

# NOTES

## EXAMINING *O'DONNABHAIN V. COMMISSIONER*, 134 T.C. NO. 4 (2010): SEX REASSIGNMENT SURGERY AS A TAX DEDUCTIBLE MEDICAL EXPENSE

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### I. INTRODUCTION

On February 2, 2010, the U.S. Tax Court ruled in *O'Donnabhain v. Commissioner* that a taxpayer's sex reassignment therapy for Gender Identity Disorder ("GID")<sup>1</sup> constitutes deductible medical care under Internal Revenue Code ("I.R.C.") section 213.<sup>2</sup> The case set precedent by determining that some costs of sex-change operations and procedures are tax-deductible.<sup>3</sup> Some believe that *O'Donnabhain* represents a "landmark

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1. "Gender identity disorders are characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one's assigned sex." American Psychiatric Association, *Sexual and Gender Identity Disorders*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000), available at [dsm.psychiatryonline.org](http://dsm.psychiatryonline.org). In other words, a gender identity disorder is "a conflict between a person's actual physical gender and the gender that person identifies himself or herself as. For example, a person identified as a boy may actually feel and act like a girl. The person experiences significant discomfort with the biological sex they were born." *Gender identity disorder*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002495> (last reviewed Feb. 19, 2010). "Gender identity" refers to an individual's "inner sense of self as male or female." *Gender Identity Disorder*, GLAD, [http://www.Genderidentity.glad.org/uploads/docs/news/GID\\_Fact\\_Sheet.pdf](http://www.Genderidentity.glad.org/uploads/docs/news/GID_Fact_Sheet.pdf) (last visited Mar. 15, 2012).

2. See *O'Donnabhain v. Comm'r*, 134 T.C. 34 (2010); *O'Donnabhain v. Commissioner of Internal Revenue*, GLAD (Feb. 2, 2010), <http://www.glad.org/work/cases/in-re-rhiannon-odonnabhain> [hereinafter *Summary of O'Donnabhain*].

3. See *O'Donnabhain*, 134 T.C. See also *Sex-Change Costs Ruled Deductible*, L.A. TIMES, Feb. 4, 2010, at B8.

victory of transgender rights over discriminatory IRS tax policies.”<sup>4</sup> For many, the decision validates the transgender experience by bringing a purported “swift end to the age-old discriminatory practices of the IRS.”<sup>5</sup> Lambda Legal, a national lesbian, gay, bisexual, and transgender (“LGBT”) civil rights group,<sup>6</sup> calls the ruling “a case of the federal government catching up with medical standards.”<sup>7</sup>

*O’Donnabhain*, however, is just the first step in eliminating discriminatory policies that transgendered individuals face. The next step is reforming health insurance policies to reflect the Tax Court’s recognition that GID treatments are not mere cosmetic procedures and that such treatments arise out of medical necessity; therefore, they should be covered under health insurance policies.

This Note explores and supports the correctness of the *O’Donnabhain v. Commissioner* decision and argues for extending its reasoning to other areas of the law, particularly in the field of health insurance. Part II defines “transgender” and discusses various forms of discrimination against transgendered individuals. Part III covers GID, sex reassignment therapy, sex reassignment surgery costs, and post-operative issues. Part IV details Rhiannon O’Donnabhain’s story and what she went through prior to the *O’Donnabhain v. Commissioner* case. Part V summarizes and analyzes the *O’Donnabhain v. Commissioner* majority opinion and dissent. Part VI forecasts the implications of *O’Donnabhain*, particularly on health insurance, taxpayers, society, and the transgender community, and explains how *O’Donnabhain* should be used to further guide policy in the law relating to transgendered individuals. Ultimately, this Note contends that

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4. Keri Renault, *The Real Life Experience of Rhiannon O’Donnabhain: “It’s Such an Affirmation.”*, THE BILERCO PROJECT (Feb. 4, 2010, 2:00 PM), [http://www.bilerco.com/2010/02/the\\_real\\_life\\_experience\\_of\\_rhiannon\\_odonnabhain\\_i.php](http://www.bilerco.com/2010/02/the_real_life_experience_of_rhiannon_odonnabhain_i.php). See also, e.g., Max V. Camp, Case Note, *O’Donnabhain v. Commissioner: Treatment Costs for Gender Identity Disorder are Tax-Deductible Medical Expenses*, 20 LAW & SEXUALITY 133, 141–42 (2011) (“[T]his ruling by the Tax Court is a victory for people suffering from GID who undergo hormone therapy and sex-reassignment surgery . . . This ruling is important because a major branch of the federal government has legitimized both that GID is an actual condition that people suffer from, and it is a condition whose treatment warrants viewing it as a medical expense.”).

5. Renault, *supra* note 4.

6. *About Us*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us> (last visited Apr. 12, 2012).

7. Denise Lavoie, *Woman Says Sex-Change Tax Battle Helps Others*, AZCENTRAL.COM, Feb. 3, 2010, <http://www.azcentral.com/news/articles/2010/02/03/20100203sex-change-tax-break.html>.

*O'Donnabhain v. Commissioner* was rightly decided, should be explicitly codified by Congress, and should encourage health insurance providers to find GID treatment a necessary, coverable expense.

## II. WHAT IS “TRANSGENDERISM?”

### A. DEFINING “TRANSGENDER”

“Transgender” is a general, non-medical, umbrella term for individuals whose gender identity or gender expression “does not conform [to the gender] they were assigned at birth,” frequently called their biological sex.<sup>8</sup> The term “transgender” includes: “transsexuals, cross-dressers, and other gender-variant people,”<sup>9</sup> although not all of these individuals may identify as being transgendered.<sup>10</sup> Transgender individuals may identify as male-to-female (“MTF”), or female-to-male (“FTM”).<sup>11</sup> These terms typically describe “the trajectory of a person who is changing or has changed their body” and the gender under which they are living.<sup>12</sup>

“Transsexualism,” is a clinical term that “refers to people whose gender identity is different from their assigned sex.”<sup>13</sup> It typically refers to

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8. *What Does Transgender Mean?* AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/sexuality/transgender.aspx> (last visited Apr. 12, 2012). See also Center of Excellence for Transgender Health, *Transgender Terminology*, University of California, San Francisco <http://transhealth.ucsf.edu/trans?page=protocol-terminology> (last visited Apr. 12, 2012); *GLAAD Media Reference Guide—Transgender Glossary of Terms*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited Mar. 15, 2012) [hereinafter *GLAAD Transgender Glossary of Terms*]; *Q and A with Paisley Currah, Richard M. Juang, and Shannon Price Minter*, UNIV. OF MINN. PRESS, <http://x-128-101-90-43.upress.umn.edu/excerpts/currahqanda.html> (last visited Mar. 15, 2012) [hereinafter *Q and A*] (discussing transgender issues relating to TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juan & Shannon Price Minter eds., 2006)).

9. *GLAAD Transgender Glossary of Terms*, *supra* note 8. See also Center of Excellence for Transgender Health, *Transgender Terminology*, *supra* note 8; Skyler Raine, *The Difference Between Transgender and Transsexual*, YAHOO! VOICES, Apr. 29, 2010, <http://voices.yahoo.com/the-difference-between-transgender-transsexual-5928104.html>; *Q and A*, *supra* note 8; *What Are Some Categories or Types of Transgender People*, AM. PSYCHOL. ASS'N, <http://www.apa.org/topics/sexuality/transgender.aspx> (last visited Apr. 14, 2012).

10. Center of Excellence for Transgender Health, *Transgender Terminology*, *supra* note 8.

11. *GLAAD Transgender Glossary of Terms*, *supra* note 8.

12. Center of Excellence for Transgender Health, *Transgender Terminology*, *supra* note 8.

13. *What Are Some Categories or Types of Transgender People?*, AM. PSYCHOL. ASS'N, *supra* note 9. See also Wendy S. Biggs, *Medical Human Sexuality*, in *TEXTBOOK OF FAMILY MEDICINE* 1001, 1008–09 (8th ed., 2011).

an individual who seeks to “modify their bod[y]” through hormonal and sometimes surgical treatment.<sup>14</sup> The *O’Donnabhain* court found that transsexualism is a type of GID and for the purposes of this Note, “GID” will refer to transsexualism since sex reassignment therapy is not commonly indicated for GID conditions other than transsexualism.<sup>15</sup> The National Center for Transgender Equality estimates that “between 1/4 and 1% of the [U.S.] population is transsexual.”<sup>16</sup>

Transsexuals and cross-dressers are not the same, and have differing conceptions of gender identification.<sup>17</sup> Similarly, transgenderism is not synonymous with homosexuality.<sup>18</sup> However, in recent years, transgender, gays, lesbians, and bisexuals have united to form a common LGBT civil-rights movement.<sup>19</sup> Both the transgender and gay rights movements are

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14. Center of Excellence for Transgender Health, *Transgender Terminology*, *supra* note 8; Biggs, *supra* note 13, at 1008.

15. See Cigna, *Cigna Medical Coverage Policy: Gender Reassignment Surgery*, (coverage policy no. 0266, Jan 15, 2011), available at [http://www.cigna.com/customer\\_care/healthcare\\_professional/coverage\\_positions/medical/mm\\_0266\\_coveragepositioncriteria\\_gender\\_reassignment\\_surgery.pdf](http://www.cigna.com/customer_care/healthcare_professional/coverage_positions/medical/mm_0266_coveragepositioncriteria_gender_reassignment_surgery.pdf) [hereinafter *Cigna Medical Coverage Policy*].

16. NATIONAL CENTER FOR TRANSGENDER EQUALITY, UNDERSTANDING TRANSGENDER 1 (2009), available at [http://transequality.org/Resources/NCTE\\_UnderstandingTrans.pdf](http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf). The National Center for Transgender Equality notes that the exact number of transsexual people is unknown: “First, there really isn’t anyone collecting this data. It’s not something that the US Census or other agencies keep track of. Second, many transgender people are not public about their identities, so they might not tell anyone about it.” *Id.*

17. *What Are Some Categories or Types of Transgender People?* AME. PSYCHOL. ASS’N <http://www.apa.org/topics/sexuality/transgender.aspx> (last visited Apr. 12, 2012) (“People who cross-dress wear clothing that is traditionally or stereotypically worn by another gender in their culture. They vary in how completely they cross-dress, from one article of clothing to fully cross-dressing. Those who cross-dress are usually comfortable with their assigned sex and do not wish to change it. Cross-dressing is a form of gender expression.”).

18. *Q and A*, *supra* note 8. Homosexuality is “having emotional, romantic, or sexual attractions to members of one’s own sex.” *Sexual Orientation and Homosexuality*, AM. PSYCHOL. ASS’N, <http://www.apa.org/helpcenter/sexual-orientation.aspx> (last visited Mar. 20, 2012). Transgender issues concern “one’s internal gender identity or outward gender expression.” *Q and A*, *supra* note 8. Dissimilarly, being gay, lesbian, or bisexual involves a person’s sexual orientation (homosexual attraction to members of the same sex). *Id.* All individuals have both a gender identity and a sexual orientation. *Id.* A transgender individual can be “heterosexual, gay, lesbian, or bisexual.” *Id.*

19. See Jeninne Lee-St. John, *Viewpoint: Civil Rights and Gay Rights*, TIME, Oct. 25, 2005, <http://www.time.com/time/nation/article/0,8599,1121811,00.html>. See also, e.g., About Us, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/the-hrc-story/about-us> (last visited Apr. 13, 2012) (As the largest civil rights organization working to achieve equality for lesbian, gay, bisexual and transgender Americans, the Human Rights Campaign represents a force of more than one million members and supporters nationwide . . .”).

human rights movements. In 2011 U.S. Secretary of State Hillary Clinton called for nations to recognize gay rights as human rights saying, "It is a violation of human rights when people are beaten or killed because of their sexual orientation, or because they do not conform to cultural norms about how men and women should look or behave."<sup>20</sup>

## B. DISCRIMINATION AGAINST THE TRANSGENDER COMMUNITY

### 1. Discrimination in General

Discrimination against transgenderism in the United States derives from sexist stereotypes, ignorance, bigotry, and fear of difference. Terrifying depictions of transgender individuals in the media make the problem worse.<sup>21</sup> Movies like *Psycho*<sup>22</sup> and *The Silence of the Lambs*,<sup>23</sup> for example, depict transgender individuals as sexual deviants and serial killers.<sup>24</sup> Transgender people may also experience additional sources of discrimination, including racism and sexism<sup>25</sup>

Moreover, transgender people encounter various forms of discrimination with overwhelming personal and financial costs.<sup>26</sup> Surveys report that as many as 97 percent of transgender individuals have "experienced harassment or mistreatment on the job," and 47 percent "lost their jobs, were denied a promotion, or denied a job as [a] result of being

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20. Clinton, *Obama Promote Gay Rights as Human Rights Around the World*, CNN, Dec. 6, 2011, [http://articles.cnn.com/2011-12-06/world/world\\_us-world-gay-rights\\_1\\_gay-rights-gay-behavior-transgendered-people?\\_s=PM:WORLD](http://articles.cnn.com/2011-12-06/world/world_us-world-gay-rights_1_gay-rights-gay-behavior-transgendered-people?_s=PM:WORLD).

21. *Id.*

22. *PSYCHO* (Shamley Productions 1960).

23. *THE SILENCE OF THE LAMBS* (Orion Pictures 1991).

24. *Id.* In *Psycho*, Norman Bates murdered his mother and her lover out of romantic jealousy. See *PSYCHO*, *supra* note 22. He then assumes her dress and persona in committing subsequent murders, acting out as a mother jealous of the women her son finds sexually attractive. *Id.* In *The Silence of the Lambs*, a serial killer murders women to create a "woman suit" out of their skin for himself to wear after he had been unsuccessful in getting a sex-change operation. *THE SILENCE OF THE LAMBS*, *supra* note 23.

25. See generally Jaime M. Grant, Lisa A. Mottet & Justin Tanis, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, 2011* available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf) (reporting the results of a survey of 6450 transgender and gender non-conforming people assessing experiences with discrimination and injustice).

26. Debra Cassens Weiss, *Report: 'Staggering' Rate of Attempted Suicides by Transgenders Highlights Injustices*, ABA J.: LAB. & EMP., Feb. 4, 2011, [http://www.abajournal.com/news/article/staggering\\_rate\\_of\\_attempted\\_suicides\\_by\\_transgenders\\_highlights\\_injustices](http://www.abajournal.com/news/article/staggering_rate_of_attempted_suicides_by_transgenders_highlights_injustices).

transgender.”<sup>27</sup> Transgender people are also more susceptible to poverty because of their greater chance of facing employment discrimination.<sup>28</sup> Correspondingly, they “are more likely to commit survival crimes that may lead to incarceration.”<sup>29</sup>

Additionally, many transgender people cannot obtain medical care or are mistreated by biased health care providers. Sometimes when transgender patients arrive at a hospital, “they are treated as ‘specimens’ and become the butt of jokes.”<sup>30</sup> The death of Tyra Hunter in 1995 exemplifies that some in the medical community treat transgender people with antagonism.<sup>31</sup> Hunter, a male-to-female transsexual, bled to death from severe car accident injuries at the scene because D.C. Fire and Medical Emergency Services rescue workers delayed medical care (while uttering derogatory epithets) after discovering her biological sex.<sup>32</sup>

Furthermore, many transgender people face rejection from their family members and spouses.<sup>33</sup> Some simultaneously lose custody of their children.<sup>34</sup> Moreover, many are regularly denied housing and public services.<sup>35</sup> All of these factors help explain a survey by the National Gay

27. Brief of Amici Curiae Gay & Lesbian Advocates & Defenders et al. in Support of Appellant A.M.B., *In re A.M.B.*, 997 A.2d 754 (2010) (No. 09-634), 2010 WL 3972079 (Me.) [hereinafter Brief of Amici Curiae, *In re A.M.B.*]. In response, multiple states have implemented laws prohibiting discrimination based on sexual orientation. For example, California prohibits discrimination based on gender identity, appearance, and behavior in housing, public and private employment, and public accommodation. See INST. OF REAL ESTATE MGMT., LAWS PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (2007), available at <http://www.irem.org/pdfs/publicpolicy/Anti-discrimination.pdf>.

28. See Grant, Mottet & Tanis, *supra* note 25, at 2 (“Respondents lived in extreme poverty. Our sample was nearly four times more likely to have a household income of less than \$10,000/year compared to the general population.”) See also *Q and A*, *supra* note 8.

29. See Grant, Mottet & Tanis, *supra* note 25, at 3 (“Respondents who were currently unemployed experienced debilitating negative outcomes, including . . . 85% more incarceration . . .”). See also *Q and A*, *supra* note 8.

30. Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road Toward Transgender Health Care Inclusion*, 16 LAW & SEXUALITY 123, 135 (2007).

31. *Id.* at 137.

32. Drake Hagner, Note: *Fighting for our Lives: The D.C. Trans Coalition’s Campaign for Humane Treatment of Transgender Inmates in District Correctional Facilities*, 11 GEO. J. GENDER & L. 837, 842 (2009/2010). See also *Tyra Hunter Anniversary*, TRANSGRIOT.COM (Aug. 7, 2007), <http://transgriot.blogspot.com/2007/08/tyra-hunter-anniversary.html>.

33. Grant, Mottet & Tanis, *supra* note 25, at 8; *Q and A*, *supra* note 8.

34. Grant, Mottet & Tanis, *supra* note 25, at 8.

35. See *Q and A*, *supra* note 8.

and Lesbian Task Force and the National Center for Transgender Equality, finding that “a ‘staggering’ 41 percent of the more than 6,400 respondents said they had attempted suicide, compared to a rate of 1.6 percent for the general population.”<sup>36</sup>

Transgender people are also disproportionately at risk of being a victim of a violent crime.<sup>37</sup> Although thirty states and the District of Columbia have hate crime laws protecting people based on sexual orientation, as of 2007 only ten of these laws provide protection on account of gender identity or expression.<sup>38</sup> Between 1995 and 2005, anti-transgender causes killed “more than one person per month.”<sup>39</sup> As of 2010, advocacy groups report “over 400 people have been murdered in the United States due to anti-transgender bias since 1999.”<sup>40</sup> These estimates may even be too low, because “the number of hate crimes against transgender people are likely underreported because of stigma, lack of knowledge of supportive organizations, and because law enforcement officials remain one of the prime categories of offenders.”<sup>41</sup>

## 2. Discrimination in the Medical Context

To this day, transgender people are medically underserved.<sup>42</sup> For example, “transgender people rank the highest amongst uninsured groups.”<sup>43</sup> The 2011 National Transgender Discrimination Survey found that “[s]tudy participants were less likely than the general population to have health insurance” and that 19 percent had no insurance (compared with 17 percent of the general population).<sup>44</sup> Also, due to the way some health insurance contracts are written, many transgender people are denied health insurance coverage even for treatments unrelated to GID.<sup>45</sup>

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36. Grant, Mottet & Tanis, *supra* note 25, at 2.

37. Brief of Amici Curiae, *In re A.M.B.*, *supra* note 27, at 19.

38. DeCleene, *supra* note 30, at 141.

39. *Id.* at 137.

40. Brief of Amici Curiae, *In re A.M.B.*, *supra* note 27, at 19.

41. *Id.* at 19–20.

42. *See* DeCleene, *supra* note 30, at 135.

43. *See id.* at 139.

44. Grant, Mottet & Tanis, *supra* note 25, at 76.

45. *Health Insurance Discrimination for Transgender People*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/9568.htm> (last visited Jan. 17, 2012). Discrimination against transgender people in health insurance typically takes one of the following forms: (1) denial of any health insurance coverage on the basis of gender identity; (2) denial of coverage for claims related to gender transition; (3) denial of coverage for claims for gender-specific care in conflict with the person’s gender marker on insurance; (4) denial of coverage for claims unrelated to gender transition. *Id.*

Moreover, the vast majority of insurance plans exclude all or most coverage for sex reassignment therapy.<sup>46</sup> Insurance companies claim that transgender procedures are not medically necessary.<sup>47</sup> With respect to employer health insurance plans, it is “difficult to get sex reassignment surgery covered, and many companies call gender identity disorder a pre-existing condition or have exclusions.”<sup>48</sup>

It is clear that these exclusions for sex reassignment surgery are discriminatory. The medical procedures and treatments needed by transgender people are covered for non-transgender individuals under the same plans.<sup>49</sup> For example, it can be assumed that hormone replacement therapy is provided for post-menopausal women; vaginoplasty and phalloplasty would likely be covered after cancer or an accidental injury; and mastectomies and hysterectomies tend to be covered in the case of cancer.<sup>50</sup> A fair and non-discriminating health insurance plan would cover the same medical procedures for everyone, irrespective of whether it relates to transgenderism.<sup>51</sup>

All transgender people deserve unbiased, quality medical care. As stated by the International Bill of Gender Rights, “[n]o individual should be denied access to competent medical or other professional care on the basis of the individual’s chromosomal sex, genitalia, assigned birth sex, or initial gender role.”<sup>52</sup>

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46. See *Sex Reassignment Surgery Cost*, COSTHELPER, <http://www.costhelper.com/cost/health/sex-reassignment-surgery.html> (last updated Aug. 2009); *Health Insurance Discrimination for Transgender People*, *supra* note 45.

47. *Transgender Health Benefits*, TRANSGENDER AT WORK, <http://www.tgender.net/taw/tsins.html> (last visited Jan. 17, 2012).

48. *Sex Reassignment Surgery Cost*, *supra* note 46. “When a company decides to cover medical needs for its transsexual employees, it’s not uncommon for the insurance company to still refuse coverage. Typical plans are worded so that the insurance company makes the determination, even though the plan is employer designed.” *Transgender Health Benefits*, *supra* note 47. But see *Cigna Medical Coverage Policy*, *supra* note 15, for a medical coverage plan that includes gender reassignment surgery, Cigna will cover gender reassignment surgery as medically necessary provided that its conditions (in accordance with the Benjamin Standards of Care) are met. *Id.* The Benjamin Standards of Care were developed by the World Professional Association for Transgender Health; for a discussion of the standards of care, see text accompanying *infra* note 69.

49. *Transgender Health Benefits*, *supra* note 47.

50. *See id.*

51. *See id.*

52. DeCleene, *supra* note 30 at 134. The International Bill of Gender Rights “was first adopted in 1993 by the International Conference on Transgender Law and Employment Policy. . . . [It] has no force of law . . . however, in recent years some of its principles have appeared in various legislative initiatives to protect transgender rights.” Erin Bender,

### III. TRANSSEXUALISM AS A GENDER IDENTITY DISORDER, TREATMENTS, AND MEDICAL COVERAGE

#### A. TRANSSEXUALISM AS A GENDER-IDENTITY DISORDER

The American Psychiatric Association lists GID in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”).<sup>53</sup> The causes and developmental factors associated with GID are currently not well understood.<sup>54</sup> However, the DSM notes that GID “is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics . . . or belief that [the individual] was born the wrong sex. . . . [GID] causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>55</sup> GID sufferers experience “persistent and recurrent discordance between their anatomical birth sex and psychological gender.”<sup>56</sup>

“Gender reassignment therapy” is an umbrella term for all gender reassignment procedures.<sup>57</sup> The word “transition” describes the process of

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Article, “*Until Death (Or Sex Change) Do Us Part*”: *Advocating For Adoption of the European Legal Approach to Validating Marriages Involving Post-Operative Transsexuals*, 18 CARDOZO J.L. & GENDER 35, 52 n. 120 (2011) (internal citations omitted).

53. American Psychiatric Association, *supra* note 1. However, “a growing number of researchers and health care professionals consider transsexuality . . . another variation on human gender, and not a disease or disorder of any kind.” Audrey C. Stirnitzke, Note: *Transsexuality, Marriage, and the Myth of True Sex*, 53 ARIZ. L. REV. 285, 288 (2011). Transgender individuals hold differing opinions regarding GID as a medical diagnosis. *Q and A*, *supra* note 8. Many consider GID as a “positive recognition of a serious health condition.” *Id.* They believe that the GID diagnosis “bestows many benefits upon the transgender community, such as medical grants for further research and insurance coverage.” DeCleene, *supra* note 30, at 136. Meanwhile, other transgender individuals view transgenderism as a normal, non-pathological human variation. Rachael St. Claire, *Culturally Competent Transgender Health Care*, TRANSGENDERSOUL, <http://www.transgendersoul.com/page14/page19/Culturally.html> (last visited Mar. 21, 2012). While they believe that transgenderism is not a choice, they “do not regard their behaviors and feelings as a disorder.” DeCleene, *supra* note 30, at 136. Proponents of this view argue that the GID diagnosis stigmatizes transsexualism by implying that transsexuals are abnormal, pathological, unhealthy, and something that should be cured. *Q and A*, *supra* note 8; DeCleene, *supra* note 30, at 136. Finally, some wish to eliminate the GID diagnosis, but “only when there is some other means for transsexuals to gain access to medical treatment.” *Q and A*, *supra* note 8.

54. *Cigna Medical Coverage Policy*, *supra* note 15.

55. American Psychiatric Association, *supra* note 1.

56. *See Gender Identity Disorder*, *supra* note 1.

57. *Cigna Medical Coverage Policy*, *supra* note 15.

changing from one gender to another.<sup>58</sup> Transgender people who transition commonly change their legal sex designation and legal name.<sup>59</sup>

#### B. TREATMENTS FOR TRANSSEXUALISM

Medical treatments for GID first became available in the late 1800s.<sup>60</sup> In the 1930s, GID treatments expanded past mere castration when synthetic hormones were developed.<sup>61</sup> By the 1950s, GID treatments “were no longer experimental” and “became available to the public.”<sup>62</sup> In the early 1970s, medical professionals coined the term “gender identity disorder.”<sup>63</sup> Since then, “medical discoveries and new techniques have resulted in many choices for transsexual individuals seeking to change their physical sex.”<sup>64</sup> Today, even transgender youths may obtain puberty suppression hormone treatments to ease their transition.<sup>65</sup>

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58. See *FTM Basics: Terminology*, HUDSON’S FTM RESOURCE GUIDE, <http://www.ftmguide.org/terminology.html> (last visited Mar. 22, 2012).

59. *Policy FAQ for Employers of Transgender Workers*, TRANSGENDER AT WORK, <http://www.tgender.net/taw/policyfaq.html> (last visited Mar. 22, 2012).

60. Katrina McCann, *Transsexuals and Title VII: Proposing an Interpretation of Schroer v. Billington*, 25 WIS. J.L. GENDER & SOC’Y 163, 167 (2010).

61. *Id.*

62. *Id.* In 1952, Christine Jorgensen became the first widely-known person to have sex reassignment surgery, creating an international sensation. See generally *Christine Jorgensen (1927–1989)*, TRANSGENDERZONE.COM, <http://www.transgenderzone.com/features/ChristineJorgensen.htm> (last visited Mar. 22, 2012).

63. Polly Reed Myers, *Jane Doe v. Boeing Company: Transsexuality and Compulsory Gendering in Corporate Capitalism*, 36 FEMINIST STUD. 493 (2010).

64. McCann, *supra* note 60, at 167.

65. Bethany Gibson & Anita J. Catlin, *Care of the Child with the Desire to Change Gender—Part 1: Pubertal Delay*, MEDSCAPE TODAY, Apr. 30, 2010, [http://www.medscape.com/viewarticle/718619\\_8](http://www.medscape.com/viewarticle/718619_8).

The primary goals of hormone use for those children who believe they need sex reassignment are twofold. The first is to eliminate, to the degree possible, the hormonally induced sex characteristics of the birth-assigned gender, and secondly, to induce those of the desired gender. . . . Early hormonal treatment can reduce the amount of invasive surgical procedures that may be required with later sex reassignment because irreversible physical development secondary to puberty can be avoided. Female-to-male transitions might avoid the need for mastectomy, and male-to-females might avoid the need for reduction thyroid chondroplasty and voice modification therapy. Initiating pubertal delay at an early age will “most certainly result in high percentages of individuals who will more easily pass into the opposite gender role than when treatment commenced well after the development of secondary sexual characteristics,” which will likely result in better quality of life and perhaps decreased reports of post-operative regret due to poor functioning.

*Id.*

GID must be diagnosed by a mental health professional using four diagnostic criteria:

First, a person must have a strong and persistent cross-gender identification; second, the disturbance causes persistent, intense discomfort with one's sex or sense of inappropriateness in the gender role of that sex; third, the person in question was not born with a physical intersex condition; and fourth, the disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.<sup>66</sup>

Sex reassignment therapy is a protracted process that must be carefully monitored.<sup>67</sup> The official treatment for GID is based on an individualized plan involving one or more of three components: (1) cross-gender hormone therapy; (2) one to two years of a "real-life experience" living full-time in the cross-gender role; and (3) surgical reassignment changing the genitalia and other sex characteristics.<sup>68</sup> These treatments are based on the Benjamin "Standards of Care" for treating gender-dysphoric individuals, which were developed by an international group of experts known as the World Professional Association of Transgender Health ("WPATH").<sup>69</sup> The Benjamin Standards of Care provide a valuable guide for GID evaluation and treatment, and are followed by numerous professionals in the field.<sup>70</sup>

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66. *Gender Identity Disorder*, *supra* note 1. Note that the term "intersex" applies to persons whose biological sex cannot clearly be classified as male or female. *What Is Intersex?*, INTERSEX SOC'Y OF N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Mar. 24, 2012). An intersex person may have biological characteristics of both the male and female sexes. *Id.*

67. *O'Donnabhain v. Comm'r*, 134 T.C. 34, 67 (2010). There are five steps to the sex reassignment process: (1) diagnostic assessment; (2) psychotherapy; (3) hormone therapy; (4) real-life experience; and (5) sex reassignment surgery. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 54–64 (7th ed. 2011), available at [http://www.wpath.org/publications\\_standards.cfm](http://www.wpath.org/publications_standards.cfm).

68. *Gender Identity Disorder*, *supra* note 1; *O'Donnabhain*, 134 T.C. at 67. "Individuals choose different combinations of the [three] available medical treatments, and the decision to pursue sex reassignment surgery is personal." McCann, *supra* note 60, at 178. Of course, there are GID treatments other than WPATH's three-part test. For some people, recreational cross-dressing in private is sufficient. *See* Chriss Pagani, *Treatment of Gender Identity Disorder—What If Surgery Isn't for Me?*, [CHRISSPAGANI.COM](http://www.chrisspagani.com/gender/index06.html), <http://www.chrisspagani.com/gender/index06.html> (last visited Jan. 11, 2012) [hereinafter, Pagani, *What If Surgery Isn't for Me?*]. Others may adjust by simply wearing women's undergarments. *Id.*

69. *See Gender Identity Disorder*, *supra* note 1. WPATH was formerly known as the Harry Benjamin International Gender Dysphoria Association. *Id.*

70. *O'Donnabhain*, 134 T.C. at 67.

Sex reassignment surgery is intended to be a permanent, irreversible change to a person's sexual identity: "Therefore, a careful and accurate diagnosis is essential for treatment and can be made only as part of a long-term diagnostic process."<sup>71</sup>

The sex reassignment "process of 'passing' as the 'opposite' gender begins long before any surgical alterations."<sup>72</sup> Transsexual individuals must begin their transition with small modifications such as "haircuts, changes in clothing, altered body movements, and voice training."<sup>73</sup> They must also undergo at least three months of therapy prior to hormone treatments.<sup>74</sup> Further, to be eligible for sex reassignment surgery, a transsexual individual must live full-time as the desired sex for a minimum of one year: this is sometimes referred to as the Real Life Test ("RLT").<sup>75</sup> Finally, a therapist must give approval before surgical reassignment is performed.<sup>76</sup>

WPATH clarifies that sex reassignment surgery includes all surgical procedures performed as part of a medical treatment for GID.<sup>77</sup> Sex reassignment surgical procedures alter the individual's physical appearance to resemble that of the other sex.<sup>78</sup> There is debate among clinicians about what is medically necessary to treat GID. WPATH, for instance, notes that "[w]hile most professionals agree that genital surgery and mastectomy cannot be considered purely cosmetic, opinions diverge as to what degree

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71. *Cigna Medical Coverage Policy*, *supra* note 15.

72. McCann, *supra* note 60, at 177.

73. *Id.* For example, it has been recommended that transsexuals "start facial hair removal as soon as [they] have a reasonable degree of certainty that [they] will transition, because this process takes years and [f]acial hair is hard to cover with make-up, even with good make-up, and probably gets more people 'read' than anything else." Chriss Pagani, *Treatment of Gender Identity Disorder—Getting Ready for Transition*, CHRISSPAGANI.COM, <http://www.chrisspagani.com/gender/index04.html> (last visited Jan. 11, 2012) [hereinafter, Pagani, *Getting Ready for Transition*]. See also WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 67, at 61.

74. McCann, *supra* note 60, at 177.

75. See *id.*; Pagani, *Getting Ready for Transition*, *supra* note 73. The goal of transsexuals is "to be accepted and to live as their chosen gender." Pagani, *Getting Ready for Transition*, *supra* note 73. "Real transsexuals welcome the opportunity to live full-time as their chosen gender. They know they will be rejected by many people, but living as their chosen gender is more important than avoiding rejection. Persons who seek to avoid RLT are almost certainly not transsexuals." *Id.*

76. McCann, *supra* note 60, at 177.

77. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 67, at 54–55.

78. Center of Excellence for Transgender Health, *Surgical Options*, University of California, San Francisco <http://transhealth.ucsf.edu/trans?page=protocol-surgery> (last visited Apr. 13, 2012).

other surgical procedures (e.g., breast augmentation, facial feminization surgery) can be considered purely reconstructive.”<sup>79</sup> WPATH, however, states that, “sex (gender) reassignment, properly indicated and performed as provided by the Standards of Care, has proven to be beneficial and effective in the treatment of individuals with transsexualism, gender identity disorder, and/or gender dysphoria.”<sup>80</sup> The Center of Excellence for Transgender Health at the University of California, San Francisco notes, “[p]rimary care physicians may recommend procedures necessary for a patient’s over-all health and well-being, such as a hysterectomy/oophorectomy for a female-to-male patient, or urological consults for a male-to female patient, and to assist patients in understanding surgical options.”<sup>81</sup> Sex reassignment surgeries considered “medically necessary” include: “complete hysterectomy, bilateral mastectomy, chest reconstruction or augmentation . . . including breast prostheses if necessary, genital reconstruction (by various techniques which must be appropriate to each patient . . .) . . . and certain facial plastic reconstruction.”<sup>82</sup> WPATH also considers other non-surgical procedures, including facial electrolysis, as medically necessary treatments for GID.<sup>83</sup>

Sex reassignment surgery can be hard to obtain, due to a combination of financial barriers and a lack of providers.<sup>84</sup> For example, “[t]here are only a handful of surgeons specializing in sex reassignment surgery in the United States, and many patients get referrals from other patients or transgender support groups.”<sup>85</sup> Additionally, the sex reassignment process is extraordinarily expensive. Estimates of gender reassignment surgery costs range from above \$70,000 for female to male surgery and more than \$35,000 for male to female surgery.<sup>86</sup>

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79. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 67, at 58.

80. *Medical Necessity Statement*, WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, [http://www.wpath.org/medical\\_necessity\\_statement.cfm](http://www.wpath.org/medical_necessity_statement.cfm) (last revised June 17, 2008).

81. Center of Excellence for Transgender Health, *Surgical Options*, *supra* note 78.

82. *Medical Necessity Statement*, *supra* note 80.

83. *Id.*

84. *See Sex Reassignment Surgery Cost*, *supra* note 46.

85. *Id.*

86. *See* Alesdair H. Ittelson, *Trapped in the Wrong Phraseology: O'Donnabhain v. Commissioner*, 26 BERKELEY J. GENDER L. & JUSTICE 356, 376 (2011); Rachel Gordon, *S.F. Set to add Sex Change Benefits*, S.F. CHRON., Feb. 16, 2001, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/02/16/MN202072.DTL&ao=all>.

After surgery, the patient will have to undergo a psychological adjustment that is critical to the success of the surgery;<sup>87</sup> therefore, continued psychiatric care may be necessary after the operation.<sup>88</sup>

Ultimately, transsexuals generally report that they are happy with the results of their sex reassignment surgeries. A study in 2001 of 232 male-to-female patients found that none of the patients reported complete regret, and only 6 percent reported partial or sporadic regrets.<sup>89</sup>

### C. MODERN DEVELOPMENTS IN OPTIONS FOR OBTAINING TREATMENT FOR GID

#### 1. Recent Improvements

While there is still need for reform, it has become easier for those seeking GID treatment. Currently, some public and commercial health insurance plans in the United States provide coverage for sex reassignment procedures.<sup>90</sup> Additionally, “employers can choose to add coverage for the surgery to their plans; Goldman Sachs offers it, as does the City of San Francisco.”<sup>91</sup> In June 2011, the American Medical Association (“AMA”) issued a statement supporting “public and private health insurance coverage for treatment of gender identity disorder in adolescents and adults.”<sup>92</sup>

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87. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *supra* note 67, at 64–65.

88. *Cigna Medical Coverage Policy*, *supra* note 15. Even after surgery, transsexuals may never fully “pass” as the desired gender. *See* Pagani, *Getting Ready for Transition*, *supra* note 73. Sex reassignment surgery and hormones are rarely enough for a complete transformation. *See id.* Passing as the desired gender depends mostly on whether a person’s body shape falls within the average size and proportion range for the opposite sex and how closely a person’s natural mannerisms match those that society expects of the chosen gender; for example, “[i]f you are 6’10” and 400 lbs, you are never going to pass as a woman.” Pagani, *What If Surgery Isn’t for Me?*, *supra* note 68. Consequently, most post-operation transsexuals have to learn to deal with being pointed out as a person attempting to conceal their gender, otherwise known as “getting read.” Chriss Pagani, *Treatment of Gender Identity Disorder—The Resolution of Treatment*, CHRISSPAGANI.COM, <http://www.chrisspagani.com/gender/index05.html> (last visited Jan. 11, 2012).

89. *See* Lawrence AA, *Factors Associated with Satisfaction or Regret Following Male-to-Female Sex Reassignment Surgery*, 32 ARCHIVES SEXUAL BEHAV. 299, 299–315 (2003).

90. *See Sex Reassignment Surgery Cost*, *supra* note 46. The out-of-pocket costs for sex reassignment patients covered by health insurance include a copay or coinsurance. *Id.*

91. *Id.*

92. *AMA-MSS Digest of Policy Actions*, AM. MED. ASS’N (June 2011), [http://www.ama-assn.org/ama1/pub/upload/mm/15/digest\\_of\\_actions.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/15/digest_of_actions.pdf).

Additionally, some governmental bodies provide means of redressing insurance discrimination against transgender people. Most notably, President Obama's 2010 health care reform bill, the Patient Protection and Affordable Care Act ("PPACA"),<sup>93</sup> will give transgender people greater access to health care and affordable insurance coverage.<sup>94</sup> Also, in 2001, the Superior Court of the State of California held that state insurance for low income people could not "categorically deny treatment to transgender people, must treat each individual on a case by case basis, and cannot deny medically necessary procedures."<sup>95</sup> In 2005, the California legislature amended the Health and Safety Code to prohibit insurance companies from discriminating against people on the basis of their gender status.<sup>96</sup> Thus, "California became the first state to expressly prohibit discrimination against transgender people in insurance."<sup>97</sup> Washington followed suit, and passed similar legislation in 2006.<sup>98</sup>

Furthermore, recent information supports the proposition that it will cost insurance companies very little to cover the basic needs of a transsexual.<sup>99</sup> Transsexualism is rare.<sup>100</sup> In a hypothetical world where all insurance plans cover GID treatments, the estimated total annual cost per insured would be \$0.05 for sex reassignment surgery, or \$0.17 for surgery, hormones, and therapy.<sup>101</sup>

## 2. President Obama's Affordable Care Act & the Transgender Community

On March 23, 2010, President Obama signed the health care reform bill, the PPACA, into law.<sup>102</sup> The Act allows millions of Americans access

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93. Patient Protection and Affordable Care Act. Pub. L. No. 111-148, 124 Stat. 119 (2010).

94. *See Being a Transgender Person Is No Longer a Pre-Existing Condition*, ADVANCING TRANSGENDER EQUALITY (Mar. 29, 2010, 05:12 PM), <http://transgenderequality.wordpress.com/2010/03/29/being-a-transgender-person-is-no-longer-a-pre-existing-condition>.

95. *Recommendations for Transgender Health Care*, TRANSGENDER LAW CENTER (Feb. 2, 2012, 5:00PM), <http://www.transgenderlaw.org/resources/tlchealth.htm>.

96. Act of Feb. 22, 2005, 2005 Cal. Legis. Serv. 421 (A.B. 1586) (West) (Codified at CAL. HEALTH & SAFETY CODE § 1365.5; CAL. INS. CODE § 10140).

97. KAREN MOULDING & NAT'L LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW § 9:23 (2010).

98. *Id.*

99. *See Transgender Health Benefits*, *supra* note 47.

100. *Id.*

101. *Transgender Health Benefits*, *supra* note 47.

102. Patient Protection and Affordable Care Act. Pub. L. No. 111-148, 124 Stat. 119-124, 1025 (2010).

to affordable insurance coverage and quality health care.<sup>103</sup> For example, “[t]hanks to the Affordable Care Act, many gay and transgender Americans who were never able to afford health insurance or health care soon will be able to apply for Medicaid or affordable private coverage in every state.”<sup>104</sup>

Although “only one provision [of the PPACA] (section 5306, regarding participation by people of ‘different genders and sexual orientations’ in mental and behavioral health education and training programs) explicitly mentions the LGBT community,” the Act “as a whole implicitly recognizes the toll that disparities, discrimination, and inequity are taking” on the LGBT community.<sup>105</sup>

The PPACA prohibits insurance companies from denying or dropping coverage based on an individual’s pre-existing conditions.<sup>106</sup> Hence, a transgender person cannot be denied coverage or be dropped by an insurance company even if the company labels transgenderism as a pre-existing condition.<sup>107</sup> Moreover, the Act “seeks to fill knowledge gaps in health care by collecting health and health disparities data.”<sup>108</sup> Because there is a “dearth of data on the health status and outcomes of LGBT people, these provisions of the law have great potential to expand our understanding of the particular needs and concerns of the LGBT community.”<sup>109</sup> However, the Act’s “prohibition against discriminating based on pre-existing conditions does not force private and public insurance [companies] to cover transition-related care.”<sup>110</sup>

#### IV. RHIANNON O’DONNABHAIN’S STORY

Rhiannon O’Donnabhain is a transgender woman who underwent sex reassignment surgery and hormone therapy for GID in 2001.<sup>111</sup> She was born anatomically male and grew up in a devout Irish Catholic family in

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103. *Being a Transgender Person Is No Longer a Pre-existing Condition*, *supra* note 94.

104. KELLAN BAKER & JEFF KREHELY, *CHANGING THE GAME*, 1 (2011), available at [http://www.americanprogress.org/issues/2011/03/pdf/aca\\_lgbt.pdf](http://www.americanprogress.org/issues/2011/03/pdf/aca_lgbt.pdf).

105. *Id.* at 7.

106. *Being a Transgender Person Is No Longer a Pre-existing Condition*, *supra* note 94. It should be noted, however, that this portion of the health care reform act will not be enforced until 2014. *Id.*

107. *Id.*

108. BAKER & KREHELY, *supra* note 104, at 14.

109. *Id.*

110. *Being a Transgender Person Is No Longer a Pre-existing Condition*, *supra* note 94.

111. *Summary of O’Donnabhain*, *supra* note 2.

Boston.<sup>112</sup> She began having conflicting feelings about her gender identity during her childhood.<sup>113</sup> At ten years of age, she secretly started wearing women's clothing.<sup>114</sup> Her discomfort in the male gender role intensified through adolescence<sup>115</sup> as she increasingly imagined herself as a woman.<sup>116</sup> She continuously felt that she was a female trapped in a male body.<sup>117</sup>

For decades, O'Donnabhain conformed to traditionally masculine roles and "tried hard to fit into the male role—to do 'masculine' things—to make [those] feelings go away."<sup>118</sup> She served on active duty in the U.S. Coast Guard during the Vietnam War, worked at an engineering firm, married, and even had three children.<sup>119</sup> Yet, even with her "male" façade, her strong sense of femininity persisted: "The dissonance between who she felt she was inside and who she saw in the mirror caused her acute distress."<sup>120</sup>

After getting divorced in 1992, O'Donnabhain hit a point where "she could no longer stand her inner discord."<sup>121</sup> She fixated on the feeling that she inhabited the wrong body.<sup>122</sup> This suffering hurt her ability to interact with others, including her own family.<sup>123</sup>

In 1996, O'Donnabhain saw a therapist and was diagnosed with GID,<sup>124</sup> pursuant to the standards set out in the DSM.<sup>125</sup> For O'Donnabhain, the GID "diagnosis meant that after a lifetime of feeling utterly alone and misunderstood, she finally had a language for what she had experienced since childhood."<sup>126</sup> Furthermore, the diagnosis, with its

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112. *Id.*

113. O'Donnabhain v. Comm'r, 134 T.C. 34, 35 (2010).

114. *Id.*

115. *Id.* See also, *Summary of O'Donnabhain*, *supra* note 2.

116. *Summary of O'Donnabhain*, *supra* note 2.

117. O'Donnabhain, 134 T.C. No. 4, 134 T.C. at 35.

118. *Summary of O'Donnabhain*, *supra* note 2.

119. O'Donnabhain, 134 T.C. No. 4, 134 T.C. at 35.

120. *Summary of O'Donnabhain*, *supra* note 2.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Jeremiah Coder et al., *Tax Court Finds Controversial Surgery Mostly Deductible*, TAX NOTES TODAY, Feb. 4, 2010, available at LEXIS 2010 TNT 24-2. See also American Psychiatric Association, *supra* note 1.

126. *Summary of O'Donnabhain*, *supra* note 2.

“prescribed course of treatment,” gave her “hope that at last she could feel better.”<sup>127</sup>

O’Donnabhain’s GID treatment thus began, which culminated in sex reassignment surgery after her health care providers determined that it “was critical to enable her to live her life as a woman.”<sup>128</sup> In addition to the sex reassignment surgery, she underwent hormone therapy, and breast augmentation treatments for her GID.<sup>129</sup> After the surgery O’Donnabhain felt “immediate relief,” and felt like she could finally live her life comfortably.<sup>130</sup>

The following year, O’Donnabhain claimed her sex reassignment surgery as deductible medical expenses on her 2001 Federal income tax return.<sup>131</sup> The IRS audited O’Donnabhain, determined that her surgery was “cosmetic,” and disallowed the deduction under I.R.C. § 213(d)(9).<sup>132</sup> O’Donnabhain disagreed with the IRS’s conclusion and eventually brought suit against the IRS.<sup>133</sup> She argued that her sex reassignment therapy was as medically needed as “an appendectomy or heart bypass surgery.” Thus, it was deductible under I.R.C. § 213.<sup>134</sup>

O’Donnabhain’s primary objective in suing the IRS was to receive “fair and equal treatment—to not be discriminated against simply because she is transgender.”<sup>135</sup> She won her case on February 2, 2010.<sup>136</sup>

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127. *Id.*

128. *Id.*

129. Coder et al., *supra* note 125.

130. *Summary of O’Donnabhain, supra* note 2.

131. See Ann Murphy, *Gender Reassignment Surgery and Hormone Therapy: Section 213 Medical Expense Deduction Upheld*, LEXISNEXIS TAX L. COMMUNITIES (Feb. 3, 2010, 11:47 AM), [http://www.lexisnexis.com/Community/taxlaw/blogs/practitionerscorner/archive/2010/02/18/Gender-Reassignment-Surgery-and-Hormone-Therapy\\_3A00\\_-Section-213-Medical-Expense-Deduction-Upheld.aspx](http://www.lexisnexis.com/Community/taxlaw/blogs/practitionerscorner/archive/2010/02/18/Gender-Reassignment-Surgery-and-Hormone-Therapy_3A00_-Section-213-Medical-Expense-Deduction-Upheld.aspx).

132. *Id.*; *Summary of O’Donnabhain, supra* note 2.

133. See *Summary of O’Donnabhain, supra* note 2. After O’Donnabhain’s medical deduction was denied, she filed an appeal, lost the appeal, and filed suit in U.S. Tax Court. *Win in O’Donnabhain Tax Court Case: GID Qualifies as Medical Care*, GLAD, <http://www.glad.org/uploads/docs/publications/odonnabhain-win.pdf> (last updated Jan. 2012) [hereinafter *Win in O’Donnabhain*].

134. *Summary of O’Donnabhain, supra* note 2.

135. *Id.*

136. *Id.*

## V. O'DONNABHAIN V. COMMISSIONER CASE

## A. BACKGROUND INFORMATION ON I.R.C. § 213

The crux of *O'Donnabhain v. Commissioner* revolves around I.R.C. § 213, which allows deductions for medical expenses exceeding 7.5 percent of a taxpayer's adjusted gross income.<sup>137</sup> Section 213 of the Internal Revenue Code provides the following:

(a) Allowance of deduction. 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, his spouse, or a dependent . . . to the extent that such expenses exceed 7.5 percent of adjusted gross income.

. . . .

(d) Definitions. For purposes of this section—

(1) The term “medical care” means amounts paid—

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

. . . .

(9) Cosmetic surgery.

(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.

(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.<sup>138</sup>

The legislative intent behind this section is to relieve taxpayers of “extraordinary” medical expenses—expenses so burdensome that they reduce taxpayers' ability to pay their taxes.<sup>139</sup>

Prior to 1990, “the courts and the IRS held that cosmetic surgery was also medical care, even though its therapeutic effect may be limited to the

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137. See 26 I.R.C. § 213 (2011).

138. *Id.*

139. See James W. Colliton, *The Medical Expense Deduction*, 34 WAYNE L. REV. 1307, 1316–17 (1988).

taxpayer's self-image."<sup>140</sup> In 1990, Congress amended section 213 to exclude cosmetic surgery from the definition of deductible medical care.<sup>141</sup> Congress "deemed the amendment necessary to clarify that deductions for medical care do not include amounts paid for 'an elective, purely cosmetic treatment.'"<sup>142</sup> Currently, cosmetic surgery is considered a personal expense that the government will not reimburse—the Senate Finance Committee report relating to the amendment explains the following:

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. . . . In contrast, expenses for procedures that are medically necessary to promote the proper function of the body and only incidentally affect the patient's appearance or expenses for the treatment of a . . . disease . . . continue to be deductible.<sup>143</sup>

#### B. LEADING UP TO THE CASE

The IRS initially gave O'Donnabhain a refund for her medical deduction claim.<sup>144</sup> However, after a subsequent audit, the IRS denied her deduction and demanded the refund back.<sup>145</sup> The IRS explained their decision by issuing a legal memorandum that concluded that sex reassignment therapy constituted nondeductible "cosmetic surgery."<sup>146</sup>

In its analysis, the IRS positioned GID as a mere social condition and argued that GID was not a real experience.<sup>147</sup> The IRS further reasoned that GID was not a "disease" for the purposes of section 213 because its clinically significant symptoms lacked a "physiological origin," and it did not "reflect pathology at a cellular level."<sup>148</sup> Since GID was not a disease, and its treatments were "not medically necessary," it followed that sex reassignment procedures were "cosmetic" in nature, undertaken for the sole purpose of improving one's appearance.<sup>149</sup> The IRS therefore found that

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140. Boris I. Bittker & Lawrence Lokken, *Medical & Dental Expenses—In General*, in FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 36.2 (1997), available at 1997 WL 439677.

141. See O'Donnabhain v. Comm'r, 134 T.C. 34, 51 (2010).

142. *Id.*

143. *Id.* at 51 n.27.

144. Coder et al., *supra* note 125.

145. *Id.*

146. *Id.*

147. Renault, *supra* note 4.

148. *Id.*

149. See *id.*

O'Donnabhain's sex reassignment costs were nondeductible under section 213's explicit "cosmetic surgery" exception.<sup>150</sup> In addition, the IRS argued that gender reassignment surgery was controversial, "so an extension of the limits of medical deductibility should not occur absent 'unequivocal expression of Congressional intent.'"<sup>151</sup>

### C. CASE SUMMARY AND MAJORITY OPINION

At issue in *O'Donnabhain v. Commissioner* was "whether [a taxpayer could] deduct as a medical care expense under section 213 amounts paid in 2001 for hormone therapy, sex reassignment surgery, breast augmentation surgery that [the taxpayer contended] were incurred in connection" with *GID*.<sup>152</sup> Ultimately, the U.S. Tax Court held on February 2, 2010, that the taxpayer's sex reassignment surgery and hormone therapy treatments for *GID* were deductible medical expenses under section 213.<sup>153</sup> However, the Tax Court denied the taxpayer's breast augmentation surgery deduction.<sup>154</sup>

In an opinion written by Judge Joseph H. Gale, the U.S. Tax Court ruled 11–5 that O'Donnabhain's claimed expenses for sex reassignment surgery and hormone therapy treatments were properly deductible under I.R.C. § 213(a).<sup>155</sup> The majority, using "settled principles of statutory construction" and case precedent, rejected the IRS's argument that a "disease" must have a "demonstrated organic origin of physiological origin in the individual."<sup>156</sup> The court rejected the IRS's interpretation of the meaning of disease, finding it "incompatible with the stated intent of the regulations and legislative history to cover 'mental defects' generally," and that it was "contradicted by a consistent line of cases finding 'disease' in the case of mental disorders without regard to any demonstrated etiology."<sup>157</sup> It concluded that *GID*, as a mental disorder, qualified as a "disease" within the meaning of section 213.<sup>158</sup>

The court recognized that O'Donnabhain was correctly diagnosed with *GID*.<sup>159</sup> The court then considered whether O'Donnabhain's sex

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150. Coder et al., *supra* note 125.

151. *Id.*

152. *O'Donnabhain v. Comm'r*, 134 T.C. 34, 35 (2010).

153. *Id.* at 76–77.

154. *Id.* at 72–73.

155. *Id.* at 76–77.

156. *Id.* at 55–56.

157. *Id.* at 59.

158. *Id.* at 59, 76.

159. *Id.* at 64.

reassignment surgery, hormone therapy, and breast augmentation surgery actually treated her *GID*.<sup>160</sup> The court referred to *WPATH*'s "Benjamin Standards of Care" for treating gender-dysphoric individuals.<sup>161</sup> It found that the "triadic" treatment sequence of the Benjamin Standards of Care involving hormonal sex reassignment, prolonged real-life experience, and sex reassignment surgery, constituted not only medical care treatment for *GID*, but also "the consensus of the medical profession regarding the appropriate treatment for *GID* or transsexualism."<sup>162</sup> The court accordingly held that O'Donnabhain's sex reassignment surgery and hormone therapy treatments were deductible medical care expenses under section 213.<sup>163</sup>

However, the court ruled that O'Donnabhain's breast augmentation surgery fell under section 213's cosmetic surgery exception because it did not treat her *GID*.<sup>164</sup> The Court found that "[t]he Benjamin [S]tandards provide that breast augmentation surgery for a male-to-female patient 'may be performed if the physician prescribing hormones and the surgeon have documented that breast enlargement after undergoing hormone treatment for 18 months is not sufficient for comfort in the social gender role.'"<sup>165</sup> O'Donnabhain did not have the requisite documentation at the time of her breast surgery.<sup>166</sup> Also, prior to O'Donnabhain's breast augmentation surgery, her hormonal treatments had already given O'Donnabhain "approximately B cup breasts with a very nice shape," that were "within a normal range of appearance" for a female.<sup>167</sup> Thus, the court found that O'Donnabhain's surgical enhancements did not "treat" her *GID*, but "merely improved her appearance."<sup>168</sup>

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160. *Id.* at 66–76. The court defined "treat" in its ordinary, plain-language sense, looking to dictionary definitions finding that to "treat" is to "deal with (a disease, patient, etc.) in order to relieve or cure," or "to seek to cure or reliev[ve] [a disease]." *Id.* at 64–65.

161. *Id.* at 65.

162. *Id.* at 65–67.

163. *Id.* at 76–77.

164. *Id.* at 73.

165. *Id.* at 72.

166. *Id.*

167. *Id.* at 72–73. However, Judge Halpern noted in his concurring opinion that O'Donnabhain's breast enhancement surgery differed from breast enhancement surgery performed on biological females. *Id.* at 78 (Halpern, J., concurring). The primary purpose of O'Donnabhain's breast surgery was "to assign her to the appropriate gender" by giving her a "female looking breast, which is quite different from a male breast." *Id.*

168. *Id.* at 73 (majority opinion).

## D. DISSENTING OPINION

Judge Gustafson's dissenting opinion in *O'Donnabhain* argued that sex reassignment treatment expenses should not be deductible under section 213.<sup>169</sup> This opinion presents a disturbing hostility toward O'Donnabhain and the transgender community, arising from what appears to be his preconceived notions about transgenderism.<sup>170</sup>

For example, throughout his dissent, Judge Gustafson reluctantly referred to O'Donnabhain as female.<sup>171</sup> He stated, “[c]onsistent with petitioner’s preference,” he would “use feminine pronouns to refer to petitioner in her post-SRS [sex reassignment surgery] state,” but he does not believe that doing so reflects “a conclusion that petitioner’s sex has changed from male to female.”<sup>172</sup>

Judge Gustafson contended the following:

The majority concludes that GID is a “serious *mental* disorder”—i.e., a disease in petitioner’s mind—and I accept that conclusion. A procedure that changes the patient’s healthy male body (in fact, that disables his healthy male body) and leaves his mind unchanged (i.e., with the continuing misperception that he is female) has not treated his mental disease. On the contrary, that procedure has given up on the mental disease, has capitulated to the mental disease, has arguably even changed sides and joined forces with the mental disease. In any event, the procedure did not (in the words of *Havey v. Commissioner*) “bear directly on the condition in question,” did not “deal with” the disease (per Webster’s), did not “treat” the mental disease that the therapist diagnosed. Rather, the procedure changed only petitioner’s healthy body and undertook to “mitigat[e]” the effects of the mental disease. . . . [E]ven if SRS is the best that medicine can do for him—it is an otherwise cosmetic procedure that does not “treat” the mental disease.<sup>173</sup>

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169. *Id.* at 122 (Gustafson, J., concurring in part, dissenting in part).

170. Anthony C. Infanti, *Dissecting O'Donnabhain*, 126 TAX NOTES TODAY 1403 (2010), available at LEXIS 2010 TNT 51-10.

171. *Id.*

172. *O'Donnabhain*, 134 T.C. at 109 n.2 (Gustafson, J., concurring in part, dissenting in part).

173. *Id.* at 122. Judge Gustafson conceded that O'Donnabhain's sex reassignment surgery “mitigat[ed] the effects of the mental disease.” *Id.* Yet, according to Gustafson, the surgery left her mind unchanged, and therefore failed to “treat” her mental disease. *Id.* There are two flaws in his reasoning. First, it is logically impossible that a procedure mitigated the effects of a mental disease without changing the person’s mind. This is common sense. Secondly, his argument is inconsistent with section 213. Under section 213, prescription drugs are tax-deductible. See 26 I.R.C. § 213(b) (2011). This means that prescription drugs, such as Lexapro, that merely “mitigate” the effects of anxiety and depression, are tax-

In the above statement, Judge Gustafson superimposed both O'Donnabhain's personal sense of self (her post-operative feelings of relief and healing)<sup>174</sup> and the judgment of her doctors with his own preconceived notions about O'Donnabhain's condition.<sup>175</sup> Judge Gustafson reasoned that there was nothing wrong with O'Donnabhain's healthy male body, so the GID she suffered was essentially a mere delusion.<sup>176</sup>

Ultimately, Judge Gustafson's contemptuous dissent "demonstrates how the medicalization and pathologization of gender identity can be manipulated to advance stereotypical and biased views of transgender individuals."<sup>177</sup> Likewise, it illustrates Judge Gustafson's inability to accept another person's unfamiliar, subjective point of view. Thus, this opinion reflects discriminatory views and demonstrates the necessity for an increased awareness and understanding of transgenderism, in order for courts and judges to reach correct legal decisions regarding necessary medical expenses, such as gender reassignment surgery, with regard to GID treatment.

## VI. IMPLICATIONS OF THE *O'DONNABHAIN VS. COMMISSIONER* CASE—WHERE TO GO FROM HERE

### A. ACTIONS TRANSGENDER INDIVIDUALS CAN IMMEDIATELY TAKE

Following *O'Donnabhain v. Commissioner*, transgender individuals possibly may retroactively amend their tax returns for up to three years.<sup>178</sup> Additionally, the *O'Donnabhain* decision makes it easier for transgender

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deductible. See Paul Bright, *What Happens When You Stop Taking Lexapro*, EHOW.COM, [http://www.ehow.com/how-does\\_4569432\\_what-happens-stop-taking-lexapro.html](http://www.ehow.com/how-does_4569432_what-happens-stop-taking-lexapro.html) (last visited Jan. 17, 2012). Like Lexapro, sex reassignment surgery should be tax-deductible.

174. See *Summary of O'Donnabhain*, *supra* note 2.

175. *Infanti*, *supra* note 170.

176. See *O'Donnabhain*, 134 T.C. at 121 (Gustafson, J., concurring in part, dissenting in part). See also *Infanti*, *supra* note 170. How will this argument stand in cases where a person has six fingers, webbed feet, or some other physical anomaly? A human body with six fingers or webbed feet may be perfectly healthy. In fact, six fingers or webbed feet may enhance a person's functionality (grasp larger things or swim better). Is the distress from having six fingers or webbed feet also a delusion?

177. *Infanti*, *supra* note 170.

178. Renault, *supra* note 4; Boyce Hinman, *Major Victory For Transgender People*, OUTWORD MAGAZINE, <http://www.outwordmagazine.com/index.php/inside-outword/glb-news/164-major-victory-for-transgender-people> (last visited Apr. 14, 2012).

individuals who claim a deduction for medical expenses related to the treatment of GID to win a challenge to that deduction by the IRS.<sup>179</sup>

#### B. CONGRESS SHOULD REACT BY CLARIFYING I.R.C. § 213

A congressional reaction to the *O'Donnabhain* decision is unlikely. Although “Congress may well have meant to exclude treatments just like this” under a strict statutory interpretation of “cosmetic surgery” in section 213,<sup>180</sup> such an interpretation is greatly outdated. It has been more than twenty years since Congress integrated section 213’s “cosmetic surgery” exception in 1990.<sup>181</sup>

In addition, before *O'Donnabhain*, the U.S. Tax Court rarely addressed tax issues specific to the LGBT community.<sup>182</sup> In fact, the Tax Court had been “less than friendly in its dealings with LGBT taxpayers.”<sup>183</sup> However, the Tax Court’s unexpected shift in favor of O'Donnabhain and transgender issues suggests that a significant number of government officials may now hold a different, more positive, and modernized awareness of LGBT issues.<sup>184</sup>

Thus, advocacy is needed to raise awareness of these tax issues as they relate to transgender issues. These groups should advocate the correctness of the *O'Donnabhain* decision, and urge Congress to clarify that GID treatment such as Rhiannon O'Donnabhain’s should be a deductible medical expense, and not exempt as mere cosmetic surgery.

#### C. THE DEDUCTIBILITY OF BREAST AUGMENTATION IN CONNECTION WITH GID TREATMENT

Under *O'Donnabhain*, sex reassignment procedures that “treat” GID are tax deductible.<sup>185</sup> In male-to-female transitions, “passing” as a female is vital to the mental health of a male GID sufferer, so surgery “treats” GID

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179. Obviously, the *O'Donnabhain* decision does not guarantee that the IRS will approve every GID related medical deduction. The IRS can always audit the medical deduction and require strong documentation from care providers that the treatment is medically appropriate. *Win in O'Donnabhain*, *supra* note 133.

180. Coder et al., *supra* note 125. “Andy R. Anderson, a partner with Morgan, Lewis & Bockius LLP in Chicago, found the outcome of the case surprising, disagreeing with the finding purely from a strict statutory interpretation of section 213.” *Id.*

181. *See O'Donnabhain*, 134 T.C. at 51.

182. *Infanti*, *supra* note 170.

183. *Id.*

184. *See id.*

185. *See O'Donnabhain v. Comm'r*, 134 T.C. 34, 76–77 (2010).

when it “effect[s] a female appearance in a genetic male.”<sup>186</sup> This concept would apply to female-to-male transitions, as well.

However, the Tax Court ruled that O’Donnabhain’s breast augmentation surgery constituted nondeductible, cosmetic surgery because it did not “treat” her GID.<sup>187</sup> Katherine Pratt, a Loyola Law School Los Angeles professor, and Roberta C. Watson of Trenam Kemker in Tampa, Florida, questioned the correctness of the *O’Donnabhain* court’s denial of the breast augmentation deduction.<sup>188</sup> They focused on an example in section 213’s legislative history, which “allow[s] a medical expense deduction for expenses related to breast reconstructive surgery following a mastectomy or lumpectomy.”<sup>189</sup> Breast enhancement surgery for the treatment of mastectomy and lumpectomy does not result in actual breast function.<sup>190</sup> Rather, those procedures, like O’Donnabhain’s, are “really just about ‘appearance that permits passing.’”<sup>191</sup> Pratt and Watson argued that because breast augmentation surgery for mastectomy or lumpectomy is deductible under section 213, breast augmentation for GID should be too.

The principal flaw in Pratt and Watson’s argument is their failure to address O’Donnabhain’s pre-operative, B-cup breast size. Numerous women have A or B-cup breasts, so O’Donnabhain’s B-cup breasts may have been sufficient for a feminine “appearance that permits passing.”<sup>192</sup> Similarly, Pratt and Watson’s analogy to mastectomy and lumpectomy is

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186. *See id.* at 73 n.52. Under *O’Donnabhain*, GID treatments serving the same therapeutic purposes as (genital) sex reassignment surgery and hormone therapy (effecting an opposite gender appearance) are deductible medical care expenses under section 213. *Id.* Thus, deductible male-to-female reassignment procedures would include: vaginoplasty, colovaginoplasty, orchiectomy, penectomy, clitoroplasty, and labiaplasty. *See Cigna Medical Coverage Policy, supra* note 15. Furthermore, deductible female-to-male reassignment procedures include: initial mastectomy or breast reduction, hysterectomy, salpingo-oophorectomy, colpectomy/vaginectomy, urethroplasty, metoidioplasty combined with initial phalloplasty. *See id.*

Non-genital procedures may also be deductible under *O’Donnabhain* provided that there is requisite proof or documentation consistent with the Benjamin Standards of Care. *See O’Donnabhain*, 134 T.C. at 72–73. Facial feminization surgery and breast augmentation surgery are potentially deductible. *Id.* In sum, under *O’Donnabhain*, it appears that every procedure that is “necessary” for the treatment of GID (cross-gender transition) is deductible so long as there’s proof consistent with the Benjamin standards that the procedure actually “treats” GID.

187. *See O’Donnabhain*, 134 T.C. at 72–73.

188. Coder et al., *supra* note 125.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

somewhat misleading. Both mastectomy and lumpectomy involve breast tissue removal for the treatment or prevention of breast cancer.<sup>193</sup> O'Donnabhain, with her B-cup breasts that had a "very nice shape,"<sup>194</sup> probably did not need breast augmentation to the same extent as post-mastectomy or post-lumpectomy women with lumpy, imbalanced, or missing breasts.

The determinative question should be whether O'Donnabhain's B-cup breasts from hormone therapy treatments were sizable enough to make her feel comfortably feminine. Although B-cup breasts are common amongst women, having a B-cup does not necessarily make a person feel feminine. O'Donnabhain's B-cup breasts may have been disproportionately small for her frame. Presumably, many unequivocally masculine and overweight men also have B-cup sized breasts. Additionally, O'Donnabhain had altered her B-cup breasts contemporaneous with genital reassignment surgery in an effort to feminize her body.<sup>195</sup> Her actions imply her discomfort "with her [B-cup] breasts 'in the social gender role.'"<sup>196</sup> It is probable that the therapeutic effect of her breast augmentation surgery really did "treat" her GID, contrary to the court's conclusion.

The problem with a finding based on feelings and inferences is that it would be too subjective, create loopholes, and would be difficult to regulate. Though the court's conclusion that O'Donnabhain's breast augmentation surgery did not treat her GID seems highly unsubstantiated (based partly on the supposed normalcy of her B-cup breasts),<sup>197</sup> O'Donnabhain did fail to meet her burden of proof in providing necessary documentation to justify her breast augmentation surgery. The court correctly held that she did not meet her burden of proof.

However, the *O'Donnabhain* decision should not stand for the proposition that breast augmentation is not a deductible medical expense as GID treatment. While courts should not look toward subjective "feelings and inferences" tests in determining the medical necessity of the procedure, courts should assess the issue based on quantifiable medical data, such as

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193. See *Mastectomy*, BREASTCANCER.ORG, <http://www.breastcancer.org/treatment/surgery/mastectomy/> (last modified Mar. 15, 2012) (defining "Mastectomy"); *Lumpectomy*, BREASTCANCER.ORG, <http://www.breastcancer.org/treatment/surgery/lumpectomy/> (last modified Mar. 15, 2011) (defining "Lumpectomy").

194. O'Donnabhain v. Comm'r, 134 T.C. 34, 72 (2010).

195. See *Id.* at 41–42.

196. *Id.* at 73.

197. See *id.* at 72–73.

the necessary documentation O'Donnabhain failed to provide to the court regarding her breast augmentation, and other relevant medical documentation and testimony from qualified medical professionals on the necessity of the procedure for the treatment of GID.

#### D. HEALTH INSURANCE PLANS & POLICIES

For many, *O'Donnabhain* provides a strong argument against “unjust health insurance exclusions for transgender medical care.”<sup>198</sup> While *O'Donnabhain* does not directly affect private health insurance plans, health insurance companies “may find it persuasive that a federal court has found that hormone therapy and [sex reassignment surgery] are ‘well-recognized and accepted’ treatments for Gender Identity Disorder and were ‘medically necessary’ for the petitioner in that case.”<sup>199</sup>

Thus, the *O'Donnabhain* decision should persuade health insurance plans to be more transgender friendly. There is a risk, however, that the decision may cause plans “to reexamine the grounds on which they refuse these sex reassignment procedures in order to be certain that their plan design, operation, and documentation takes this case into account.”<sup>200</sup> Under section 213, sex reassignment procedures covered by insurance are not deductible.<sup>201</sup> Insurance plans may exclude sex reassignment procedures out of feigned “[concern] that their coverage will result in negative tax implications” for transgender people.<sup>202</sup> This should not happen. Increased awareness and understanding of the legitimacy of transgender issues, could not only encourage courts and judges to see the medical necessity of GID treatments, but also could likewise be used to convince health insurance providers to cover the costs of GID treatments, regardless of tax considerations.

Additionally, several things can be done to aid against health care discrimination experienced by the transgender community. Transsexual health care “is currently seldom taught in medical school,” and “medical and endocrinology textbooks are often outdated and misleading,” thus “[e]ducation for medical students on transgender health care should be

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198. See Renault, *supra* note 4.

199. MOULDING & NAT'L LAWYERS GUILD, *supra* note 97.

200. Coder et al., *supra* note 125.

201. See 26 I.R.C. § 213(a) (2011). Section 213(a) states that “[t]here shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care.” *Id.*

202. Coder et al., *supra* note 125.

mandatory and up to date.”<sup>203</sup> Practicing “[m]edical professionals should [also] routinely receive training in transgender health needs.”<sup>204</sup> Once the medical community is fully informed and current on transgender issues, health insurance groups will have no excuse for continuing their discriminatory policies.

Thus, to effectuate comprehensive and effective healthcare reform:

[T]he federal government and the states must explicitly ensure that gay and transgender Americans and their families are fully covered under the new law. The LGBT community and its allies must take action to move successful implementation forward and to defend the law from efforts to defund or otherwise dismantle it.<sup>205</sup>

Ultimately, the *O'Donnabhain* decision is a step in the right direction against unjust health insurance exclusions for transgender medical care. These “exclusions reflect outdated prejudices against transgender people.”<sup>206</sup> The *O'Donnabhain* decision rebuts insurance company claims that sex reassignment procedures are not medically necessary. Most importantly, the *O'Donnabhain* court’s recognition of transgender issues legitimizes the transgender community. This decision should be a persuasive force against discriminatory health insurance policies.

## VII. CONCLUSION

*O'Donnabhain*’s verdict signals significant positive change on the horizon for the transgender community. Some say that it validates the transgender experience by bringing a purported “swift end to the age-old discriminatory practices of the IRS.”<sup>207</sup> Now:

[T]ransgender Americans have the law on their side to deduct sex reassignment expenses on their taxes. . . . Pending any further IRS legal action, [transsexuals] will not only be able to deduct sex reassignment surgery, but other “non-genital sex-reassignment” surgeries recognized as medical treatment for [GID] under the Harry Benjamin Standards of Care . . . [including] hormone therapy and facial feminization.<sup>208</sup>

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203. DeCleene, *supra* note 30 at 138.

204. *Id.*

205. BAKER & KREHELY, *supra* note 104, at 26.

206. Alice E.M. Underwood, *New Policy Covers Transgender Health*, HARV. CRIMSON, Mar. 11, 2010, <http://www.thecrimson.com/article/2010/3/10/transgender-policy-medical-insurance/?print=1>.

207. Renault, *supra* note 4.

208. *Id.*

*O'Donnabhain* can “help educate and bring along transgender rights in other areas because it ratifies what the medical community has said clearly for years, which is for people with GID, this type of surgery is frequently a medical necessity for their lives and for their well-being.”<sup>209</sup>

As this Note has explained, *O'Donnabhain* was correctly decided from a medical, ethical, and legal standpoint. It should serve as a guidepost for judges and courts in analyzing transgender related issues in a medical context. Additionally, Congress should codify the decision in I.R.C. § 213 to protect the rights of transgender individuals against courts and judges ignorant of the importance of understanding GID and its treatments in deciding the necessity of medical expenses under the law. Furthermore, transgender advocates can use this decision as evidence of the importance of GID treatments from a medical standpoint in encouraging health insurance companies to cover GID treatments.

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209. Lavoie, *supra* note 7 (quoting Hayley Gorenberg, deputy legal director at Lambda Legal).