Karen and Lee	 Same-Sex Couple – Karen and Julie (“Lee”) File Separately			
	Scenario 1	Scenario 2		Scenario 3	
	Karen and Lee file as “Married Filing Jointly” and claim Chris and Carolyn as “qualifying children.”	Karen files as “Single” and claims Chris and Carolyn as “qualifying children.” ⁷²	Lee files as “Single” and is unable to claim any dependents since Karen has claimed the children on her tax return. ⁷³	Karen decides not to file since she owes no tax, and is not required to do so. ⁷⁴	Lee files as “Single” and claims children as “qualifying relatives” since Karen has not claimed them as “qualifying children.” ⁷⁵
Income	\$34,555	\$5,555	\$29,000	\$5,555	\$29,000
Allowable Deductions and Exemptions to Reduce Taxable Income					
Standard Deduction	-\$11,600 ⁷⁶	-\$5,800 ⁷⁷	-\$5,800 ⁷⁸	N/A	-\$5,800 ⁷⁹
Personal/ Spousal Exemption	-\$7,400 ⁸⁰	-\$3,700 ⁸¹	-\$3,700 ⁸²	N/A	-\$3,700 ⁸³
Dependency Exemptions	-\$7,400 ⁸⁴	-\$7,400 ⁸⁵	\$0 ⁸⁶	N/A	-\$7,400 ⁸⁷
Taxable Income	\$8,155 ⁸⁸	\$0 ⁸⁹	\$19,500 ⁹⁰	N/A	\$12,100 ⁹¹
Tax Based on Taxable Income	\$818 ⁹²	\$0	\$2,504 ⁹³	N/A	\$1,394 ⁹⁴
Non-Refundable Tax Credits to Reduce Taxes Owed (Which Cannot Generate a Refund)					
Child and Dependent Care Credit	-\$500 ⁹⁵	\$0 ⁹⁶	\$0 ⁹⁷	N/A	\$0 ⁹⁸
Education Credits	-\$318 ⁹⁹	\$0 ¹⁰⁰	\$0 ¹⁰¹	N/A	\$0 ¹⁰²
Child Tax Credit ¹⁰³	\$0 ¹⁰⁴	\$0 ¹⁰⁵	\$0 ¹⁰⁶	N/A	\$0 ¹⁰⁷
Total Tax Due	\$0	\$0	\$2,504	\$0	\$1,394
Payments and Refundable Tax Credits (Which Can Generate a Refund)					
Earned Income Credit	\$2,415 ¹⁰⁸	\$2,230 ¹⁰⁹	\$0 ¹¹⁰	N/A	\$0 ¹¹¹
Additional Child Tax Credit	\$2,000 ¹¹²	\$383 ¹¹³	\$0 ¹¹⁴	N/A	\$0 ¹¹⁵
American Opportunity Education Credit	\$400 ¹¹⁶	\$0 ¹¹⁷	\$0 ¹¹⁸	N/A	\$0 ¹¹⁹
Tax Owed/ Refund	Refund of \$4,815	Refund of \$2,613	Owes \$2,504	\$0	Owes \$1,394
Bottom Line	\$4,815 REFUND. Family receives a \$4,815 tax refund from the IRS.	\$109 REFUND. Family owes taxes of \$2,504 on one return and receives refund of \$2,613 on the other return, for a net refund of \$109 from the IRS.	\$1,394 TAXES DUE. Family owes the IRS \$1,394.		

the federal tax return as the basis for the state tax return. For those state-level returns, LGBT families must prepare a dummy “Married Filing Jointly” federal tax return (which cannot be legally filed) to generate those calculations, and then prepare the two separate “Single” or “Head of Household” federal returns to file as well. Heterosexual married couples need only complete one federal tax return, not three.

- **LGBT families in community property states must submit extra paperwork or face delays.** Married LGBT families in California and other LGBT families in domestic partnership in California, Nevada and Washington (community property states), must attach an “allocations worksheet” to each of their individual federal tax returns that shows how they calculated the income, deductions, and federal income withheld or attach both spouses’/partners’ forms such as W-2s, 1099s, and distributions from retirement assets on each return (essentially duplicating that process for each individual return). They are also cautioned by the IRS that failure to do so may result in a delay of the processing of their returns.¹²⁰ Heterosexual married families filing jointly in these states face none of these additional burdens.
- **Adoptive LGBT families face audits for legitimate expenses.** Since the adoption credit was a fully refundable credit in 2010 and 2011 (meaning it could generate a refund when taxes are not owed), it faces extra scrutiny from the IRS; for the 2010 tax year, 68% of all families requesting the credit were audited by mail. Because LGBT families are often unable to create legal ties to their children without adoption, this credit is an important way to help defray the additional costs of creating those ties. In tax year 2010, lesbian families who were seeking the credit were inappropriately denied the relief and were forced to re-submit paperwork and appeal the denials, resulting in refund delays.¹²¹

IRS Apologizes to LGBT Families in California



The IRS rules for LGBT families in the community property states of California, Nevada and Washington are too complex for “do-it-yourself” tax preparation software. As a result many LGBT families are forced to complete returns that take 4-5 times longer than most returns to complete or to pay as much as \$4,000 per return for professional tax preparation assistance.

The rules are so complex that even the IRS cannot keep up with them. After the new community property rules went into effect in California for the 2010 tax year, more than 300 LGBT taxpayers who complied with the new rules had their returns rejected by the IRS with a note saying, “Your return includes income or tax liability for more than one taxpayer, other than husband and wife.” LGBT families receiving the letters were forced to submit additional paperwork, and if a refund was expected, faced delays.

In June 2011, the IRS issued a statement and said that the letters were “incorrectly sent” as a result of “a processing error” and apologized for the mistake and inconvenience.

Source: Scott James, The New York Times/The Bay Citizen, “From I.R.S. to Gay Couples, Headaches and Expenses,” June 11, 2011.

CONCLUSIONS AND RECOMMENDATIONS

Historically, the federal government has provided tax benefits to families through a combination of personal exemptions, standard deductions, and tax credits. Yet LGBT families, together with other contemporary families raising children, fall outside of the outdated, narrow definitions of family in many state and federal laws, including the federal tax code. As a result, LGBT families are forced to pay higher taxes than other families in similar economic circumstances.

First, in the majority of states, state parenting law does not adequately recognize same-sex parents and adoption is not available as a means for both parents to secure legal ties to the children. As a result, often one LGBT parent is a legal stranger to their children, which limits that parent's ability to claim dependency exemptions and child-related deductions, particularly when a non-legally recognized parent is the primary wage earner in the family.

Second, because the federal government does not recognize the relationship of same-sex couples, most LGBT families cannot file a joint tax return and instead must "split up" their families and claim deductions and exemptions on separate tax returns. Being forced to file as "Single" or "Head of Household", even when legally married under state law, usually results in higher tax liability for the family. Additional undue economic burdens for LGBT families include excess tax preparation time and expense and delayed processing of refunds—money that could otherwise be used to provide economic stability to their households.

This need not be the case. In the sections below, we have included broad recommendations that would strengthen legal ties for all LGBT families and reduce the resulting economic inequities that these families face. We have also included recommendations about tax-specific reforms that would help eliminate the inequities they face.

Broad Federal & State Policy Recommendations to Support LGBT Families

Many of the tax inequities for LGBT families stem from the lack of federal and state legal recognition of LGBT families, both between LGBT spouses/partners, and between LGBT parents and their children.

Federally-Recognize Marriage for Same-Sex Couples

DOMA currently prevents federal recognition of same-sex couples. If same-sex couples who are married, in a civil union, or in a domestic partnership were recognized as such by the federal government, LGBT families could accurately represent themselves for the purposes of federal tax filing benefits, federal tax credits and deductions, and federal tax-free benefits like employer health insurance.

Legalize Marriage for Same-Sex Couples Across the States

Federal recognition of same-sex couples only helps those couples who can enter into legal relationships in their state. Expanding marriage for same-sex couples to all states would help strengthen legal ties of the entire family, including those between a child's parents and between the child and his or her parents. Married LGBT parents would be recognized as legal spouses, would have legal ties with children born or adopted into the married family, and would be able to access federal and state-level tax benefits and credits.

Legally-Recognize LGBT Families by Passing Comprehensive Parental Recognition Laws

State parentage and adoption statutes should allow joint adoption by LGBT parents, recognize LGBT parents using assisted reproduction in the same manner as heterosexual parents, and provide avenues such as stepparent adoption, second-parent adoption and legal recognition of *de facto* parents to allow children to gain full legal ties to their parents. When both parents have legal ties to their children, a family's ability to claim child-related tax exemptions, deductions and credits is significantly increased.

Tax-Related Policy Recommendations for LGBT Families

LGBT families should be treated equally by federal and state taxing authorities. Below are targeted recommendations designed to remedy the existing inequities and allow LGBT families to benefit from the family-focused tax advantages and incentives available at the federal and state level.

Create a Designation of “Permanent Partner”

The IRS should create a designation of a “permanent partner,” who would be treated as a spouse for the purposes of the tax code. Individuals in a committed relationship—whether legally recognized as a domestic partnership, civil union or marriage, or not legally recognized—would qualify if they meet certain criteria.¹²² This would allow LGBT families, whether parents are able to marry or not, to file joint tax returns and be eligible for tax-related exemptions, credits and deductions designed for families, including joint filing status, child and dependency-related exemptions and credits, and estate and gift tax exemptions.

Broaden the Definition of “Qualifying Person”

The IRS should broaden the “qualifying person” test for “Head of Household” status to include all “qualifying relatives.” The IRS should also broaden the “qualifying person” test for the Credit for Child and Dependent Care Expenses to include all dependent “qualifying relatives” under the age of 13 so that any taxpayer who is providing the majority of support for a dependent and paying for child or dependent care can access these benefits designed to help families.

Broaden the Definition of “Qualifying Child”

The IRS should allow adults who are parenting, raising and providing for children to claim the children as a “qualifying child” even if they are not a legal parent. This would allow LGBT families and other families where children are raised by someone other than a legal parent to more easily access the “Head of Household” filing status, dependency exemptions, the Child Tax Credit, the Credit for Child and Dependent Care Expenses, and the Earned Income Tax Credit.

Expand Access to the Credit for Child and Dependent Care Expenses

To help families with the high costs of child care and dependent care for working families, the IRS should expand the Credit for Child and Dependent Care Expenses so that any person who pays for the child care or dependent care of another person can claim the credit. This would help LGBT families who cannot currently claim this credit for their non-legally related children or partners and also help families where a grandparent or other person assists the family by paying child or dependent care expenses.

Expand Access to Education Deductions and Credits

To encourage investment in higher education, the IRS should allow any individual who pays the tuition and fees of another person—regardless of the legal relationship to that person—to take these deductions and credits. This would help LGBT families with the cost of college tuition for their children, and it would make it easier for an LGBT parent to return to college because his or her partner/spouse could use these deductions and credits to offset the cost of tuition.

End Inequitable Taxation of Health Benefits

Lawmakers should amend the tax code to end the inequitable federal taxation of benefits provided to same-sex partners and other “non-dependent” beneficiaries under employers’ health plans.¹²³ Additionally, states that mimic the federal tax guidelines and impose an additional state tax on domestic partner benefits should eliminate their state’s portion of this tax.

REFERENCES AND ENDNOTES

- ¹ Julia Isaacs, Heather Hahn, Stephanie Rennane, C. Eugene Steuerle and Tracy Vericker, “Kids’ Share 2011: Report on Federal Expenditures on Children Through 2010,” The Brookings Institution and Urban Institute, July 2011, http://www.brookings.edu/~media/Files/rc/reports/2011/0721_kids_share_isaacs/0721_kids_share_isaacs.pdf. This amount includes credits and deductions that reduced the amount of tax owed and those that resulted in tax payments refunded directly to families.
- ² Andrew Chamberlain and Gerald Prante, “Who Pays and Who Receives Government Spending? An Analysis of Federal, State and Local Tax and Spending Distributions, 1991-2004,” Tax Foundation, 2007, <http://www.taxfoundation.org/files/wp1.pdf>.
- ³ Movement Advancement Project, Family Equality Council and Center for American Progress, “All Children Matter: How Legal and Social Inequalities Hurt LGBT Families (Full Report),” October 2011, <http://www.lgbtmap.org/file/all-children-matter-full-report.pdf>.
- ⁴ Because this report contains updated information, it supersedes tax-related content from the original October 2011 report.
- ⁵ Rose M. Kreider and Diana B. Elliott, “The Complex Living Arrangements of Children and Their Unmarried Parents,” Population Association of America, Poster Presentation, May 2, 2009, <http://www.census.gov/population/www/socdemo/complex-poster.pdf>.
- ⁶ See Movement Advancement Project et al., “All Children Matter,” pp. 118-119.
- ⁷ Gary J. Gates, “Can Homophobia Reduce Your Home Equity?,” November 9, 2011, http://www.huffingtonpost.com/gary-j-gates/can-homophobia-reduce-you_b_1082729.html.
- ⁸ Suzanne Macartney, “Child Poverty in the United States 2009 and 2010: Selected Race Groups and Hispanic Origin,” American Community Survey Briefs, United States Census, November 2011, <http://www.census.gov/prod/2011pubs/acsbr10-05.pdf>.
- ⁹ Special tabulation of the 2010 American Community Survey by Gary J. Gates.
- ¹⁰ *Ibid.*
- ¹¹ See Movement Advancement Project, Family Equality Council and Center for American Progress, “Strengthening Economic Security for Children Living in LGBT Families,” January 2012, <http://lgbtmap.org/file/strengthening-economic-security.pdf>.
- ¹² Revenue Act of 1913, ch. 16, 38 Stat. 114 (1913).
- ¹³ Revenue Act of 1948, Public Law 80-471 (1948).
- ¹⁴ For a detailed review of the history of joint federal income tax filing, see Daniel Milstein, “Note: ‘Til Death Do Us File Joint Income Tax Returns (Unless We’re Gay),” *Cardozo Public Law, Policy & Ethics Journal*, Yeshiva University, Spring, 2011, pp. 451-485.
- ¹⁵ Tax Reduction Act of 1975, Public Law 94-12 (1975).
- ¹⁶ Tax Reform Act of 1976, Public Law 94-455 (1976).
- ¹⁷ Small Business Job Protection Act, Public Law 104-188 (1996).
- ¹⁸ Taxpayer Relief Act of 1997, Public Law 105-34 (1997).
- ¹⁹ 2004 Working Families Tax Relief Act, Public Law 108-311 (2004).
- ²⁰ According to the IRS, “You are considered married for the whole year if on the last day of your tax year. . . you are married and living together in a common law marriage that is recognized in the state where you now live or in the state where the common law marriage began.” IRS, “Publication 17: Your Federal Income Tax for Individuals: Tax Guide 2011 For Individuals,” December 21, 2011, p. 21, <http://www.irs.gov/pub/irs-pdf/p17.pdf>.
- ²¹ The Defense of Marriage Act, Public Law 104-199 (1996).
- ²² The U.S. Department of Justice decided to stop enforcing DOMA in federal court in 2011. See “Statement of the Attorney General on Litigation Involving the Defense of Marriage Act,” February 23, 2011, <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.
- ²³ IRS, “1040 Instructions: 2011,” p. 13, <http://www.irs.gov/pub/irs-pdf/i1040.pdf>.
- ²⁴ Likewise, state-level inequities still exist in a few states that offer forms of relationship recognition that fall short of marriage to same-sex couples. For example, Rhode Island, which implemented civil union legislation in 2011, still requires all state taxpayers to file with the same tax status as their federal returns (see State of Rhode Island, “RI-1040 Resident Individual Tax Return, 2011, <http://www.tax.ri.gov/forms/2011/Income/2011%20Resident%20Booklet%20FINAL.pdf>). Although Maryland recognizes same-sex marriages from other jurisdictions in some matters, it explicitly does not do so for tax returns and taxpayers must file with the same tax status as federal (see Comptroller of Maryland, “Filing Status,” <http://individuals.marylandtaxes.com/incometax/filing.asp>, last accessed 3/23/2012) (Note: Maryland also recently passed marriage recognition legislation, but the legislation has not yet taken effect). In New Mexico, an Attorney General’s opinion indicates that the state would likely recognize out-of-state same-sex marriages, yet state tax instructions mandate the same filing as federal without exception (See Office of New Mexico Attorney General, “Opinion No. 11-01 – Are same-sex marriages performed in other jurisdictions valid in New Mexico?” January 4, 2011, <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1131> and State of New Mexico Taxation and Revenue Department, “2011 New Mexico Personal Income Tax (PIT) Form Packet,” <http://www.tax.new-mexico.gov/SiteCollectionDocuments/2011pit-1-ins.pdf>). Wisconsin, which offers limited domestic partnership recognition does not recognize domestic partnerships for tax filing purposes or for community property allocations (See Wisconsin Department of Revenue, “Effect of Recent IRS Ruling on Wisconsin Domestic Partnerships,” last updated June 9, 2010, last accessed March 23, 2012, <http://www.revenue.wi.gov/taxpro/news/100609.html>). As with Wisconsin, Maine and Colorado, which offer limited recognition to same-sex couples, do not extend recognition for tax-related matters.
- ²⁵ This analysis focuses on a side-by-side comparison of married heterosexual couples raising children and LGBT families who are unable to file jointly—primarily same-sex couples raising children. When relevant, line items that impact other LGBT families have also been referenced in notes.
- ²⁶ See “LGBT Families Denied Joint Filing Status” in this report.
- ²⁷ Filers have the option to itemize or choose the standard deduction. Because itemized deductions are based on the specifics of every family situation, an analysis of itemizations is beyond the scope of this report. However, it should be noted, that until recently, transgender individuals were unable to include medical expenses associated with the cost of transitioning as itemized expenses because these expenses were considered “cosmetic.” For LGBT families with transgender parents, the 2011 IRS “Notice of Acquiescence” that allows deduction of these expenses related to a serious medical condition may have a significant positive impact on tax liability. See Jonathan Berr, “Sex Change Surgery is Now Tax Deductible,” *Time Magazine*, November 10, 2011, <http://moneyland.time.com/2011/11/10/sex-change-surgery-is-now-tax-deductible>.
- ²⁸ Depending on the specific family circumstances, married bisexual or transgender parents who are raising children with partners or spouses of the opposite sex may be able to file as “Married Filing Jointly.”

- ²⁹ See, "Tax Exemptions for Self, Spouse, and Dependents," in this report.
- ³⁰ Also includes foster children, minor siblings or stepsiblings, or a descendent of any of these, such as a grandchild.
- ³¹ See "Difficulty Securing Legal Ties," above and "Qualifying Child as a Dependent" and "Qualifying Relative as a Dependent," in this report.
- ³² See "Credit for Child and Dependent Care Expenses," in this report.
- ³³ See "Education-Related Deductions and Credits," in this report.
- ³⁴ See "Child Tax Credit and Additional Tax Credit," in this report.
- ³⁵ See "Earned Income Credit," in this report.
- ³⁶ See "Adoption Credit," in this report.
- ³⁷ See IRS, "Publication 555: Community Property", Rev. December 2010, <http://www.irs.gov/pub/irs-pdf/p555.pdf> and IRS, "Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California," last updated November 16, 2011, last accessed March 26, 2012, <http://www.irs.gov/newsroom/article/0,,id=245869,00.html>.
- ³⁸ Dennis J. Ventry, Jr., "Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation," *Indiana Law Journal*, Vol. 86: Iss. 4, Article 6, 2011, page 1520.
- ³⁹ Different rules apply for community property states. See IRS, "Publication 555: Community Property."
- ⁴⁰ As with all families, LGBT families are diverse. In some situations, married bisexual or transgender parents who are raising children with partners or spouses of the opposite sex may be able to file as "Married Filing Jointly" and obtain the advantages of that filing status as a result.
- ⁴¹ IRS, "1040 Instructions: 2011," pp.12-13.
- ⁴² *Ibid.* The line instructions for the 2011 Form 1040 require state that a taxpayer can check the "Single" box if (1) S/he was never married, (2) S/he was legally separated, or (3) S/he was widowed. Similarly, in addition to other requirements, to check the box for "Head of Household," the instructions require the taxpayer to be "unmarried" or "considered unmarried" by reason of divorce, separation or marriage to a nonresident alien.
- ⁴³ For a thorough discussion of the "Head of Household" filing status, see James M. Hopkins, "Clarifying Head of Household Issues," *The CPA Journal*, October 2011, pp. 42-46, <http://viewer.zmags.com/publication/261bb12d#/261bb12d/44>.
- ⁴⁴ LGBT families who are married or in registered domestic partnerships in the community property states of California, Nevada and Washington face challenges with the requirement of "more than half the cost of keeping up a home" for "Head of Household" because they are required to split their income and assets acquired during the relationship in exactly half. According to the IRS, it is still possible for one parent to qualify as "Head of Household" if s/he contributes non-community assets to the cost of keeping the home (such as assets acquired before the relationship commenced). See IRS, "Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California," Question and Answer 3, last updated November 16, 2011, last accessed March 22, 2012, <http://www.irs.gov/newsroom/article/0,,id=245869,00.html>.
- ⁴⁵ IRS, "1040 Instructions: 2011," page 13. Some exceptions exist to these "living with" rules for adult children providing care for dependent parents and for temporary absences for dependent children.
- ⁴⁶ See IRS, "Publication 501: Exemptions, Standard Deduction, and Filing Information," December 2, 2011, page 9, Table 4, "Who Is a Qualifying Person Qualifying You To File as Head of Household?," <http://www.irs.gov/pub/irs-prior/p501--2011.pdf>.
- ⁴⁷ IRS, "A Qualifying Child," January 2005, last updated October 13, 2011, last accessed March 14, 2012, <http://www.irs.gov/newsroom/article/0,,id=133298,00.html>.
- ⁴⁸ LGBT stepparents who are legally recognized as such in their state of residence may be able to claim a child as a "qualifying child" for federal income tax purposes. According to the IRS, "If a registered domestic partner is the stepparent of his or her partner's child under the laws of the state in which the partners reside, then the registered domestic partner is the stepparent of the child for federal income tax purposes." Although this was provided in an IRS Q & A specific to California, Nevada and Washington, it is possible that this could apply to any of the states that provide comprehensive relationship recognition. See IRS, "Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California," last reviewed November 16, 2011, last accessed March 20, 2012. See also, Pat Cain, "Same-sex Couples, Stepchildren, and Employer Health Plans," *Same Sex Tax Law Blog*, Santa Clara Law, October 27, 2011, <http://law.scu.edu/blog/samesextax/same-sex-couples-stepchildren-and-employer-health-plans.cfm>.
- ⁴⁹ IRS, "Bulletin 2008-2: Qualifying Relative for Purposes of Section 152(d)(1)," January 14, 2008, http://www.irs.gov/irb/2008-02_IRB/ar14.html.
- ⁵⁰ IRS, "Six Important Facts about Dependents and Exemptions, IRS Tax Tip 2012-07," last updated January 11, 2012, last accessed March 14, 2012, <http://www.irs.gov/newsroom/article/0,,id=252258,00.html>.
- ⁵¹ IRS, "Publication 503: Child and Dependent Care Expenses, 2011" <http://www.irs.gov/pub/irs-pdf/p503.pdf>.
- ⁵² IRS, "Tax Benefits for Education: Information Center, 2011," accessed March 14, 2012, <http://www.irs.gov/newsroom/article/0,,id=213044,00.html>.
- ⁵³ The Child Tax Credit is non-refundable so it can only be taken to reduce tax owed. Some families can also take the Additional Child Tax Credit, which can result in a refund, even when no tax is owed. See IRS, "Publication 972: Child Tax Credit, 2011" <http://www.irs.gov/pub/irs-pdf/p972.pdf>.
- ⁵⁴ IRS, "Earned Income Tax Credit Central," last accessed March 14, 2012, <http://www.eitc.irs.gov/central/abouteitc>.
- ⁵⁵ This tax saving assumes a 15% marginal tax rate. IRS, "IRS Bulletin, Notice 2008-5," January 14, 2008.
- ⁵⁶ See supra, note 49.
- ⁵⁷ IRS, "Publication 503: Child and Dependent Care Expenses, 2011," <http://www.irs.gov/pub/irs-pdf/p503.pdf>.
- ⁵⁸ *Ibid.*
- ⁵⁹ IRS, "Tax Benefits for Education: Information Center, 2011," accessed March 14, 2012, <http://www.irs.gov/newsroom/article/0,,id=213044,00.html>.
- ⁶⁰ IRS, "Publication 972: Child Tax Credit, 2011."
- ⁶¹ U.S. Census Bureau, Current Population Survey, 2011 Annual Social and Economic Supplement, unpublished data cited in "Income, Poverty, and Health Insurance Coverage: 2010," September 2011, http://www.census.gov/newsroom/releases/pdf/2010_report_plotpoints.pdf.
- ⁶² Center on Budget and Policy Priorities, "Policy Basics: State Earned Income Tax Credits," last updated January 13, 2011, last accessed March 26, 2012, <http://www.cbpp.org/cms/index.cfm?fa=view&id=2506>.
- ⁶³ IRS, "Earned Income Tax Credit Central."
- ⁶⁴ IRS, "Topic 607: Adoption Credit," last updated December 22, 2011, accessed March 15, 2012, <http://www.irs.gov/taxtopics/tc607.html>.
- ⁶⁵ A limited exception exists when the same-sex partner/spouse or child meets the "qualifying relative" test and is claimed as a dependent of the employee.

- ⁶⁶ Employers are also required to pay payroll taxes on the value of domestic partner benefits, costing them an estimated \$57 million per year. M. V. Lee Badgett, "Unequal Taxes on Equal Benefits: The Taxation of Domestic Partner Benefits," The Williams Institute and the Center for American Progress, December 2007, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-UnequalTaxesOnEqualBenefits-Dec-2007.pdf>.
- ⁶⁷ The Kaiser Family Foundation and Health Research & Educational Trust, "Employer Health Benefits: 2011 Annual Survey," 2011.
- ⁶⁸ For a detailed analysis of the estate tax disadvantage for same-sex couples see Michael D. Steinberger, "Federal Estate Tax Disadvantage for Same-Sex Couples," The Williams Institute, 2009, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Steinberger-Federal-Estate-Tax-Nov-2009.pdf>.
- ⁶⁹ We chose Mississippi because census data shows that it is the state where the highest percentage of same-sex couples is raising children.
- ⁷⁰ U.S. Census, "Quick Facts, 2006-2010," <http://quickfacts.census.gov/qfd/states/28/2836000.html>.
- ⁷¹ See Tara Siegel Bernard, "Is Tax Software Sophisticated Enough for Same-Sex Couples?," The New York Times Bucks Blog, February 29, 2012, <http://bucks.blogs.nytimes.com/2012/02/29/is-tax-software-sophisticated-enough-for-same-sex-couples>.
- ⁷² Karen cannot file as "Head of Household" because she did not pay more than half the costs of keeping up a home in this tax year. See IRS, "Publication 501: Exemptions, Standard Deduction, and Filing Information," page 8, "Cost of Keeping Up a Home."
- ⁷³ Even if both parents have legal ties to their children (which in this case, they do not), if they do not file joint returns, a dependent can only be claimed as a "qualifying child" by one taxpayer. See 26 USC §152(c)(4). Likewise, a taxpayer cannot claim a dependent as a "qualifying relative" if that dependent is a qualifying child of another taxpayer who is required to file. See 26 USC §152(d)(1)(D) and IRS, "Internal Revenue Bulletin 2008-5: Qualifying Relative for Purposes of Section 152(d)(1)," January 14 2008, http://www.irs.gov/irb/2008-02_IRB/ar14.html.
- ⁷⁴ Karen is not required to file because she owes no taxes, her income does not equal or exceed \$9,500 (the combined total of the personal exemption and the standard deduction), and she is not claiming her children for any tax deductions or credits. As a result, Lee may claim the children as "qualifying relatives." See IRS, "Internal Revenue Bulletin 2008-5: Qualifying Relative for Purposes of Section 152(d)(1)," January 14 2008, http://www.irs.gov/irb/2008-02_IRB/ar14.html.
- ⁷⁵ Lee cannot file as "Head of Household" even though she paid more than half the cost of keeping up the home because, since Lee has not been able to adopt the children, neither of the children count as a "qualifying person" for "Head of Household" status (this test is different than the test for exemptions for "qualifying relatives"). See "Filing as 'Single' or 'Head of Household'" in this report.
- ⁷⁶ The 2011 standard deduction was \$11,600 for "Married Filing Jointly," \$8,500 for "Head of Household," and \$5,800 for "Single." See IRS, "Publication 501: Exemptions, Standard Deduction, and Filing Information," "2011 Standard Deduction Tables," page 24.
- ⁷⁷ *Ibid.*
- ⁷⁸ *Ibid.*
- ⁷⁹ *Ibid.*
- ⁸⁰ In 2011, filers could deduct \$3,700 for each personal exemption claimed. "Married Filing Jointly" filers can claim one exemption for themselves and one for their spouse. Single filers can claim just one personal exemption. See IRS, "Publication 501," "Personal Exemptions," page 10.
- ⁸¹ *Ibid.*
- ⁸² *Ibid.*
- ⁸³ *Ibid.*
- ⁸⁴ In 2011, filers could deduct \$3,700 for each dependent exemption claimed. Karen and Lee were able to claim both children as "qualifying child" dependents for a total dependency exemption of \$7,400 (\$3,700 X 2). See IRS, "Publication 501," "Exemptions for Dependents," page 10.
- ⁸⁵ *Ibid.* As in Scenario 1, since Karen is the legal mother of Carolyn and Chris, she can claim them as dependents using the "qualifying child" status.
- ⁸⁶ Because Lee is not a legally-recognized parent, she cannot claim the children as "qualifying children." And, since Carolyn and Chris are the "qualifying children" of another filing taxpayer (Karen), they cannot be claimed as dependents by Lee. See IRS, "Publication 501," "Table 5. Overview of the Rule for Claiming and Exemption for a Dependent," page 12.
- ⁸⁷ See *supra*, notes 73 and 85. Since Karen was not required to file, and did not do so, Lee is able to claim the exemptions for dependents using the "qualifying relative" rules.
- ⁸⁸ Karen and Lee are able to maximize the use of all of their deductions and exemptions of \$26,400 for a reduction in their taxable income to just \$8,155 for the entire family.
- ⁸⁹ Unlike the married heterosexual couple in Scenario 1, Karen's exemptions and deductions total only \$16,900. And, because she must file as "Single," Karen cannot combine her income with Lee's income on a joint return. Instead, these exemptions and deductions can only be applied toward her \$5,555 in income to reduce that income to \$0, leaving \$11,345 in unusable exemptions and deductions for the family.
- ⁹⁰ Lee is only able to take the "Single" standard deduction and her own personal exemption, even though she provides the primary financial support for the entire family. This means that the family cannot access \$11,345 in exemptions and deductions that can be accessed by the married heterosexual family. See also *supra*, note 88. This would be true even if Lee and Karen were married under state law.
- ⁹¹ Lee and Karen cannot file jointly, so they are unable to access the \$5,800 standard deduction for Karen and the \$3,700 personal exemption for Karen, which means that, in this scenario they cannot access \$9,500 in exemptions and deductions that can be accessed by the married heterosexual family. As in Scenario 2, this would be true even if Lee and Karen were married under state law.
- ⁹² See IRS, "2011 Tax Table," <http://www.irs.gov/pub/irs-pdf/i1040tt.pdf>.
- ⁹³ *Ibid.*
- ⁹⁴ *Ibid.*
- ⁹⁵ Calculated using IRS, "2011 Form 2441," Child and Dependent Care Expenses.
- ⁹⁶ Karen did not pay for child care (Lee did), so she cannot take the child and dependent care credit.
- ⁹⁷ Since Lee is unable to claim the children as either a "qualifying child" or a "qualifying relative," she is also unable to obtain the credit for the cost of their care.
- ⁹⁸ Although Lee paid for child care and has claimed the children as "qualified relatives," she still cannot take the child and dependent care credit, because unless one of the children is physically or mentally disabled, the children do not meet the narrower "qualifying person" test for the exemption. See James M. Hopkins, CPA, "Unrelated Child as a Qualifying Relative," Journal of Accountancy, November 2009, <http://www.journalofaccountancy.com/Issues/2009/Nov/20091989.htm>. Even if the children did meet the "qualifying person" definition, it is not clear that the child care was provided so that Lee could work or go to school (instead it was to enable Karen to do so).
- ⁹⁹ Although multiple education tax credits can be used to reduce taxes owed, in this scenario, the American Opportunity Tax Credit was used for the family, since up to

40% of it is refundable. Calculated using IRS Form 8863, Karen and Lee were able to use the non-refundable portion of the credit for the \$1,000 of tuition expenses for Karen to reduce their remaining tax due down to zero (\$318), and then they were also able to receive 40% of the credit as a refundable credit that contributed to a refund. See IRS, "American Opportunity Tax Credit: Questions and Answers," last updated January 19, 2012, last accessed April 2 2012, <http://www.irs.gov/newsroom/article/0,id=211309,00.html> and IRS, "2011 Form 8863: Education Credits (American Opportunity and Lifetime Learning Credits)," <http://www.irs.gov/pub/irs-pdf/f8863.pdf>.

¹⁰⁰ Since Karen did not pay for her own tuition (Lee did), she is not able to claim any education-related deductions or credits.

¹⁰¹ Since Lee cannot claim Karen as a spouse (she cannot be federally-recognized as such even if they were married under state law) or as a dependent (Karen's income exceeds the maximum allowable gross income of \$3,700 for dependents), Lee cannot claim any deductions or credits for her education-related expenses.

¹⁰² See note 100, *supra*.

¹⁰³ Non-refundable credits are capped at the amount of taxes owed. In 2011, some families who were unable to apply the full Child Tax Credit to reduce taxes owed could, based on income, also receive up to 40% of the credit as a refundable credit (see "Additional Child Tax Credit," below).

¹⁰⁴ The family is not able to take the non-refundable Child Tax Credit because they have already reduced their tax owed to zero. However, the family does qualify for the refundable "Additional Child Tax Credit," below.

¹⁰⁵ Although Karen qualifies for the Child Tax Credit because the children meet the definition of "Qualifying Child," Karen owes no taxes, so she cannot access the child tax credit to reduce her income. However, she does qualify for a small refundable "Additional Child Tax Credit," below.

¹⁰⁶ Lee is blocked from claiming the Child Tax Credit and the Additional Child Tax Credit for two reasons: (1) Because Lee is not federally-recognized as a parent, the children do not meet the "qualifying child" test for Lee and (2) Karen has already claimed the children.

¹⁰⁷ Even though Lee can claim the children as dependents, Lee is blocked from claiming the non-refundable Child Tax Credit or the refundable Additional Child Tax Credit because she cannot claim her children using the "qualifying child" status and the credit is unavailable for dependents claimed as "qualifying relatives."

¹⁰⁸ See IRS, "2011 Earned Income Credit (EIC) Table," last updated August 11, 2011, last accessed April 2, 2012, http://www.irs.gov/app/vita/content/globalmedia/earned_income_credit_table_1040i.pdf.

¹⁰⁹ *Ibid.*

¹¹⁰ Lee is blocked from claiming the Earned Income Credit (EIC) for two reasons: (1) Because Lee is not federally-recognized as a parent, the children do not meet the "qualifying child" test for Lee and (2) Karen has already claimed the children.

¹¹¹ Even though Lee can claim the children as dependents, Lee is blocked from claiming the Earned Income Credit (EIC) because she cannot claim her children using the "qualifying child" status and the credit is unavailable for dependents claimed as "qualifying relatives."

¹¹² Calculated using IRS, "2011 Form 8812: Additional Child Tax Credit," <http://www.irs.gov/pub/irs-pdf/f8812.pdf>.

¹¹³ *Ibid.*

¹¹⁴ See note 105, *supra*.

¹¹⁵ See note 106, *supra*.

¹¹⁶ See note 98, *supra*.

¹¹⁷ See note 99, *supra*.

¹¹⁸ See note 100, *supra*.

¹¹⁹ *Ibid.*

¹²⁰ See IRS, "Publication 555: Community Property."

¹²¹ See Tara Siegel Bernard, "I.R.S. Denied Lesbians Legitimate Adoption Credit," The New York Times Bucks Blog, December 13, 2011, <http://bucks.blogs.nytimes.com/2011/12/13/i-r-s-denying-lesbians-legitimate-adoption-credit>.

¹²² For example, the Uniting American Families Act of 2011 (UAFA) defines "permanent partner" as an individual 18 years of age or older who (a) is in a committed, intimate relationship with another individual 18 years of age or older in which both parties intend a lifelong commitment; (b) is financially interdependent with that other individual; (c) is not married to or in a permanent partnership with anyone other than that other individual; (d) is unable to contract with that other individual in a "cognizable" marriage (for tax purposes one that is federally recognized); and (e) is not a first, second, or third degree blood relation of that other individual.

¹²³ This could be done by passing legislation such as the Tax Parity for Health Plan Beneficiaries Act, H.R. 2088 and S. 1171 (2011). See HRC, "Tax Parity for Health Plan Beneficiaries Act," for more detail, last updated June 24, 2011, last accessed April 2, 2012. <http://www.hrc.org/laws-and-legislation/federal-legislation/tax-parity-for-health-plan-beneficiaries-act>.



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