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**PRETRIAL MEMORANDUM FOR RESPONDENT**

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**NAME OF CASE:**

Rhiannon G. O'Donnabhain

**DOCKET NO.**

6402-06

**ATTORNEYS:**

**Petitioner:**

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**Respondent:**

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**AMOUNTS IN DISPUTE:**

**Year**

2001

**Deficiency**

\$5,679\*

\*As a result of concessions by the parties described below, the amount in dispute is less than the amount of the deficiency asserted in the notice of deficiency.

**STATUS OF CASE:**

Probable Settlement\_\_\_ Probable Trial\_\_\_ Definite Trial X

**CURRENT ESTIMATE OF TRIAL TIME:**        40 hours

**MOTIONS RESPONDENT EXPECTS TO MAKE:**

Motions in Limine

If necessary, to preclude Diane Ellaborn, LICSW, Alex Coleman, J.D., Ph.D., and Toby Meltzer, M.D., who have been identified by petitioner's counsel as fact witnesses, from testifying in the capacity of expert witnesses.

**STATUS OF STIPULATION OF FACTS:**    Completed   X      In Process   \_\_  

The Stipulation of Facts was submitted to the Court on June 15, 2007. A Supplemental Stipulation of Facts is expected to be submitted to the Court on July 3, 2007.

**ISSUE:**

Whether the costs of male to female sex reassignment surgery, feminizing hormone treatment, and other costs associated therewith including transportation and purported counseling are deductible medical expenses, as asserted by petitioner; or whether such expenses do not meet the requirements for deductible medical expenses under I.R.C. §213 and the regulations thereunder, as asserted by respondent.

**WITNESS(ES) RESPONDENT EXPECTS TO CALL:**

Petitioner

Petitioner will be called to testify about facts regarding her alleged disease or illness and her treatment to the extent that such matters have not been stipulated.

Dr. Park Dietz

Dr. Dietz has prepared an expert report. Dr. Dietz will give expert testimony regarding

his opinion that gender identity disorder (GID) is not an illness or disease as those terms are medically and scientifically understood. A synopsis of Dr. Dietz's testimony is set forth in the discussion of Legal Authorities set forth below.

Dr. Chester Schmidt, Jr.

Dr. Schmidt has prepared an expert report. Dr. Schmidt will give expert testimony regarding his opinion that the sex reassignment surgery and related treatment undergone by petitioner is elective treatment and not medically necessary. A synopsis of Dr. Schmidt's testimony is set forth in the discussion of Legal Authorities set forth below.

Diane Ellaborn, LICSW

Ms. Ellaborn will be called to testify regarding her diagnosis of petitioner's GID and transsexualism, and her purported treatment of petitioner.

Dr. Toby Meltzer

Dr. Meltzer will be called to testify regarding the procedures he performed on petitioner, including sex reassignment surgery in 2001, secondary genital surgery and other surgery in 2002, and facial surgery in 2005.

Respondent reserves the right to call any witnesses disclosed in petitioner's trial

memorandum, as well as impeachment or any other rebuttal witnesses as necessary.

**SUMMARY OF FACTS:**

Petitioner was born on August 27, 1943 as a male with unambiguous male genitalia. Petitioner's birth name was Robert Donovan. Petitioner received an Associates Degree in Civil Engineering from Wentworth Institute, and a Bachelor of Science Degree in Industrial Engineering from Northeastern University. Petitioner worked as a senior subcontracts administrator at an engineering and construction company during taxable year 2001 and at all relevant times.

Petitioner married a woman in 1970. Petitioner and her former wife were separated in 1992 and divorced in 1996. Petitioner fathered three children with her former wife.

Beginning in 1996, petitioner underwent a series of procedures to change her appearance from male to female, including plastic surgery in 2001 to remove her male genitalia and construct female genitalia. Petitioner's social worker states that she guided petitioner through this process pursuant to the so-called Harry Benjamin Standards of Care for Gender Identity Disorders. In 1996, Diane Ellaborn, LICSW (Ellaborn) provided petitioner with a diagnosis of gender identity disorder (GID) and transsexualism. Ellaborn is a licensed social worker and is not a medical doctor.

From September, 1997 to the present, petitioner has been taking feminizing hormones, resulting in changes to her appearance including breast development. Petitioner also began electrolysis to remove facial hair in September, 1997, which continued through 2005. Petitioner also underwent various facial feminizing surgeries in 2000, including a rhinoplasty, facelift, and tracheal shave.

In March, 2000, petitioner legally changed her name to Rhiannon G. O'Donnabhain and began living full time in the female role. Petitioner changed her name and designation of gender on her Massachusetts driver's license on July 3, 2000.

In 2000, Ellaborn requested that petitioner be put on a waiting list with Dr. Toby Meltzer (Meltzer) for sex reassignment surgery (SRS), sometimes also referred to as genital reassignment surgery (GRS). Ellaborn wrote a letter to Meltzer on July 16, 2001, recommending that petitioner receive SRS. Alex Coleman, J.D., Ph.D. (Coleman), wrote a letter dated August 8, 2001 to Meltzer stating that petitioner could make an informed choice to have the surgery. Coleman wrote this letter after meeting with petitioner for only two hours, and without having read petitioner's medical records. Coleman is a licensed psychologist and is not a medical doctor.

On October 19, 2001, petitioner underwent the following procedures performed by Meltzer at Eastmoreland Hospital, Portland, Oregon: penectomy, bilateral orchiectomy, vaginoplasty, clitoroplasty, labiaplasty, and bilateral breast implants. Meltzer described these procedures in a letter dated November 13, 2002 as petitioner's "First Stage Surgery."

In December, 2001, Dr. Judith Robinson diagnosed petitioner with serious depression. Robinson's records, which were furnished to respondent after the Court granted respondent's motion to compel production of such records, indicate that petitioner's depression is long-standing. As recently as March 1, 2007, Robinson described petitioner's depression in her records as "severe." Petitioner has received ongoing treatment with Robinson for depression since December, 2001.

Petitioner underwent additional genital surgery performed by Meltzer in May, 2002, including secondary labiaplasty, urethral revision, and clitoral revision. Meltzer described these procedures in a letter dated November 13, 2002, as petitioner's "Second Stage Procedure." Petitioner had further facial surgery performed by Meltzer in February, 2005, including genioplasty, malar augmentation, mid face lift, lip augmentation, and lip lift. According to Robinson's records, this was "major facial surgery for transformation to [female] features."

Petitioner has made the following admissions, which are part of the Stipulation of Facts:

(1) She did not undergo SRS or feminizing hormone therapy to ameliorate a deformity arising from, or directly related to, a personal injury resulting from an accident or trauma.

(2) She did not undergo SRS or feminizing hormone therapy to ameliorate a deformity arising from, or directly related to, a disfiguring disease.

(3) Neither SRS nor any other surgical or therapeutic procedure has ever changed or altered her genetic makeup.

(4) Her breast augmentation did not promote the proper function of her breasts.

(5) Neither Ellaborn nor Coleman, who made the recommendations that petitioner undergo SRS, is a medical doctor.

Petitioner has conceded the adjustment in the notice of deficiency attributable to the disallowance of a claimed IRA deduction in the amount of \$2,000.

Respondent concedes that petitioner is entitled to the following medical expense deductions in taxable year 2001: dental expenses in the total amount of \$562.50; ophthalmologic expenses in the total amount of \$228.00 for eye doctors and prescriptions; psychiatric expenses in the total amount of \$195.99 for office visits to Dr. Judith Robinson and prescription medications; \$218.10 for prescription medications (painkillers) associated with the SRS performed by Dr. Meltzer in October, 2001; and general medical expenses in the total amount of \$165.00 for primary care doctors and prescription medications other than feminizing hormones.

**BRIEF SYNOPSIS OF LEGAL AUTHORITIES:**

I.R.C. §262(a) provides, in general, that except as otherwise expressly provided, no deduction shall be allowed for personal, living, or family expenses.

I.R.C. §213(a) provides that there shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer . . .to the extent that such expenses exceed 7.5 percent of adjusted gross income.

I.R.C. §213(b) provides that an amount paid during the taxable year for medicine or a drug shall be taken into account under subsection (a) only if such medicine or drug is a prescribed drug or is insulin.

I.R.C. §213(d) provides the following definitions which are pertinent in this case. For purposes of I.R.C. §213,

213(d)(1) The term "medical care" means amounts paid -

213(d)(1)(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body, and

213(d)(1)(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

213(d)(3) Prescribed drug. -The term "prescribed drug" means a drug or biological which requires a prescription of a physician for its use by an individual.

213(d)(4) Physician. -The term "physician" has the meaning given to such term by section 1861(r) of the Social Security Act (42 U.S.C. 1395x(r)).

213(d)(9) Cosmetic surgery. -

213(d)(9)(A) In general. -The term "medical care" does not include cosmetic surgery or other similar procedures, unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.

213(d)(9)(B) Cosmetic surgery defined. -For purposes of this paragraph, the term "cosmetic surgery" means any procedure which is directed at improving the patient's appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.

Treas. Reg. §1.213-1(e)(1)(ii) provides that "[d]eductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness."

The threshold requirement for deductible medical expenses is that they meet the definition of medical care in I.R.C. §213(d). It is respondent's position that petitioner's SRS, feminizing hormones, and associated expenses were not for the cure, mitigation, or treatment of disease, although they did affect a structure or function of her body.

The Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition (DSM-IV), published in 1994, and the Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition Text Revision (DSM-IV-TR), published in 2000, are publications of the American Psychiatric Association. The DSM-IV and DSM-IV-TR are used in the United States for diagnosis of mental disorders. The use of the coding system in the DSM assists the health care provider and the patient in obtaining insurance coverage. However, it is respondent's position that the mere inclusion of a disorder in the DSM-IV and/or DSM-IV-TR does not establish that it is an illness or disease for purposes of I.R.C. §213. The DSM-IV and DSM-IV-TR contain many conditions which are actually social or behavior matters, for example "caffeine intoxication." Other so-called disorders in the DSM appear not to have any component of illness, mental or otherwise, such as "Circadian Rhythm Sleep Disorder, Jet Lag Type," i.e., jet lag.

Both the DSM-IV and DSM-IV-TR contain Cautionary Statements, stating in part that "inclusion...of a diagnostic category...does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability." Further, by their own terms, the DSM-IV and DSM-IV-TR "may not be wholly relevant to legal judgments..."

Respondent's expert witness, Dr. Park Dietz, will testify that GID is not the result of pathology, and therefore is not a disease. Dr. Dietz is a Clinical Professor of Psychiatry and Biobehavioral Sciences at the UCLA School of Medicine. He received his Bachelor's Degree in psychology and biology from the Cornell University College of Arts and Sciences in 1970, his M.D. Degree from Johns Hopkins University School of Medicine in 1975, his Master of Public Health Degree from the Johns Hopkins School of Hygiene and Public Health in 1975, and his Ph.D. in sociology from Johns Hopkins University in 1984. Dr. Dietz has been board certified in psychiatry since 1979. He has practiced as an Assistant Psychiatrist at McLean Hospital (1978-1982), as Director of Forensic Psychiatry at the maximum security Bridgewater State Hospital (1978-1980), and as Medical Director of the Forensic Psychiatry Clinic and the Institute of Law, Psychiatry and Public Policy at the University of Virginia Hospitals (1983-1989).

Dr. Dietz's teaching experience includes serving as a Professor of Law at the University of Virginia School of Law (1986-1989), as Professor of Behavioral Medicine and Psychiatry at the University of Virginia School of Medicine (1986-1989), as Associate Professor of Law and of Behavioral Medicine and Psychiatry at the University of Virginia Schools of Law and Medicine (1982-1986), and as Assistant Professor of Psychiatry at Harvard Medical School (1978-1982).

Dr. Dietz will opine that persons with GID are included in the "range of natural variations in the human condition with respect to subjective identifications of gender identity." Dr. Dietz will further testify that GID has been subject to "medicalization," a "process through which a condition is redefined as being within the jurisdiction of medicine." Homosexuality is a prominent example of a condition which was medicalized. Homosexuality was previously classified as a mental disorder in prior versions of the DSM and has since been removed from the DSM as a mental disorder.

Although petitioner asserts that GID is a congenital abnormality, she has not substantiated that claim. Further, petitioner's claim that she has been cured of GID is in dispute, because she has been under treatment for depression for many years up to the present. Petitioner's depression is described in Robinson's records as ranging from "serious" in December, 2001, shortly after her SRS, to "severe" in March, 2007.

Regarding petitioner's visits for purported counseling with Ellaborn and Coleman, it is respondent's position that these sessions were not for treatment of a disease, but rather for facilitating petitioner's access to SRS. Therefore, the costs of visits to Ellaborn and Coleman are not medical care within the meaning of I.R.C. §213(d)(1)(A).

Even if the Court were to determine that GID is a disease within the meaning of I.R.C. §213(d)(1)(A), petitioner's SRS, feminizing hormones, and associated expenses would still not deductible because they are cosmetic or other similar procedures. I.R.C. §213(d)(9)(B) defines cosmetic surgery as "any procedure which is directed at improving the patient's appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease." Under I.R.C. §213(d)(9)(A), no deduction is allowed for cosmetic surgery or other similar procedures unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or a disfiguring disease.

I.R.C. §213(d)(9) was added to the law by the Omnibus Budget Reconciliation Act of 1990. The legislative history to that section shows that where a procedure changes the appearance of a patient's body, Congress intends that the availability of a medical deduction be limited to either (1) "procedures that are medically necessary to promote the proper function of the body and only incidentally affect the patient's appearance," or (2) "procedures that are for treatment of a disfiguring condition arising from a congenital abnormality, personal injury or trauma, or disease (such as reconstructive surgery following removal of a malignancy)." Informal Senate Report on S. 3209, Vol. 136 Congressional Record S15667, October 18, 1990, at page S15711. Congress was concerned that the Internal Revenue Service had interpreted the term medical care "as including procedures that permanently alter any structure of the body, even if the procedure generally is considered to be an elective, purely cosmetic treatment (such as removal of hair by electrolysis and face lift operations." Id.

The Senate Committee set forth its reason for adding the cosmetic surgery exception to I.R.C. §213 as follows: "Expenses for purely cosmetic procedures that are not medically necessary

are, in essence, voluntary personal expenses, which like other personal expenditures (e.g., food and clothing) generally should not be deductible in computing taxable income." Id. Under the new I.R.C. §213(d)(9), "procedures such as hair removal electrolysis, hair transplants, lyposuction [sic], and face lift operations generally are not deductible. In contrast, expenses that are medically necessary to promote the proper function of the body and only incidentally affect the patient's appearance or expenses for treatment of a disfiguring condition arising from a congenital abnormality, personal injury or trauma or disease (such as reconstructive surgery following removal of a malignancy) continue to be deductible under present-law rules." Id.

In the present case, petitioner changed her appearance from masculine to feminine through a series of hormonal and surgical procedures. Because petitioner expressed distress at her male appearance and desired to look like a woman, it is clear that she intended to change her appearance, and that a feminine appearance was a subjective improvement to her. Therefore, petitioner's SRS and feminizing hormone treatment was directed at improving her appearance. In this regard, the feminizing hormone treatment is excluded from the definition of medical care, even though the hormones were prescribed by a doctor, because they were a cosmetic or similar procedure within the meaning of I.R.C. §213(d)(9).

Petitioner's surgery and hormone treatment did not merely "incidentally" affect her appearance, but rather, it drastically affected her appearance. After being on the hormone therapy prior to her surgery, petitioner was able to live full time in the female role, that is, to "pass" as a woman. The purpose of the surgery was to entirely remove petitioner's male genitalia and to create the appearance of female genitalia by plastic surgery. Petitioner received breast implants to enlarge her breasts, even though she had already obtained breast development as a result of the hormone treatment. Petitioner admits that her breast augmentation did not promote the proper function of her breasts.

SRS and feminizing hormones did not meaningfully promote the proper function of petitioner's body or prevent or treat illness or disease, and is therefore cosmetic in nature. Respondent's expert witness Dr. Chester W. Schmidt, Jr., will testify that SRS does not meaningfully treat GID.

Dr. Schmidt received his Bachelor of Science Degree from Johns Hopkins University (1956), and his medical degree from Johns Hopkins University Medical School (1960). After military service, Dr. Schmidt received his residency training in psychiatry at Johns Hopkins Hospital (1963-1966), and served as Chief Resident in psychiatry at Hopkins in 1967. Dr. Schmidt has been a faculty member at Hopkins since the late 1960's and is currently a Professor of Psychiatry in the Department of Psychiatry and Behavioral Sciences. He is also currently the Chief Medical Director, Johns Hopkins Health Care, and Chair of the Medical Board, Johns Hopkins Bayview Medical Center.

Dr. Schmidt was a co-founder in 1971 of the Sexual Behavior Consultation Unit (SBCU) of the Johns Hopkins Hospital, which has been in existence since that time. More than 500 gender patients have been evaluated through the SBCU. Dr. Schmidt has personally evaluated an average of 12 GID cases per year. It is noted that Johns Hopkins Hospital discontinued its Surgical Reassignment Program in 1976.

Dr. Schmidt will opine that even though GID is a diagnostic category in DSM-IV-TR, it is not universally accepted as a diagnosis. He will also opine that there is not "a consensus in American medicine about the requirements for treating Gender Identity Disorder, the medical necessity of the procedures requested by the patients, or a standard of care that meets the legal definition of a community standard (the care provided by the prudent practitioner in that community)." In Dr. Schmidt's opinion, there is no community standard of care that hormone therapy and SRS must or should be provided to persons with GID. Dr. Schmidt will opine that hormone therapy and SRS are elective procedures which are not medically necessary. It is his opinion that a person may elect such procedures as a personal decision, but that medical providers should properly remain neutral as to those procedures unless they are contraindicated for some medical or psychiatric reason. Further, Dr. Schmidt will testify that there is "no scientific evidence of a genetic or congenital abnormality associated with Gender Identity Disorder."

In sum, petitioner's expenses for feminizing hormones, SRS, and expenses related thereto for transportation and meetings with Ellaborn and Coleman, are non-deductible personal expenses.

**EVIDENTIARY PROBLEMS:**

This case is subject to a protective order of the Court. Petitioner's home address and social security number are under seal. Respondent is endeavoring to redact this information from all stipulated exhibits and non-stipulated exhibits to be exchanged prior to trial. It is possible that petitioner or a subpoenaed witness may present a document which has not been previously stipulated or exchanged with respondent which may not have been so redacted.

As of the date of this trial memorandum, the parties are in the process of preparing a Supplemental Stipulation of Facts. It is possible that evidentiary problems may arise in connection with the Supplemental Stipulation of Facts.

DONALD L. KORB  
Chief Counsel  
Internal Revenue Service

Date: \_\_\_\_\_

By: \_\_\_\_\_

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Docket No. 6402-06

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing PRETRIAL MEMORANDUM FOR RESPONDENT was served on counsel for petitioner by mailing the same on \_\_\_\_\_ in a postage paid wrapper addressed as follows:

Karen L. Loewy, Esq.  
Gay & Lesbian Advocates & Defenders  
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Date: \_\_\_\_\_

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