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IN THE
COURT OF APPEALS OF INDIANA

In re the Change of Name and Gender of H.S., a Minor

L.S.,

Appellant-Petitioner.

August 30, 2021

Court of Appeals Case No. 21A-MI-884

Appeal from the Allen Superior Court

The Honorable Andrew S. Williams, Judge

Trial Court Cause No. 02D01-2009-MI-617

Bailey, Judge.

Case Summary

[1] L.S. ("Mother") petitioned the trial court for a change of the name and gender marker on the birth certificate of her fifteen-year-old transgender son H.S.,[1] pursuant to Indiana Code Section 34-28-2-1 and Indiana Code Section 16-37-2-10, respectively. The trial court granted the request for a name change and denied the request for a gender marker change, finding that there was insufficient evidence of the child's best interests. L.S. appeals, presenting the sole issue of whether the denial was contrary to law. We affirm.

Facts and Procedural History

[2] On September 16, 2020, Mother filed her "Verified Petition for Change of Name and Gender Marker of a Minor." (App. Vol. II, pg. 18.) Mother averred that the petition was made in good faith, and not for fraudulent purposes, but rather for the purpose of having "the child's legal gender … accurately reflect the child's gender identity and presentation." (*Id.* at 19.) Mother averred that J.S. ("Father") consented to the change and she attached to the petition a signed parental consent document.

[3] On March 4, 2021, the trial court conducted a hearing and heard testimony from Mother, Father, and H.S., each of whom advocated for the name and gender marker changes. Mother also submitted into evidence two documents,

[1] H.S. has since turned sixteen years old.

one described as a letter from H.S.'s physician and the other described as a letter from H.S.'s "counselor." (Tr. Vol. II, pg. 20.) At the conclusion of the hearing, the trial court ordered that the case be sealed from public access and took the petition for changes under advisement.

[4] On April 16, 2021, the trial court issued an order granting the petition for a name change and denying the petition for a gender marker change. The order indicated that the trial court had applied a "best interests of the child analysis found in Indiana Code Section 31-7-17-2-8 [sic] as the standard for deciding cases involving a request for a gender marker change for a minor child." Appealed Order at 5. The trial court considered "the mental and physical health of the child" statutory factor to be "likely the most significant factor." *Id.* at 10. Pointing to the absence of expert testimony or authenticated documents, the trial court found "the lack of competent evidence with regard to this factor to be dispositive." *Id.* Ultimately, the court concluded that Mother failed to establish that it is in the best interests of H.S. to have the gender marker changed.

[5] Mother appeals, arguing that a parent's uncontested request to change a child's gender marker is presumptively in the child's best interests and entitlement to a gender marker change is not dependent upon a specific medical intervention.

Discussion and Decision

[6] We apply a de novo standard of review to matters of law, including the construction of statutes and rules. *Matter of K.H.*, 127 N.E.3d 257, 260 (Ind. Ct. App. 2019). To the extent that a review of a trial court's factual determinations is required, we apply a clearly erroneous standard. *Id.*

[7] Indiana Code Section 16-37-2-10(b) provides:

> 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.

A panel of this Court examined the foregoing statutory language in *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014), an appeal from the denial of a petition from a transgender man to change his gender marker. We observed that the Indiana State Department of Health "defers to the courts by requiring a court order to establish adequate documentary evidence for an amendment of gender on a birth certificate." *Id.* at 708-09. In finding that the appellant "made an adequate showing" and holding that the trial court erred in denying the petition, we further observed:

> The legislature is free to craft specific requirements. Without such guidance, however, it is our view that the ultimate focus should be on whether the petition is made in good faith and not for a fraudulent or unlawful purpose.

Id. at 710.

[8] In *In re A.L.*, 81 N.E.3d 283, 289 (Ind. Ct. App. 2017), which was a consolidated appeal arising from a trial court determination that publication was required for changes of gender marker and name, we reiterated:

> Unless and until the General Assembly crafts specific requirements regarding gender marker changes, this Court's common sense standard in *Birth Certificate* is the bar that must be met. Thus, a gender marker change petitioner needs to establish that the petition is made in good faith and not for a fraudulent or unlawful purpose. If a trial court determines that the petitioner has met that standard, no further requirements need to be met and the petition should be granted.

[9] More recently, in *Matter of R.E.*, 142 N.E.3d 1045 (Ind. Ct. App. 2020), a panel of this Court reversed the denial of a petition by a transgender man to have his name and gender marker changed on government documents. "Notwithstanding clear and binding caselaw," the trial court had imposed requirements of publication in a local newspaper, litigation in open court, and the submission of medical evidence that R.E. "had actually undergone a physical sex change." *Id.* at 1047. We rejected the attempt to engraft additional requirements upon the process of obtaining a gender marker change:

> [A]ll R.E. had to show in order to obtain a change to the gender marker on his birth certificate was that his request was made in good faith and not for a fraudulent or unlawful purpose. There is no question that R.E. met that threshold. Moreover, R.E.'s genuine desire to have all identifying documents conform to his current physical and social identity is apparent.

> The trial court's insistence that R.E. could not meet his burden on his petition without medical evidence of an actual physical change to R.E.'s body, that R.E.'s "gender has actually been changed from female to male," is contrary to law. No such evidence or enhanced burden of proof is required to grant R.E.'s petition.

Id. at 1052 (record citation omitted).

[10] Subsequent to this line of cases, wherein we clearly stated that an adult seeking a gender marker change bears only the burden of showing good faith, we were presented with a consolidated appeal brought by parents who each had been denied a change of gender marker as set forth on their child's birth certificate. *Matter of A.B.*, 164 N.E.3d 167 (Ind. Ct. App. 2021). The threshold question to be answered was "whether a parent has the authority to ask a court to amend the gender marker on a minor child's birth certificate." *Id.* at 169. We answered this question in the affirmative, observing that "[t]he fundamental right of parents to make important decisions for their minor children is reflected in a variety of statutes" and that the language of Indiana Code Section 16-37-2-10(b) is "broad." *Id.* at 169-70.

[11] The Court next addressed the matter of the appropriate standard to be applied when considering a parental petition for a gender marker change, rejecting the parents' contention that the standard was that applicable to an adult petition, that is, "whether the petition was filed in good faith." *Id.* at 170. The Court concluded that the appropriate standard is whether the change is in the child's best interests and directed that a trial court "may consider the same factors as

for a name change." *Id.* at 171. The factors for a name change are those set forth in Indiana Code Section 31-17-2-8, governing child custody determinations. *Id.* at 171. The Court remanded with instructions to the trial court to address the petitions in accordance with the best interests standard. *Id.*

[12] Judge Pyle dissented, opining that the majority had "strayed into an area reserved for our General Assembly." *Id.* He was not persuaded that there was either "statutory authority to grant petitions to change a minor child's gender to reflect their gender identity and presentation" or that the Fourteenth Amendment "provides a fundamental right to parents to seek a change in the gender of their children to reflect their gender identity." *Id.* at 171-72. Acknowledging that allowing change upon parental initiative might be "a worthy policy objective," he nonetheless concluded that the "remedy must be sought through the legislative branch." *Id.* at 173.

[13] To date, the Legislature has not spoken to this issue and we are again asked to expand upon the generic language for birth certificate alteration found in Indiana Code Section 16-37-2-10-(b). In Mother's view, the statute provides for expansive parental rights. In principle, she does not oppose a best interests analysis. But she argues that no more than a minimal burden should rest upon a parent seeking to change her child's gender marker. According to Mother, we should recognize a presumption that a parent's unopposed decision is in her child's best interests, and evidence of medical intervention is unnecessary or perhaps unwarranted, as overly intrusive into the parental domain.

[14] It is necessary to examine the statutory provision for alteration to a birth certificate with the objective of neither invading the legislative domain nor that of a fit parent.[2] 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.

[15] Clearly, the totality of the child's medical history is highly relevant. But here the parents decided to forego expert testimony or the proffer of any relevant medical records, in favor of their conclusory testimony prompted by their teenager's relatively recent disclosure.[3] Indeed, the trial court aptly pointed out

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[2] I observe that here there has been no challenge to parental fitness. In some circumstances, a child's best interests might best be served by the appointment of a Guardian ad Litem or the filing of a petition alleging that the child is a Child in Need of Services.

[3] I acknowledge that neither expert medical testimony nor medical records is a statutory prerequisite for a gender marker change. However, as a practical matter, it could be crucial to the trial court's decision-making process where a child is involved. The trial court bears the heavy burden of making a best interests determination without a legislative framework and without party opposition to any proffered evidence. The language of Indiana Code Section 16-37-2-10(b), although reasonably interpreted to encompass an adult's petition for a gender marker change, does not prescribe how a parent seeking a gender marker change for his or her child is to show that the change at that point in the child's development is in the child's best interests. In general, the adversarial nature of proceedings is designed to test the veracity of proffered evidence. Here, there is no adverse party.

that there was no authenticated document of any sort admitted into evidence. Under these circumstances, I cannot say that the trial court misapplied the law.

Conclusion

[16] The trial court did not clearly err by denying Mother's petition for a gender marker change for H.S.

[17] Affirmed.

Pyle, J., concurs in result with opinion.
Crone, J., dissents with opinion.

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Pyle, Judge, concurring in result with opinion.

[18] I concur in the decision to affirm the trial court's judgment denying the petition requesting a gender marker change on the birth certificate. As summarized in this opinion and more fully explained in *Matter of A.B.*, 164 N.E.3d 167, 171 (Ind. Ct. App. 2021) (J. Pyle dissenting), I do not believe statutory authority exists for the judiciary to invent a procedure for changing a minor child's

gender marker to reflect gender identity and presentation.[4] Further, a fundamental right has not been established allowing the judiciary to grant the remedy sought in this case.

[4] In footnote 6 of Judge Crone's dissent, he implies that the legislature's failure to respond to this court's holdings in *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014) and *Matter of R.E.*, 142 N.E.3d 1045 (Ind. Ct. App. 2020) amounts to a form of legislative acquiescence. However, I respectfully disagree. 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 the Change of Name and Gender of H.S., a Minor

L.S.,

Appellant-Petitioner.

Court of Appeals Case No. 21A-MI-884

Crone, Judge, dissenting.

[19] I agree with Judge Bailey's conclusion that any application of Indiana Code Section 16-37-2-10 to a child "must be accompanied by a best interests analysis" as set forth in Indiana Code Section 31-17-2-8. Slip op. at 8. I also agree with his statement that "the totality of the child's medical history is highly relevant" in assessing the child's best interests in this situation. *Id*. But I respectfully disagree with his assertion that H.S.'s parents proffered no relevant medical records and that their testimony was too conclusory to sustain their burden.

[20] Mother offered into evidence, and the trial court admitted without limitation, a letter from a physician who averred that she has had a doctor/patient

relationship with H.S. since September 2019, that H.S.'s sex "has been changed by medical procedure from female to male[,]" and that the birth certificate should be changed accordingly. Ex. A. The trial court also admitted a letter from a licensed mental health counselor who stated that H.S. "was initially seen at [her] office in January of 2020, for issues related to gender identity." Ex. B.[5] H.S. "was determined to be exhibiting symptoms consistent with a diagnosis of Gender Dysphoria[,]" had "presented male at all of his [counseling] sessions[,]" "began testosterone therapy in August of 2020[,]" and "shared about his desire to change his name and gender marker[,]" which the counselor believed to be "important to his overall well-being." *Id*. On their face, these letters are relevant to and probative of H.S.'s medical history and mental health history; if the trial court was truly concerned about their foundation or authentication, it should not have admitted them at all.[6]

[21] With respect to a best-interests analysis, which the lead opinion does not undertake, Section 31-17-2-8 provides that a court "shall consider *all* relevant factors," including those cited by the court in *A.B.*:

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[5] Mother testified that the aforementioned physician had recommended this counselor, who is "experienced" in the "matter" of gender transition. Tr. Vol. 2 at 14. She also testified that the counselor said that H.S. is "doing so much better with happiness and with his confidence levels" since "he's come out to us about all of this[.]" *Id*. at 13.

[6] Mother testified that she requested the letter from the physician and "picked it up from her office myself." Tr. Vol. 2 at 19. She also requested the letter from the counselor, who "e-mailed it to [Mother] directly." *Id*. at 20. The trial court had discretion to assign whatever weight it chose to the letters, but it also had discretion either not to admit them or to request more foundational information, which it did not do.

(1) The age and sex of the child.

(2) The wishes of the child's parent or parents.

(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.

(4) The interaction and interrelationship of the child with:

(A) the child's parent or parents;

(B) the child's sibling; and

(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

164 N.E.3d at 171 (emphasis added).[7]

[7] The trial court's order incorrectly states that the *A.B.* court limited the best-interests factors to the six listed above. Appealed Order at 6 n.1.

[22] In its order, the trial court was dismissive of fifteen-year-old H.S.'s age, stating that "[a]ny parent who has raised a teenager is well-aware that their thoughts, opinions, and wishes change rapidly. Teenagers are full of hormones and emotions which often results in impulsive, short-sighted decisions. At this age, teenagers are also easily influenced by peer pressure, trends, and pop culture." Appealed Order at 7.[8] These are not specific findings based on the evidence actually presented to the court; these are blatant and biased overgeneralizations. There is no indication that H.S.'s decision to change his gender via a medical procedure was impulsive or the result of peer pressure or pop culture influences. According to Mother, it took H.S. "a year" before he felt "ready" to tell her and Father about his desire to transition. Tr. Vol. 2 at 17. H.S. has received counseling for gender identity issues, and both Mother and Father are supportive of his course of action, testifying that he seems "happier" now. *Id.* at 21, 13.

[23] And yet with respect to the parents' wishes, the trial court held their supportiveness against them, claiming that

> parents are frequently caught in the precarious position of balancing what is truly best for their adolescent with their desire to support their child's decisions. It is apparent from the testimony of H.S.'s parents that this is the case here. Both parents testified that H.S. appears "happier" now; however,

[8] The trial court concluded that H.S.'s sex "has no bearing on the [best interests] analysis. While the sex of the child is important in the context of child custody disputes, whether the child is male or female has no impact on [the] determination" of whether the child's gender marker should be changed. Appealed Order at 7. I agree with this conclusion.

> "happy" is a nebulous term. There was no clear indication of how this new-found happiness has manifested itself in H.S.'s life. "Happiness", especially in the life of an adolescent, waxes and wanes. Thus, it is unreliable.

Appealed Order at 7-8.

[24] It should go without saying that H.S.'s parents, who have known him since his birth, are infinitely more capable than the trial court of judging what "happiness" means to their child and what is in his long-term best interests with respect to his gender identity. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interest of their children."); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (citation and quotation marks omitted). At the hearing, Mother testified that H.S.'s birth name "isn't the name he wants to go by and he understands what's going on. He knows it's not a phase, it's who he is as a person." Tr. Vol. 2 at 17. Father testified,

> [Mother] and I, we're educated people. We value evidence so when this thing started, we spent some time looking up […] evidence based articles, psychological studies and that sort of thing and came to the conclusion that […] this would definitely be something that would be beneficial to pursue. And as we got into it, it definitely has become clear that this is the right thing.

Id. at 21. Father also testified, "[I]t seems like a lot of studies show that […] transgender people who don't have parental support often end up in homeless shelters or, you know, bad circumstances." *Id*. at 22. Unfortunately, Mother and Father placed more value on evidence than the trial court did in this case.

[25] Indeed, the court faulted them for their pragmatism, finding it "troubling" that

> in response to questions from their attorney about why H.S.'s gender marker should be changed, both cited (in addition to happiness) the ease with which H.S. will be able to obtain a driver's license, passport, and other legal documents. While this certainly might be the case, one would think there would be many reasons much higher on the list than the procurement of legal documents. The testimony was simply not convincing. It seemed more in line with parents wanting to support their child's decisions rather than parents objectively considering the best interests of their child.

Appealed Order at 8.

[26] On the contrary, when asked about her "concerns" with the possibility of H.S. getting "an ID with current legal name and a female gender marker," Mother replied that it would not be "good for him mentally, but of course, there have also been news story discriminatory treatment from first responders when they found out that a person is trans." Tr. Vol. 2 at 15-16. She also noted that if H.S. is able to change his gender marker "in his youth, he can apply to colleges as himself. He can get his driver's license and his passport as himself. He doesn't have to have those changed at a later date." *Id*. at 15. When asked if

there were reasons besides H.S.'s happiness that he wanted to see the name and gender that H.S. uses "to be reflected on his birth certificate[,]" Father replied,

> Well, of course from a legal standpoint […], it would be a lot easier for him in the future if that reflected, of course how he felt. He felt he was the real him that sort of thing, […] going forward, […] rather than getting to the point where we have all these documents issued, his name, driver's licenses, passports, what have you. And then needing to revise those and […] going forward just having that set now would be a big help ….

Id. at 21.

[27] Recent history offers plenty of unfortunate examples of legal, governmental, and social intolerance (including violence) toward transgender persons. In fact, Mother testified that she withdrew H.S. from the local public school because of bullying based on his "position as a transgender student[.]" *Id.* at 7. I cannot fault Mother and Father for being concerned about the difficulties and indignities that might arise when H.S. is required to present (or revise) identification documents that do not reflect his gender. In sum, the trial court was wrong to disregard the wishes of H.S.'s parents as they relate to his best interests.

[28] As for H.S.'s wishes, the trial court found,

> When asked why the Petition should be granted, H.S. responded, "I want these changes because, so that I can reflect who I really am and just to be able to use the name and gender that I have gone by for almost two (2) years now on legal stuff." Again, it seems odd that the primary rationale includes the ease of

> obtaining legal documents.
>
> In addition to the rationale, how H.S. testified is significant. While H.S. presents as an intelligent and reasonably articulate child, H.S. appears much younger than the stated age. H.S.'s biological maturity level seems far less than expected for fifteen (15) years of age. It did not seem that H.S. fully understood or appreciated the significance of the requested action.[9] Coupled with this, H.S.'s testimony lacked the level of emotion that would be expected under the circumstances.
>
> In sum, it did not appear that H.S. fully understood the gravity of the requested action. Therefore, the Court concludes this factor neither favors nor disfavors the granting of the Petition.

Appealed Order at 8-9.

[29] As stated above, I believe that the trial court erred in discounting the importance of legal documents to H.S.'s gender identity. As far as the trial court's focus on H.S.'s "biological maturity level" and "level of emotion," H.S. was fifteen at the time of the hearing, and therefore his wishes were entitled to more consideration than if he had been under fourteen years of age. Ind. Code § 31-17-2-8(3). He elected to undergo testosterone therapy and sought gender identity counseling, which suggests that he understood and appreciated the significance of amending the gender marker on his birth certificate. The trial

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[9] Here, the trial court dropped the following footnote: "It would have been helpful to the Court if there had been live testimony from a qualified medical doctor and/or a qualified mental health professional to clarify these issues." Appealed Order at 9 n.2. Such testimony might have been helpful, but I do not believe that it was required.

court conceded that H.S. appeared "intelligent and reasonably articulate[,]" and his youthful appearance and calm demeanor should not count against him. H.S.'s composure reflects an intellectual and emotional maturity beyond his years, in contrast to the overwrought courtroom performance that the trial court apparently was expecting. H.S.'s carefully considered wishes should weigh in favor of granting the petition.

[30] Regarding H.S.'s interaction and interrelationship with others, the trial court found that his parents "testified H.S. is now more 'interactive'. However, in response to questions from the Court, H.S.'s mother indicated that little has really changed since H.S. informed her of H.S.'s desire to change gender identification. Nevertheless, the Court concludes this factor provides some support for the granting of the Petition." Appealed Order at 9. To be more precise, when asked to describe H.S. "prior to coming out versus after coming out and being treated in all respects as a boy named [H.S.]," Mother testified, "Before, he was quiet, reserved, didn't really want to interact with people, but now he's happy. He's smiling. He's more confident in himself. He's more interactive." Tr. Vol. 2 at 14-15. She further testified, "Before then, he was quiet. He wanted to spend a lot of time in his room. And since then, he's become more talkative. He wants to be out and around us more often, spending time with us. Talking to us." *Id*. at 18. Father testified in a similar vein. *See id*. at 21 ("He was withdrawn before, but now he's […] participating more and he's more open. He's happier."). In other words, H.S. did not merely go from being "interactive" to "more interactive," as the trial court's

order suggests; he went from being quiet and reserved to confident and outgoing, which provides even more support for granting the petition.

[31] On the topic of H.S.'s adjustment, the trial court found,

> The evidence submitted clearly demonstrates that H.S. was well-adjusted prior to the August 2019 discussion, and H.S. remains well-adjusted. Prior to the discussion, H.S. had received A's, B's and C's in school. Since the discussion, there has been no change in H.S.'s grades. Prior to the discussion, H.S. had friends. Since the discussion, H.S. still has friends. Prior to the discussion, H.S. had had no disciplinary issues in school or at home. Since the discussion, there have been no disciplinary issues.
>
> The Court concludes this factor neither weighs for or against the granting of the Petition.

Appealed Order at 9. The trial court's finding that H.S. was well-adjusted is contrary to the evidence and a blatant misrepresentation of the record. Mother testified that she withdrew H.S. from school because he was being bullied due to his transgender status.

[32] The trial court found that "no admissible evidence" was presented on H.S.'s mental and physical health, which obviously is not the case because the court actually admitted the testimony of H.S. and his parents, as well as the letters from H.S.'s physician and mental health counselor. Judge Bailey deems the parents' testimony "conclusory," but I respectfully disagree. We must review the trial court's ruling based on the record before us, and I believe that the record is more than sufficient to support the granting of Mother's petition to

change the gender marker on H.S.'s birth certificate. Consequently, I would reverse and remand with instructions to grant the requested relief, as the failure to do so was a blatant abuse of the trial court's discretion.[10]

[10] In his concurring opinion, Judge Pyle reiterates his view that statutory authority does not exist to change a minor child's gender marker. I simply observe that in the nearly seven years since this Court decided *In re the Petition for Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014), on which the holding in *A.B.* is based, our legislature has not taken any concrete steps to abrogate that precedent.