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IN THE COURT OF APPEALS OF INDIANA

IN RE: THE CHANGE OF GENDER OF:

O.J.G.S.,

A Minor,

S.G.S.,

Appellant.

May 2, 2022

Court of Appeals Case No. 21A-MI-2096

Appeal from the Allen Circuit Court

The Honorable Wendy W. Davis, Judge

Trial Court Cause No. 02C01-2003-MI-156

Altice, Judge.

Case Summary

[1] Over two years ago, S.G.S. (Mother) petitioned the trial court for a change of the gender marker on the birth certificate of her then seven-year-old transgender

daughter O.J.G.S. (Child), pursuant to Ind. Code § 16-37-2-10.[1] This is Mother's second appeal. In the first, she was part of a consolidated appeal with other parents challenging the denial of their respective petitions for a gender marker change. There, in *Matter of A.B.*, 164 N.E.3d 167 (Ind. Ct. App. 2021), the majority held, as a matter of first impression, that a parent has the authority to petition for a gender marker change on their minor child's birth certificate and determined that the appropriate standard to apply to such a petition is whether the proposed change is in the child's best interests. Thus, the majority reversed and remanded with instructions for the trial court to address Mother's petition in accordance with this standard. Judge Pyle dissented on the basis that I.C. § 16-37-2-10 does not provide trial courts with the authority to change the gender marker on a birth certificate.

[2] On remand, with a new judge presiding, the trial court held another evidentiary hearing. Thereafter, the trial court denied the petition, concluding that it could not find that a gender marker change would be in Child's best interests.

[3] Mother appeals, once again, from the denial of the petition. She argues that the trial court abused its discretion because all of the evidence, including from Child's medical providers, supported changing the gender marker on Child's birth certificate to promote her safety and social and emotional well-being. Mother asserts that the court denied the petition based on its own assumptions

[1] Child's father D.S. (Father) consented to the petition.

about Child's ability to know her gender identity at, as the court classified, such an "extremely young" age. *Appellant's Appendix* at 10.

[4] However well taken Mother's arguments are regarding the trial court's best interests determination, Judge Bailey and I do not reach them. For my part, I, like Judge Pyle, believe that I.C. § 16-37-2-10 has been improperly interpreted by this court on a number of occasions, including in the first appeal in this case. The statute simply does not grant courts of this state the authority to order a change of a gender marker on a birth certificate. Such a policy objective, no matter how worthy, must be sought through the deliberative legislative process rather than via piecemeal litigation with limited records and, most often, in the face of no adversarial process.

[5] We affirm.

Facts & Procedural History

[6] Child is blessed with a loving, well-intentioned, intact family, which includes five siblings and both parents. Child was born in February 2013 and was assigned male at birth. Mother and Father (Parents) began noticing, before the age of two, that Child preferred toys and dress typically associated with girls. After developing speech, Child became increasingly adamant that she was a girl and distressed when treated as a boy. By the age of four, Child expressed to her longtime speech and language pathologist that although she was born with boy parts, she was a girl inside.

[7] When Child started kindergarten, she was recognized as a girl at home but still presented and treated as a boy at school. Child often avoided using the bathroom at school because she did not feel comfortable in the boys' bathroom. This resulted in her having nearly daily accidents at school. On one occasion when she went into the boys' bathroom, she was yelled at and pushed by older boys and, when she broke down crying, was directed by a teacher to the girls' bathroom. Child panicked and urinated on herself in front of others.

[8] Parents eventually sought medical advice to figure out how to address Child's gender identity issues. Their first step was discussing the matter with Dr. Thomas Lock with the Developmental Pediatrics Clinic at Riley Hospital for Children, a physician who had been working with the family for some time to address Child's diagnosis as being on the autism spectrum. Dr. Lock referred them to the Riley Hospital for Children Gender Health Program (the Gender Clinic). The family saw Kelly Donahue, PhD, HSPP, a licensed clinical psychologist and co-director of the Gender Clinic. Dr. Donahue evaluated Child in relation to her gender identity and diagnosed her with gender dysphoria.[2] In consultation with Dr. Donahue and the treatment team at the Gender Clinic, Parents decided, during Child's first grade year, to allow Child to present as female at all times and to use female pronouns in every aspect of

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[2] Gender dysphoria "refers to psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity" and "often begins in childhood." https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (last visited March 14, 2022).

her life. Although the school was supportive of Child upon learning that she was a transgender girl, it still required Child, due to her birth certificate, to remain listed as male in school records, which was the main impetus for Mother filing the instant petition on March 4, 2020.

[9] The first evidentiary hearing was held on June 24, 2020. Thereafter, the trial court denied the petition without explanation. Mother successfully appealed, and the case was remanded for a consideration of Child's best interests. At the evidentiary hearing before a new judge on July 13, 2021, the trial court agreed to take the testimony from the 2020 hearing into evidence, as well as the letters submitted from three medical and mental health professionals. Mother also testified again at the second hearing. In addition to the facts set out above, Mother testified regarding Child:

> She, one hundred percent, to her core, is female. It's who she is. I don't understand it. I don't understand the physiological side of it. I don't understand the medical side of it. I'm learning so much through her and working with doctors and what … we need to do to support her. But she is confident in who she is. She doesn't feel bad when she steps out. She doesn't, like I said, she doesn't understand that people think transgender is negative. She kind of sees herself as a unicorn. She's amazing and something different and that's just how she was born. That's who she is.

Transcript at 18. Mother noted instances in which Child had been "outed" in Girl Scouts, which "devastated" Child, and while in waiting rooms for medical/dental appointments. *Id*. at 14. Additionally, without the requested

gender marker change, Mother indicated that the school intended to exclude Child from using the girls' locker room, which she believed would negatively impact Child's social engagement with peers and her self-esteem. Mother testified that Child wants the gender marker on her birth certificate changed "[m]ore than anything" and asks about it often. *Id*. at 19.

[10] Among the letters submitted to the court was one from Dr. Donahue, noting her diagnosis of Child with gender dysphoria and expressing support for the family's request to legally change Child's gender marker. Dr. Donahue explained:

> Existing research demonstrates that transgender youth whose gender is affirmed through developmentally appropriate social (e.g., name or gender marker change) and/or medical interventions show more positive mental health outcomes. When transgender youth desire these interventions but cannot access them, they are [at] greater risk for negative mental health outcomes, including suicide. While [Child] has the full support of her family, her legal gender marker of "male" has created difficulties for her and distress in certain school situations and in medical settings. I believe the family's request to legally change [Child's] gender marker to "female" is in the best interest of the child at this time and will likely serve to protect her from additional future harm.

Appendix at 28.

[11] At the conclusion of the hearing, the trial court acknowledged that Child "presents like a girl" and that "I would have otherwise thought that she was a girl." *Transcript* at 29. While the trial court believed Mother to be "a really

good parent," the court queried how a gender marker change for an eight-year-old, who had not yet reached puberty, would be in their best interests. *Id*. at 25. Further, the court observed that Child had not been the victim of any hate crimes and that the issues she had encountered, though "difficult," had not been "showstoppers right now." *Id*. at 29. After further dialog with Mother's counsel, the trial court took the matter under advisement.

[12] Later that week, on July 19, 2021, the trial court denied the petition. Among other things, the court found Child's age to be "extremely young" and Mother's wishes as a "very loving and caring parent" to be based "more on a mother's speculation and future worry than on current conditions." *Appendix* at 10. The court noted that Child is "loved and accepted" in her home and thriving in Girl Scouts (except for one incident with another child) and that the school is providing a private bathroom for Child to use to avoid any confusion with other children. *Id*. at 10-11. Ultimately, the trial court determined that it could not make a finding that granting the petition would be in Child's best interests.

[13] After an unsuccessful motion to correct error, Mother now appeals.

Discussion & Decision

[14] Mother contends that the trial court abused its discretion by relying on its own assumptions rather than the evidence presented through her testimony and the letters from Child's medical providers, particularly Dr. Donahue's expert opinion. Mother asserts that the trial court's order "thwarts the reasoned decision of a 'very good parent' instead of deferring to it. And it refuses relief

that will increase [Child's] safety and wellbeing when her current and future welfare should be the chief concern." *Appellant's Brief* at 11.

[15] Mother's arguments regarding Child's best interests are compelling. But I cannot overlook the fact that this court made an improper lane change beginning in 2014, as highlighted by Judge Pyle's dissent in this case's first appeal.

[16] I.C. § 16-37-2-10 provides:

> (a) As used in this section, "DNA test" means an identification process in which the unique genetic code of an individual that is carried by the individual's deoxyribonucleic acid (DNA) is compared with the genetic codes of another individual.
>
> (b) The state department may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence, including the results of a DNA test under subsection (c) or a paternity affidavit executed under section 2.1 of this chapter.
>
> (c) The state department may make an addition to a birth certificate based on the results of a DNA test only if:
>
> > (1) a father is not named on the birth certificate; and
> >
> > (2) a citation to this subsection as the authority for the addition is noted on the birth certificate.

Focusing on only the first clause of subsection (b) and essentially ignoring the rest of the statute, panels of this court have held that Indiana courts have the statutory authority to grant requests for gender marker changes on birth

certificates. *See In re Petition for Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014) (the seminal case involving an adult petitioner); *Matter of R.E.*, 142 N.E.3d 1045, 1052 (Ind. Ct. App. 2020) (holding that adult petitioner need only show that request to change gender marker on birth certificate is made in good faith and not for a fraudulent or unlawful purpose); *Matter of A.B.*, 164 N.E.3d at 169-71 (first case to hold that a parent has the authority – under the "broad" language of the statute and in light of the "fundamental right of parents to make important decisions for their minor children" – to file such a petition on behalf of their minor child and adopting a best interests standard); *see also In re A.L.*, 81 N.E.3d 283, 285 (Ind. Ct. App. 2017) (holding that there is no statutory requirement to publish notice of intent to change one's gender marker).[3]

[17] In his recent plurality opinion in *In re H.S.*, 175 N.E.3d 1184 (Ind. Ct. App. 2021), *trans. denied*, Judge Bailey outlined the cases dealing with gender marker changes and noted the legislature's continued inaction to address this emerging area of law. *Id*. at 1186-87. He also recognized Judge's Pyle's strong dissent in *Matter of A.B.*, in which Judge Pyle opined that our court had "strayed into an area reserved for our General Assembly." 164 N.E.3d at 171 (citing Ind. Const. art. 4, § 1 (reserving legislative power for the General Assembly)). Unwilling to

[3] I acknowledge my seemingly inconsistent concurrence in *In re A.L.*, which reversed and remanded with instructions for the trial court to, among other things, grant the petition for change of the adult petitioner's gender marker. The relevant issue presented on appeal was whether the trial court could require the petitioner to publish notice of the intended gender marker change. 81 N.E.3d at 285.

go so far as holding that I.C. § 16-37-2-10 applies to a parent seeking a gender marker change for their minor child, Judge Bailey concluded:

> The generic statutory provision has served as a vehicle with enough flexibility to permit its ready application to the gender marker choice of a competent adult. Nevertheless, the statutory flexibility applicable to adults has reached a point of inelasticity where the issue concerns children. And assuming the statute has application when a parent seeks a change of gender marker for a child, its streamlined (essentially unquestioned) application to a child would ignore the State's interest in the child's wellbeing. In my view, any application to a child must be accompanied by a best interests analysis.

In re H.S., 175 N.E.3d at 1188. Judge Bailey then affirmed the trial court's determination that H.S.'s mother had not presented sufficient evidence establishing that a gender marker change was in H.S.'s best interests.[4] *Id*.

[18] Judge Pyle, concurring in result with opinion, referenced his dissent in *Matter of A.B.* and stated, "I do not believe statutory authority exists for the judiciary to invent a procedure for changing a minor's gender marker to reflect gender

[4] In dissent, Judge Crone argued that a best interests analysis applies to petitions filed by parents for a change of their children's gender marker and that the totality of a child's medical history is highly relevant in making this assessment. He found certain of the trial court's findings, on which it denied the petition, to be "blatant and biased overgeneralizations" rather than specific findings based on the evidence. *In re H.S.*, 175 N.E.3d at 1190. Additionally, he believed the trial court discounted the parents' testimony and their child's wishes, misrepresented the record, and ignored letters from H.S.'s physician and mental health counselor. Judge Crone found the record "more than sufficient to support the granting of [the] petition" and found the trial court's failure to do so to be "a blatant abuse of the trial court's discretion." *Id*. at 1193.

identity and presentation." *In re H.S.*, 175 N.E.3d at 1188. In his dissent in *Matter of A.B.*, Judge Pyle explained:

> A plain reading of the text [of I.C. § 16-37-2-10] reveals that this section has nothing to do with amending a birth certificate to reflect a parent's desire to change a minor child's gender to reflect their gender identity and presentation. *In re S.H.*, 984 N.E.2d 630, 635 (Ind. 2013) (when a statute is unambiguous, courts apply its plain and ordinary meaning without enlarging or restricting the obvious intent of the legislature). This section clearly applies *only* to the use of DNA testing or other documentary evidence in order to establish paternity for the purpose of including the proper parent's name on a child's birth certificate. I see no other way to read this statute. The assertion that a name change and the addition of a parent's name to a birth certificate is "commensurate" with changing a child's gender, ignores the fact that there is no statutory authority to do what my colleagues have ordered.
>
> My colleagues also imply, without citation to authority, that the Fourteenth Amendment provides a fundamental right for parents to seek a change in the gender of their children to reflect their gender identity. Instead, the majority provides a series of examples where the General Assembly has enacted statutes reflecting areas where parents make important decisions for their minor children. *See* Ind. Code § 31-17-5-1 (statute governing grandparent visitation); Ind. Code § 31-32-5-1 (parental waiver of juvenile rights); Ind. Code § 20-33-2-9 (withdrawing child from school); and Ind. Code § 22-2-18-33 ([now expired statute that governed] parental permission for extended working hours). The distinction between each of these examples and this case is, ironically, the heart of the matter: the absence of any statute authorizing trial courts to order a change of gender reflecting a minor child's gender identity.

> Finally, my colleagues suggest that trial courts should use Indiana's name change statute to assess whether to grant a petition to change a minor child's gender for gender identity purposes. I respectfully submit that this proposition is also outside of our bailiwick as judicial officers. The General Assembly has provided a mechanism for a minor's name change when it enacted INDIANA CODE § 34-28-2-4. However, the statute contains no language that it intended the name change statute to be used as a shoehorn for a change of gender to reflect gender identity. Again, the shoe does not fit.
>
> Allowing for a change of a gender marker on a birth certificate may be a worthy policy objective. However, it is not an objective that should be achieved through the courts. This remedy must be sought through the legislative branch. In the General Assembly, hearings can be held, testimony from experts may be heard, input from the public sought, and language may be carefully crafted to fit the desired need. Our court should not rely upon a limited appellate record to bootstrap a statute in order to achieve a policy objective; instead, the legislature, which is in session, should be the cobbler of the mechanism to seek a gender marker change on a birth certificate. Respectfully, I believe that the decisions handed down in this case, *In re Birth Certificate*, 22 N.E.3d 707, and *Matter of R.E.*, 142 N.E.3d 1045 improperly expand judicial authority into an area where none presently exists.

Matter of A.B., 164 N.E.3d at 172-73 (emphasis in original). Thus, in Judge Pyle's view, the plain language of I.C. § 16-37-2-10 does not provide Indiana trial courts with the authority to grant petitions to amend gender markers on birth certificates, whether for an adult or a child.

[19] Further, in response to Judge Crone's suggestion of legislative acquiescence, Judge Pyle observed:

> Legislative acquiescence is a well-established doctrine of judicial interpretation, especially if used by the Indiana Supreme Court, wherein the judiciary's interpretation of a statute, accompanied by substantial legislative inaction for a considerable time, "may be understood to signify the General Assembly's acquiescence and agreement with the judicial interpretation." *Fraley v. Minger*, 829 N.E.2d 476, 492 (Ind. 2005). However, legislative acquiescence is inapplicable when a statute is unambiguous. *Allen v. Allen*, 54 N.E.3d 344 (Ind. 2016) (an unambiguous statute needs no interpretation). Because a plain reading of INDIANA CODE § 16-37-2-10 shows it only applies to the use of DNA testing or other documentary evidence in order to establish paternity for the purpose of including the proper parent's name on a child's birth certificate, the General Assembly's inaction is irrelevant.

In re H.S., 175 N.E.3d at 1188 n.4.

[20] The plurality opinion in *In re H.S.*, handed down last August, put the issue squarely before the Indiana Supreme Court for the first time, as transfer had not been sought in any of the earlier gender marker cases. The Court, however, denied transfer in a vote of 3-2. 178 N.E.3d 798 (Ind. 2021) (order denying transfer with Chief Justice Rush and Justice David voting to grant). Thus, we remain a divided court on this issue without guidance from our Supreme Court or any action from the General Assembly, the body that is responsible for legislating a remedy, if any, in this context.

[21] As recognized by Judge Pyle and, again, recently by our Supreme Court, "only the General Assembly can make the law." *WTHR-TV v. Hamilton Se. Sch.*, 178 N.E.3d 1187, 1192 (Ind. 2022). I agree with Judge Pyle that the plain language

of I.C. § 16-37-2-10 "clearly applies *only* to the use of DNA testing or other documentary evidence in order to establish paternity for the purpose of including the proper parent's name on a child's birth certificate." *Matter of A.B.*, 164 N.E.3d at 172 (emphasis in original). Starting with *In re Birth Certificate* in 2014, this court essentially amended the statute in order to permit individuals – first adults and then parents on behalf of their minor children – to petition for gender marker changes. This went far beyond the plain language and clear intent of I.C. § 16-37-2-10, a statute which has not been amended by the legislature since 1995, and improperly ventured into legislating. *See Abbott v. State*, No. 21S-PL-347, slip op. at 12 (Ind. March 29, 2022) ("'The job of this Court is to interpret, not legislate, the statutes before it,' and 'we exercise caution so as not to add words' to a statute where none exist.") (cleaned up) (quoting *ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1200 (Ind. 2016) and *West v. Off. of Ind. Sec'y of State*, 54 N.E.3d 349, 353 (Ind. 2016)).

[22] In light of this second plurality opinion in less than a year, I urge the Supreme Court to speak on this matter, which has divided this court and resulted, unfortunately, in unpredictability for petitioners who earnestly desire a remedy. In my view, the mechanism for such a change, no matter how vital to certain members of our society, must be crafted by the General Assembly.

[23] Affirmed.

Bailey, J., concurs in result with opinion.

Mathias, J., dissents with opinion.

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[24] **Bailey, Judge, concurring in result.**

[25] I agree with the contention of my colleague authoring the lead opinion that Indiana Code Section 16-37-2-10 does not provide trial courts with the authority to order the registrar of the division of vital statistics within the Indiana Department of Health to change the gender marker on a birth certificate of a child. I also agree with my dissenting colleague that a remedy for a harm should exist in these circumstances and that an equitable action has great appeal. That said, I write separately because I conclude than an equitable action cannot accomplish the desired objective where the best interests of a

child must be demonstrated yet there is absolutely no statutory framework giving context to that requirement.

[26] I have previously stated my view that the generic language of Indiana Code Section 16-37-2-10 does not confer upon a parent an unopposable statutory right to secure a gender marker change without a showing of best interests of the child:

> The generic statutory provision has served as a vehicle with enough flexibility to permit its ready application to the gender marker choice of a competent adult. Nevertheless, the statutory flexibility applicable to adults has reached a point of inelasticity where the issue concerns children. And assuming the statute has application when a parent seeks a change of gender marker for a child, its streamlined (essentially unquestioned) application to a child would ignore the State's interest in the child's wellbeing. In my view, any application to a child must be accompanied by a best interests analysis.

In re. H.S., 175 N.E.3d 1184, 1188 (Ind. Ct. App. 2021), *trans. denied*. At the time of authoring that lead opinion, I hoped that our Legislature would hasten to address these gender issues. That was not to happen.

[27] Without question, a fit parent has a constitutional right to direct the upbringing of a child. In *Matter of A.B.*, 164 N.E.3d 167, 169 (Ind. Ct. App. 2021), we answered the question of "whether a parent has the authority to ask a court to amend the gender marker on a minor child's birth certificate" in the affirmative.

> "[T]he Fourteenth Amendment to the United States Constitution protects the traditional right of parents to establish a home and

> raise their children." *In re Adoption of O.R.*, 16 N.E.3d 965, 972 (Ind. 2014). "A parent's interest in the care, custody, and control of his or her children is 'perhaps the oldest of the fundamental liberty interests.'" *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060, 147 L.Ed.2d 49 (2000)). It follows that parents have a "fundamental right" to make decisions concerning the care of their children. *Troxel*, 530 U.S. at 66, 120 S. Ct. at 2060. The fundamental right of parents to make important decisions for their minor children is reflected in a variety of statutes. . . . Indiana law recognizes parents' authority to make decisions for a child that may have substantial or permanent effects on the child's life.

Matter of A.B., 164 N.E.3d at 169-70. Certainly, a parent has the prerogative to treat a child in accordance with the child's expressed gender identity, and to take actions to foster like responses from others in the child's environment. However, the parent's initiation of a lawsuit seeking to change the sex designation on the birth certificate to align with the child's gender identity does not constitute intrusion by the State into the realm of family life. At most, any State infringement took place at the time of birth recordation and was not inconsistent with the physical characteristics that were observed at that time.

[28] A parent is subject to the requirement of reporting a live birth in the State of Indiana. *See* Ind. Code § 16-37-2-2 (requiring a person in attendance at a live birth to file a certificate of birth with the local health officer or, if there was no person in attendance at the birth, requiring one of the parents to file a certificate of birth). The information to be included is prescribed by Indiana Code Section 16-37-2-9, and the local health officer is required to make a "permanent record"

of, among other things, the "sex" of the child.[5] Records pertaining to vital statistics must be maintained by "the employee in charge of the division of the state department administering the system of vital statistics … known as the state registrar." I.C. § 16-37-1-2. To the extent that the duty to report a live birth represents an intrusion into family life, it occurred at birth.[6] A parent who wishes to initiate a change to the reported information is not being subjected to unwanted State action at that juncture; rather, the parent is affirmatively requesting State action. He or she is then faced with the reality that there is no statutory mechanism for directing the state registrar to make the desired change.

[29] Once a parent exercises parental authority to request a gender marker change – something not prohibited by statute – the trial court simply has no statutory framework for granting or denying the request. Because the State has an interest in the wellbeing of its minor citizenry, a parent would be unable to obtain equitable reformation of a birth certificate, in my opinion, absent a showing of the best interests of the child. Here, in particular, there is ample

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[5] This designation represents an observation of the physical characteristics present at the time of birth. The designated "sex" of the child at birth is not equivalent to development of gender identity, which may or may not be consistent with the birth attendant's sex designation. As an example, the State of Idaho defines "sex" as "the immutable biological and physiological characteristics, specifically the chromosomes and internal and external reproductive anatomy, genetically determined at conception and generally recognizable at birth, that define an individual as male or female." ID St. § 39-245A(3).

[6] The statutory requirement of recordation of births is not intended as a restriction of parental rights. "It has been held that statutes requiring the filing of births, deaths, and marriages are enacted by the state in exercise of the police power of the state to prevent the spread of contagious diseases, and generally to promote the public health and welfare; that within its legitimate objects and purposes such a record is proper evidence. However, such a statute does not interfere with private rights or create a new rule of evidence." *Steele v. Campbell*, 118 Ind. App. 549, 552, 82 N.E.2d 274, 275 (1948) (citing *Brotherhood of Painters, Decorators and Paperhangers of America v. Barton, et al.*, 46 Ind. App. 160, 168, 92 N.E. 64, 67 (1910)).

evidence, albeit without the benefit of notice to the State and an opportunity to be heard, that a gender marker change is consistent with the family's wishes and the child's best interests as understood by the child's medical providers. Logically, a trial court would welcome an independent evaluation of a child's psychological makeup and the sincerity of the child's and parent's expressed wishes. But we simply have no statutory context. At bottom, a parent has the right to ask, but no right to order the registrar to effect a change, absent an error in the designated sex of the child at the time of birth.

[30] Absent a statutory framework, I vote to affirm the trial court's denial of the petition for a gender marker change.

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Appellant.

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Mathias, Judge, dissenting.

[31] This case is about "Child" who has known she is, and has expressed her fervent desire to be recognized as, a girl since she was two years old. She is not alone. She is part of a large population across the nation who find themselves to be Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex, Asexual, or other (LGBTQIA+). Specifically, Child is transgender, and Child has many contemporaries in Indiana. According to the most recent statistics, over 38,000 Hoosiers identify as transgender, with an overall LGBTQIA+ population in Indiana of approximately 306,000 Hoosiers.[7] This case, therefore, has very real

[7] According to Gallup data collected from 2012 through 2017, approximately 4.5% of adults in the United States identify as LGBT. The Williams Inst., UCLA School of Law, *LGBT Demographic Data Interactive*, https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#density (Jan. 2019). The same data approximate that Indiana is in line with that national figure, with 4.5% of adult Hoosiers identifying as LGBT. *Id.* (selecting Indiana). An IUPUI professor analyzing the Gallup data in February 2019 stated that

application and consequences for many, many Hoosier families and their children.

[32] Child's parents are what each of us who are blessed with children would like to consider ourselves: loving and devoted to the well-being of our sons and daughters. Families find that their love is neither diminished nor belittled by the discovery that one or more of their children is LGBTQIA+. Indeed, Child's parents and other parents like them find their love and devotion to their LGBTQIA+ child to be galvanized by the trials and discrimination their children face as they grow up and throughout life.

[33] That there is a sizable number of Hoosier transgender children is a well-known fact to our General Assembly. Just this past legislative session, a bill banning transgender girls from competing with girls in interscholastic sports was passed by both the House and the Senate but was later vetoed by our Governor. *See* H.R. 1041, 122nd Leg., 2nd Reg. Sess. (Ind. 2022). Therefore, and this fact is critical to this issue and to this appeal, *there is no statute in effect that even speaks to, let alone covers, the issue before us in this case: The request of Child's Parents to change the gender marker on Child's birth certificate from male to female.*

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the data also show an Indiana population of 0.56% who identify as transgender specifically. A.J. Young, *LGBTQ+ Population Quick Facts*, https://diversity.iupui.edu/offices/lgbtq/images/LGBT-Population-Quick-Facts.pdf, at 1 (Feb. 2019). And, in July 2021, the United States Census Bureau estimated Indiana's total population to be 6,805,985 Hoosiers. United States Census Bureau, *QuickFacts Indiana*, available at https://www.census.gov/quickfacts/IN (last visited Mar. 30, 2022).

Assuming the Gallup data are a close representation of Indiana's July 2021 total population, about 306,269 Hoosiers would currently identify as LGBT, with about 38,113 transgender Hoosiers specifically.

[34] The case before us is the second attempt by Child's parents to have the gender marker of Child changed to female. In a prior appeal, a panel of our Court remanded this case back to the trial court for a determination of Child's best interests in this regard. *In re A.B.*, 164 N.E.3d 167, 170-71 (Ind. Ct. App. 2021). The trial court on remand denied Parents' request yet again, despite the uniform, unchallenged recommendations of medical professionals to the contrary that are a part of the record.

[35] The majority's analysis follows the dissent in *In re A.B.*, 164 N.E.3d at 171-73 (Pyle, J., dissenting) and concludes, either expressly or in effect, that Indiana's trial courts have no authority to act on a parent's petition to change a child's gender marker unless the General Assembly first enacts a statutory framework under which the judiciary may review such a petition. While I agree with my colleagues that a statutory framework would be ideal, and while I join them in calling for our General Assembly to provide that guidance, I cannot agree with my colleagues that Indiana's judiciary is unable to act without a statutory framework in Child's case. Further, in reviewing the merits of this appeal, I would hold that the trial court's judgment denying Mother's petition is clearly erroneous.

I. Indiana's Judiciary Has the Power in Equity to Hear Petitions Such as Mother's.

[36] The majority's conclusion that Indiana's judiciary either lacks the authority or should abstain from exercising its authority to consider petitions such as Mother's is contrary to the well-established constitutional and equitable power

of the judicial branch of government to remedy a wrong *in the absence of statutory authority to the contrary*. *State ex rel. Root v. Circuit Court of Allen Cnty.*, 259 Ind. 500, 289 N.E.2d 503, 507 (1972). In 2014, our Court held that the absence of express statutory authority to change the gender marker on a birth certificate was not a barrier to a judicial remedy:

> I.C. § 16-37-2-10 provides general authority for the amendment of birth certificates, without any express limitation (in the statute or elsewhere) regarding gender amendments. In light of this statute, *as well as the inherent equity power of a court of general jurisdiction*, we conclude that the trial court had authority to grant the petition at hand. *See State ex. rel. Root*[, 289 N.E.2d at 507] ("*a court of general jurisdiction has inherent equity power unless a statute expressly or impliedly provides otherwise*"). *See also In re Heilig*, 816 A.2d [68,] 82 [(Md. 2003)] ("[t]here is nothing extraordinary about equity jurisdiction in these kinds of matters").

In re Change of Birth Certificate, 22 N.E.3d 707, 709 (Ind. Ct. App. 2014) (emphases added). The dissent in *In re A.B.* disagreed with the statutory analysis of the unanimous panel in *In re Change of Birth Certificate*, but the dissent said nothing about the judiciary's inherent equity power to act in the absence of a statute prohibiting that action. *See In re A.B.*, 164 N.E.3d at 171-73 (Pyle, J., dissenting).

[37] The existence of our equity jurisdiction is clear. There is simply no doubt that, as an independent branch of government, and in the absence of a statute to the contrary, the judiciary has the inherent authority to hear claims for relief in equity. *See State ex. rel. Root*, 289 N.E.2d at 507. As Article 1, Section 12 of the

Indiana Constitution makes clear, "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have a remedy by due course of law." Ind. Const. art. 1, § 12.

[38] That constitutional authority has long been recognized by the Indiana Supreme Court as "the duty of a court of equity to provide [a wronged party] with a remedy, *if one does not already exist*." *Ritter v. Ritter*, 219 Ind. 487, 494, 38 N.E.2d 997, 1000 (1942) (emphasis added). As our Supreme Court further explained:

> The maxim that ["]Equity will not suffer a wrong to be without a remedy["] is probably the most important principle addressed to the chancellor. Lord Coke once said: ["]The law wills that, in every case where a man is wronged and endangered, he shall have a remedy[."] 19 Am. Jur., Equity § 451.

Id.

[39] Our case law has long provided for equitable relief in any number of circumstances in the absence of statutory authority to the contrary. *See, e.g.*, *Blackford v. Welborn Clinic*, 172 N.E.3d 1219, 1229 (Ind. 2021) (fraudulent concealment as an equitable exception to the statute of limitations); *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020) (trial courts have inherent equitable power to award attorney's fees notwithstanding the General Recovery Rule codified at Indiana Code section 34-52-1-1); *Presbytery of Ohio Valley, Inc. v. OPC, Inc.*, 973 N.E.2d 1099, 1109 (Ind. 2012) ("Implied trusts are creatures of equity, imposed to do justice" and may arise when parties have "failed to satisfy the statutory requirements for creating an express trust")

(quotation marks omitted); *Coca-Cola Co. v. Babyback's Int'l, Inc.*, 841 N.E.2d 557, 568-70 (Ind. 2006) (promissory estoppel as an equitable exception to the Statute of Frauds); *cf. Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 387 (Ind. 2020) (where a statute establishes a specific type of relief, there is no ground for a "weighing of equities to fashion an alternative form of relief"). *See also* Ind. Trial Rule 1 ("these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature *whether cognizable as cases at law, in equity, or of statutory origin*") (emphasis added); *Walters v. Marathon Oil Co.*, 642 F.2d 1098, 1100 (7th Cir. 1981) ("the ancient maxim that 'equity will not suffer a wrong to be without a remedy' has long been the law in the State of Indiana").

[40] To be sure, Hoosiers would be well served by having statutory authority that addresses petitions such as the one here. Statutory authority would provide uniformity across Indiana when considering how to handle such petitions, and, like my colleagues, I would also invite the General Assembly to consider how to make such petitions adversarial so that evidence may be properly tested as in a typical civil case. Finally, I would remind trial courts that they have the discretion and authority to appoint guardians ad litem to represent a child's best interests in cases such as this.

[41] But the absence of a statutory framework in this case does not render our judiciary incapable of hearing these petitions or granting relief thereon. Indeed, rather than acknowledging the constitutional and long-standing equity power of the Indiana judiciary to act in the absence of statutory authority to the contrary,

the majority's analysis here would require the Indiana judiciary to refrain from acting in the absence of statutory permission. This is the exact opposite of how the Indiana judiciary's equity power operates.[8] Our judiciary has the constitutional role and the inherent, equitable authority to hear a claim for relief from a wrong and to grant relief from that wrong so long as we are not barred by statute from doing so. *See State ex. rel. Root*, 289 N.E.2d at 507; *Ritter*, 38 N.E.2d at 1000. With the greatest respect for my colleagues, their plurality analysis is not an exercise of deference to our legislature; it is an abdication from the judiciary's constitutional obligation to be open to all claims of injury. Accordingly, I cannot join either of their plurality opinions, and I would review the trial court's judgment on the merits.

II. The Trial Court's Judgment is Wholly Unsupported by the Record and, thus, is Clearly Erroneous.

[42] As for the merits of the trial court's judgment following the hearing on remand, there is no question that the trial court's judgment is wholly unsupported by the record and, thus, is clearly erroneous. In reviewing the trial court's judgment, I must begin by acknowledging that Mother's petition to the trial court arises out of her fundamental right to raise her own child. The Supreme Court of the United States and the Indiana Supreme Court have long recognized that "the

[8] Indeed, our Supreme Court recently emphasized that our equity jurisdiction does not apply where statutory authority exists and controls, which is entirely consistent with my analysis here. *See Abbott v. State*, 183 N.E.3d 1074, 1080-83 (Ind. 2022) ("a court will not exercise its equitable powers if the petitioner has an adequate remedy at law").

parent-child relationship 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Perkinson v. Perkinson*, 989 N.E.2d 758, 765 (Ind. 2013) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). It is the fundamental right of fit parents "to establish a home and raise their children." *Keen v. Keen*, 629 N.E.2d 938, 941 (Ind. Ct. App. 1994) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)). And "*the state [does not] have a special interest in substituting its judgment, through the authority of a judge, for that of a child's parents in carrying out those responsibilities*." *Id.* (emphasis added).

[43] In other contexts, the Indiana Supreme Court has established that "clear and convincing evidence" is required to overcome a parent's fundamental right to control the upbringing of her own child. *See, e.g.*, *K.T.K. v. Ind. Dep't of Child Servs.*, 989 N.E.2d 1225, 1230 (Ind. 2013) (termination of parental rights); *K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 460-61 (Ind. 2009) (third-party visitation). Thus, once Mother presented competent evidence in support of her petition, there must have been clear and convincing evidence to overcome Mother's fundamental right to control the upbringing of Child and conclude that denial of Mother's petition was in Child's best interests. Appellate review of the trial court's judgment, then, should be "to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment." *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016).

[44] Mother testified that, although Child was born male, "[a]s soon as [Child] could start expressing herself . . . between a year and three years old" Mother and Father "started questioning" child's gender. Tr. Vol. 2 p. 9. Child wanted

to play with traditionally female toys and wear traditionally female clothes. *Id.* Child wanted to grow her hair to a traditionally female length. *Id.* These patterns "started to grow as [Child] became more verbal." *Id.*

[45] At three years old, Child stated, "[w]hen I get married, I'm going to [wear] a wedding dress." *Id.* at 10. Around four years old, Child asked Mother, "when will I get my breast[s]?" *Id.* Around that time, Mother and Father decided "to seek out medical help to figure out what is actually going on." *Id.*

[46] Mother and Father took Child to the Pediatric Behavioral Department at Riley Hospital in Indianapolis. *Id.* There, Dr. Thomas Lock,[9] who had initially worked with Child and diagnosed her as being on the autism spectrum, informed Mother and Father that he was "noticing these desires in [Child]," such as "constantly direct[ing] us and telling us that she is not a boy." *Id.* at 11. Dr. Lock referred Mother and Father to Dr. Kelly Donahue[10] at Riley's Pediatric Endocrinology Department. *Id*. When Child was four years old, Dr. Donahue diagnosed Child with gender dysphoria. *Id.*

[47] When Child entered first grade, Mother and Father met with Child's medical team. Based on medical advice, Mother and Father concluded that it was in

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[9] Dr. Lock is a Clinical Professor, the Director of Developmental Pediatrics at Riley, and the Co-Director of the Neurodevelopmental Disabilities Residency Program. Appellant's App. Vol. 2 p. 26.

[10] Dr. Donahue is a licensed clinical psychologist, the Co-Director of the Child Gender Health Program at Riley Hospital, an Assistant Professor of Clinical Pediatrics, and a member of the Adolescent Medicine and Pediatric Endocrinology Division at the Indiana University School of Medicine. *Id.* at 28. It is also important to remember that, in Indiana, a clinical psychologist is competent to examine a criminal defendant and to testify as to that defendant's sanity. *See* Ind. Code § 35-36-2-2 (2021).

Child's "best interest to go ahead and present [as] female [at] all times and to use female pronouns in every aspect of her life." *Id.* at 12. Mother described one of the reasons they made that decision:

> [Child] has always outwardly looked feminine and . . . the first week of school knew that, "Okay, I have to use these restrooms because this is what I'm supposed to use i[s] the boy's restroom." So, instead she would not go to the bathroom all day. She would hold it until she would wet herself. . . . When pressed about . . . why you're having this . . . she would say, "I don't belong there." So, we had an issue with a time she did have to go, went into the boy's bathroom and older boys were hollering at her and telling her she was in the wrong bathroom. So, with her inability to understand social cues and communicate a lot of times, she just broke down bawling and she was getting pushed by boys out of the bathroom. . . . [At one] point a teacher was brought in and actually took [Child] by the shoulders and guided her out of the bathroom and tried to make her go into the girl's bathroom where she's panicking and peeing herself in front of everybody.

Id. at 12-13.

[48] Mother testified that Child's "male designation on her birth certificate has resulted in her isolation from other students" at her school in other ways. *Id.* at 16. For example, Child's gym class would swim at a local middle school. School officials "wanted [Child] . . . to go in the boys['] locker room . . . and change," but that was "very inappropriate for her." *Id.* Eventually, school officials gave Child her own room to change in apart from both boys and girls, which "isolated" Child and "pointed out" her differences. *Id.* at 16-17.

[49] Mother believed that, overall, Child's school has been "very supportive" of Child presenting as female. *Id.* at 13. However, school officials believed they could only do so much, and they informed Mother that "they are not legally allowed" to change Child's gender marker in school records unless Child's birth certificate is changed first. *Id.* Mother testified that having the school records reflect Child as female would "improve [her] educational opportunities" because it would

> allow her to relax. Just to allow her not to have to constantly have that . . . gnawing at her. To just be calm and be able to just focus on school. To not worry about, "Oh, I have to urinate. Where do I go?" I'm gonna have people point me out or push me out. And to not be called out and . . . made or pointed out as other. So, for instance if there's a substitute teacher and they print the roster out for the teacher. It puts [the students] into male and female sides and so if the teacher is calling boys, whatever, this is the boy's side. Well, why are you over there?

Id. at 14.

[50] Mother further testified about safety concerns underlying the petition:

> I'm hoping by stepping in now and . . . starting off with a good foundation . . . that the individual she grows up with will just always know that [Child] is [Child] and just accept her and love her for who she is. We have run into some situations . . . for instance, [Child] joined Girl Scouts and there was a little girl that had known her from the previous year. Where even though [Child] presented the same, I made [Child] dress in a boy[-]affirming way. And so, [the other girl] went around and told the Girl Scout Troop, "Oh well, that's a boy. That's a boy." And it just devastated [Child] because this is a group that we are

> reaching out for in the community to actually find more females her age to hang out with . . . , to become friends with, and develop bonds with . . . .

Id. at 14-15.

[51] Following that incident, the parents of the other child removed their child from Girl Scouts because they were "upset" that Child was involved. *Id.* at 15. Child has since been able to participate in Scouting in an affirming way. *Id.* That participation, in turn, has resulted in a "[o]ne-hundred percent" change in Child's "self-worth" and growth" and given her the confidence to present herself as female. *Id.* at 15-16.

[52] Mother added that the current birth certificate has affected Child's medical care and mental health in other ways. For example, Child "obviously presents [as] female," but in filling out new paperwork at various medical offices Mother is obliged to identify Child as male. *Id.* at 21. On "several" occasions, this has led to "chaos" in an office lobby when Child's name was called and the person thought a mistake had been made, which resulted in Child being outed in the lobby, which Mother described as "detrimental" to Child's well-being. *Id.*

[53] In support of Mother's petition, Dr. Lock wrote a letter to the trial court. In his letter, Dr. Lock stated: "I have been seeing [Child] since 2016 and acknowledge [Child] as female. I agree that her gender markers should be changed to reflect this." Appellant's App. Vol. 2 p. 26. The court admitted Dr. Lock's letter as evidence.

[54] Dr. Donahue also wrote a letter to the court in support of Mother's petition. In that letter, Dr. Donahue stated:

> I am a licensed clinical psychologist in the state of Indiana and have evaluated [Child] in relation to her gender identity. I am in support of [Child] and her family's request to legally change her gender marker to "female," consistent with her experienced gender identity. [Child] is now seven years old and first articulated her desire to be referred to as a girl and to use the pronoun "she" when she was five years old, at which time her parents requested an evaluation at our clinic. The history collected at that evaluation was consistent with a diagnosis of Gender Dysphoria in Childhood.
>
> Existing research demonstrates that transgender youth whose gender is affirmed through developmentally appropriate social (e.g., name or gender marker change) and/or medical interventions show more positive mental health outcomes. *When transgender youth desire these interventions but cannot access them, they are [at] greater risk for negative mental health outcomes, including suicide*. While [Child] has the full support of her family, her legal gender marker of "male" has created difficulties for her and distress in certain school situations and medical settings. I believe the family's request to legally change [Child's] gender marker to "female" is in the best interest of the child at this time and will likely serve to protect her from additional future harm.

Id. at 28 (emphasis added). Dr. Donahue's letter was also admitted by the trial court as evidence.

[55] Despite this unequivocal and uncontradicted evidence from medical professionals supporting the gender marker change, the trial court denied Mother's petition to change Child's gender marker on Child's birth certificate.

In its order, the court stated that, at eight years old, Child is "extremely young"; that, while Mother is "a very caring and loving parent," her "wishes for [C]hild's gender marker to be changed seems to be based more on a mother's speculation and future worry than on current conditions of the child's social well-being"; that, while Child "is living in a very[] loving home, has good interaction and interrelationships with the other five (5) siblings[,] and is loved and accepted," there was "[n]o evidence presented" that changing Child's gender marker "would improve" those relationships; that Child's "adjustment to [her] . . . home, school, and community [were] good," and, despite "one child in the Girl Scout troop [who] made fun of the child one time, . . . the child is still thriving in the Girl Scout troop"; that the parents are "working with" the school " to ensure [C]hild can use the bathroom . . . in a private bathroom"; and that "[t]he only real testimony and evidence . . . involved [M]other's future worries." *Id.* at 10-11.

[56] However, the trial court's comments find no support in the record. First, the court's conclusion that Mother's concerns about Child's well-being were "speculation" or just "future worry" is clearly contrary to the only medical evidence presented at trial. In addition, Mother testified at length about ongoing social and psychological harms Child had endured and was enduring, based on the incorrect gender marker on Child's birth certificate. Child has been repeatedly embarrassed and isolated at her school, which prohibits her school from being a fully supportive and effective learning environment. She has been outed and embarrassed at medical offices. And Dr. Donahue made clear that

the failure to amend Child's gender marker placed Child at "*greater risk for negative mental health outcomes, including suicide.*" *Id.* at 28 (emphasis added). Child's increased risk for negative health outcomes is a present detriment to Child's well-being, and the trial court's judgment failed to consider this uncontradicted and compelling evidence.

[57] Further, the trial court's well-meaning emphasis on Child's ability to thrive in Girl Scouts once the other child was removed from the troop missed the point of Mother's testimony. Mother's testimony was that, in a supportive and affirming environment, Child can and will thrive. The trial court's judgment, however, denies Child the benefits of gender affirmation and the opportunity to thrive in other environments where a correct gender marker on Child's birth certificate is essential. Likewise, the trial court's emphasis that there was no evidence that changing Child's gender marker "would improve" Child's relationship with loved ones who already accept her has no bearing on whether changing the gender marker change might still be in Child's best interests in the world at large.

[58] The trial court did not acknowledge Mother's testimony that Child needs a corrected birth certificate for Child to participate more fully and effectively at school. School officials made clear that they could not support Child fully, such as allowing Child into gendered areas or listing Child properly on the school's gendered class rosters, unless Child's birth certificate is corrected. The trial court's decision to deny Child the opportunity to be fully accepted at her school and to instead set Child up for future, continued ostracism is clearly erroneous.

[59] The trial court's comments about the speculative nature of potential future harm to Child are also contrary to the law and the evidence in this case. As our Court has recognized on multiple occasions, "the risk of harm faced by our transgender population is common knowledge." *In re R.E.*, 142 N.E.3d 1045, 1054 (Ind. Ct. App. 2020) (discussing *In re M.E.B.*, 126 N.E.3d 932, 936 (Ind. Ct. App. 2019); *In re A.L.*, 81 N.E.3d 283, 288 (Ind. Ct. App. 2017)). It is beyond dispute that the transgender community is subject to increased risk of harm due to their identity.

[60] The trial court also commented that Child is "extremely young" at eight years old. This comment suggests that minors below a certain, unstated age are simply not eligible to have their gender markers corrected despite uncontradicted evidence from medical professionals and their families of the need for the change, as well as the negative social and psychological consequences of denying the change for the child. There is no legal or equitable basis for such a conclusion.

[61] Here, the uncontradicted medical evidence fully supported Mother's petition to change Child's gender marker. That evidence even went so far as to *recommend* that Child's birth certificate gender marker be changed. There was no contrary evidence whatsoever, let alone clear and convincing contrary evidence, to allow the State, "through the authority of a judge," to "substitute[e] its judgment . . . for that of a child's parents" in determining Child's best interests. *Keen*, 629 N.E.2d at 941.

[62] In the end, we are left with Child, and many other Hoosier children like Child, with no remedy for the condition in which they find themselves through no fault of their own. It does not need to be this way. Unless and until the General Assembly and Governor create a fair resolution structure, or clearly forbid any change of gender markers on birth certificates for any reason, equity jurisprudence provides the remedy to consider Mother's request on Child's behalf.

[63] For all of these reasons, I respectfully dissent. I would find that the trial court's decision to deny Mother's petition is clearly erroneous, and I would reverse and remand with instructions for the trial court to grant Mother's petition.