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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Change of Gender
Identification of A.B.

February 24, 2021

Court of Appeals Case No.
20A-MI-1580

Appeal from the Allen Circuit Court
The Honorable Thomas J. Felts,
Judge

Trial Court Cause No.
02C01-2003-MI-179

In the Matter of the Change of Gender
Identification of O.S.

Appeal from the Allen Circuit Court
The Honorable Thomas J. Felts,
Judge

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

In the Matter of the Change of Name and
Gender Identification of C.V. (f/k/a V.V.)

Appeal from the Decatur Circuit
Court

The Honorable Timothy Day, Judge

Trial Court Cause No.
16C01-1910-MI-601

Friedlander, Senior Judge.

[1] In this consolidated appeal, three parents appeal the denials of their petitions to change their children’s gender markers as set forth on the children’s birth certificates. We reverse and remand with instructions.

[2] A.B.’s mother petitioned the trial court to change the gender marker on A.B.’s birth certificate from male to female. At the time, A.B. was fourteen years old. A.B. was listed on her birth certificate as male, but she identified as female from a young age. At age nine, she transitioned to presenting a female identity. A.B. had previously petitioned (through her mother) to change the name on her birth certificate to reflect her new identity, and the petition was granted. A.B. has been in counseling since the age of nine and has undergone surgical procedures to experience puberty as a female rather than a male. The trial court held an evidentiary hearing, during which A.B.’s mother explained, “[A.B.] lives completely as a female.” A.B. Tr. Vol. 2, p. 6. The court expressed “hesitat[ion]” about “changing something like this for a child who’s not of age of majority, um, potentially could change back, could change mind [sic].” *Id.* at 16. The court subsequently denied the petition without explanation.

- [3] In O.S.’s case, her mother petitioned for a change of the gender marker on O.S.’s birth certificate from male to female. O.S. was seven years old. She has identified as female since the age of five and has been under the care of a psychologist who specializes in pediatrics and gender health. The trial court held an evidentiary hearing, and O.S.’s mother explained, “[being female] is who O.S. is at her core. Um, it’s not play acting, it’s not going to change.” O.S. Tr. Vol. 2, p. 13. The court subsequently denied the petition without explanation.
- [4] Finally, in C.V.’s case, C.V.’s father petitioned to change the following on C.V.’s birth certificate: (1) the name, from V.V. to C.V.; and (2) the gender marker, from female to male. C.V.’s father stated in the petition that the changes were necessary to “accurately reflect the child’s gender identity and presentation.” Appellants’ App. p. 18. At the time, C.V. was sixteen years old.
- [5] The trial court held an evidentiary hearing. During the hearing, C.V. testified that he wanted his gender marker changed to match his gender identity. After the hearing, the court granted C.V.’s father’s request to change the name on C.V.’s birth certificate. The court denied the request to change C.V.’s gender marker. The court found that C.V.’s father filed the petition in good faith, but “[p]arents may not consent to a gender change for their children.” Appellants’ App. p. 14.
- [6] All three parents appealed. The Court consolidated the appeals on C.V.’s motion.

- [7] The parents argue the trial courts erred in denying their petitions, claiming: (1) parents have the authority to seek a gender marker change on their children’s birth certificates; and (2) they established they are entitled to relief. This appeal presents questions of law, which we review de novo. *In re A.L.*, 81 N.E.3d 283 (Ind. Ct. App. 2017).
- [8] We first address whether the parents were allowed to seek the gender marker changes. The Indiana Department of Health “may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence” Ind. Code § 16-37-2-10(b) (1995). The documentary evidence may include court orders. *See In re Petition for Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014) (concluding a trial court has the authority to order a correction of a gender marker on an adult’s birth certificate). The Indiana Bureau of Motor Vehicles expressly acknowledges that a birth certificate may be amended to show a change in a person’s gender. 140 Ind. Admin. Code § 7-1.1-3(b)(1)(B) (2017). The question is whether a parent has the authority to ask a court to amend the gender marker on a minor child’s birth certificate.
- [9] “[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.

[10] The fundamental right of parents to make important decisions for their minor children is reflected in a variety of statutes. Parents may limit grandparents or other relatives’ contact with children, except in a few circumstances. *See* Ind. Code § 31-17-5-1 (1997) (setting forth circumstances in which grandparents have the right to request visitation with grandchildren). Parents may waive their child’s constitutional rights (if the child concurs) in juvenile delinquency proceedings. *See* Ind. Code § 31-32-5-1 (1997) (establishing process for parental waiver of juvenile’s rights). Parents may consent to a child’s withdrawal from school (with the consent of the school’s principal) if the child is between sixteen and eighteen years of age. *See* Ind. Code § 20-33-2-9 (2015) (setting forth the process for withdrawal). Parents may consent to their child working extended hours if the child is between sixteen and eighteen years of age. *See* Ind. Code § 22-2-18-33 (2020). Indiana law recognizes parents’ authority to make decisions for a child that may have substantial or permanent effects on the child’s life.

[11] As for birth certificates, it is well established that a parent may petition a court to change a minor child’s name, as C.V.’s parent requested in his case. *See* Ind. Code § 34-28-2-2 (2016) (setting forth the requirements for a parent to change a child’s name); *Matter of J.N.H.*, 659 N.E.2d 644 (Ind. Ct. App. 1995) (reversing trial court’s denial of parent’s petition to change child’s name). In addition, a man who has been determined by a court to be the biological father of a child may petition to have his name added to the child’s birth certificate. Ind. Code §

31-14-9-1 (1997). The changing of a child's gender marker is commensurate with these other life-changing alterations to a birth certificate.

- [12] Considering the broad language of Indiana Code section 16-37-2-10(b), and the wide authority of parents to make decisions about their children's lives, we conclude the trial court in C.V.'s case erred in stating C.V.'s father lacked the authority to request a change to the gender marker on C.V.'s birth certificate. *See In re Birth Certificate*, 22 N.E.3d 707 (concluding the trial court has the authority to change a gender marker on an adult's birth certificate based on the general statutory authority governing amendment of birth certificates, as well as the trial court's inherent equitable power to grant such relief).
- [13] Next, the parents claim they are entitled to have their petitions granted. They further claim the appropriate standard for a trial court to apply when considering a petition to change gender marker is whether the petition was filed in good faith. We disagree.
- [14] It is useful to compare the standards by which trial courts resolve petitions to change a name on a birth certificate. When an adult petitions a court to change his or her name on a birth certificate, the trial court grants the petition if it is filed in good faith, without "fraudulent intent." *J.N.H.*, 659 N.E.2d at 646. By contrast, when a parent petitions to change a child's name, "the trial court shall consider what is in the best interests of the child." *Petersen v. Burton*, 871 N.E.2d 1025, 1028 (Ind. Ct. App. 2007) (discussing Ind. Code § 34-28-2-4(d) (1998)).

[15] As for a petition to change gender marker on a birth certificate, when an adult requests that relief, “the ultimate focus should be on whether the petition is made in good faith and not for a fraudulent or unlawful purpose.” *In re Birth Certificate*, 22 N.E.3d at 710. That standard tracks the standard for an adult seeking to change his or her name. By contrast, when a parent petitions to change a child’s gender marker, similar to requesting a name change for a child, we conclude the appropriate standard is whether the change is in the child’s best interests.

[16] In determining the best interests of the child for a gender marker change, a trial court may consider the same factors as for a name change. Indiana Code section 34-28-2-4 instructs a trial court ruling on a petition for a name change to consider the factors set forth in Indiana Code section 31-17-2-8 (2017), which governs child custody. Those factors include:

- (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 physical and mental health of all individuals involved.

Ind. Code § 31-17-2-8.

[17] The trial court in C.V.'s case did not reach the issue of whether C.V.'s father had demonstrated a gender marker change was in C.V.'s best interests, and we cannot determine whether the trial court in A.B.'s and O.S.'s cases applied the best interests standard. Under these circumstances, the trial courts should be given an opportunity to reconsider the petitions using the correct standard of review.

[18] For the reasons stated above, in all three trial court cases, we reverse the denial of the parents' petitions and remand with instructions to address the petitions in accordance with the best interest standard.

[19] Judgments reversed and remanded.

Vaidik, J., concurs

Pyle, J., dissents with opinion.

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In the Matter of the Change
of Gender Identification of A.B.

Court of Appeals Case No.
20A-MI-1580

In the Matter of the Change of
Gender Identification of O.S.

In the Matter of the Change of
Name and Gender
Identification of C.V. (f/k/a
V.V.).

Pyle, Judge dissenting with opinion.

[20] I respectfully dissent from my colleagues’s opinion reversing the judgments of the respective trial courts. My colleagues seek, based upon the holdings in *In re the 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), to shoehorn a remedy for

the petitioners that does not yet exist. However, the shoe does not fit. As a result, my colleagues have strayed into an area reserved for our General Assembly. IND. CONST. art. 4, § 1 (reserving the legislative power for the General Assembly).

[21] It has long been settled that the judiciary interprets the law. *See Marbury v. Madison*, 5 U.S. 137 (1803). With this authority comes a host of doctrines (such as *stare decisis* and approaches to statutory and constitutional interpretation) that assist courts in their decision making. However, none of these important approaches is relevant because our General Assembly has not provided Indiana trial courts with any statutory authority to grant petitions to change a minor child's gender to reflect their gender identity and presentation.

[22] My colleagues, as well as the panels in *In re Birth Certificate* and *Matter of R.E.*, believe that INDIANA CODE § 16-37-2-10 provides trial courts with the necessary statutory authority. However, I disagree. *See In re J.J.*, 911 N.E.2d 659 (Ind. Ct. App. 2009) (Indiana does not recognize horizontal *stare decisis*; we are respectful of other panel's decisions but are not bound by them). The selected statute provides as follows:

- (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 code 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 result 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 result 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.

Ind. Code § 16-37-2-10. A plain reading of the text 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.

[23] 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 (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.

[24] 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.

[25] 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.

[26] As a result, I would affirm the judgments of the respective trial courts.