IN RE: ADAM CHRISTOPHER STRAIN

NO. 24-CA-234

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 849-387, DIVISION "L"
HONORABLE DONALD A. ROWAN, JR., JUDGE PRESIDING

December 30, 2024

SCOTT U. SCHLEGEL
JUDGE

Panel composed of Judges Stephen J. Windhorst,
Scott U. Schlegel, and Timothy S. Marcel

AFFIRMED

SUS
SJW

MARCEL, J., DISSENTS WITH REASONS

TSM

COUNSEL FOR PLAINTIFF/APPELLANT,
ADELAIDE SELENE STRAIN, FORMALLY KNOWN AS ADAM CHRISTOPHER STRAIN

Donald F. deBoisblanc, Sr.
Donald F. deBoisblanc, Jr.

SCHLEGEL, J.

Petitioner, Adam Christopher Strain, appeals the district court's judgment of March 25, 2024, which denied petitioner's Motion for Change in Gender Marker and for Issuance of New Birth Certificate under La. R.S. 40:62, and the April 2, 2024 judgment denying petitioner's motion for new trial. Finding that the district court's conclusions were not manifestly erroneous and the denial of petitioner's motion for new trial was not an abuse of discretion, we affirm the judgment of the district court.

Background

On November 30, 2023, petitioner filed a "Petition for Name Change, Gender Marker and for Issuance of New Birth Certificate," alleging that petitioner was born Adam Christopher Strain in 2001, and that on September 28, 2023 underwent sex reassignment surgery. The petition sought: (1) permission to change petitioner's name to Adelaide Selene Strain, and (2) an order pursuant to La. R.S. 40:62 to the Louisiana State Registrar of Vital Records to issue a new birth certificate with the new name and gender marker of female.

The district attorney for the Parish of Jefferson, representing the State, filed an answer to the petition stating he had no objection to the name change but that he had no position on the request to change petitioner's sex/gender identification because the Louisiana State Registrar was the proper party on that issue. On December 4, 2024, the district court rendered judgment granting petitioner's requested name change to Adelaide Selene Strain pursuant to La. R.S. 13:4751, *et seq.* The order crossed out the relief requested under La. R.S. 40:62.

On January 10, 2024, the Vital Records Registrar for the Louisiana Department of Health, Office of Public Health - Vital Records Registry ("DHH-VRR") filed an answer to the petition generally denying the factual allegations and specifically denying "the allegations of compliance with La. R.S. 40:62 for lack of

sufficient information to justify a belief therein." In response, on January 18, 2024, petitioner filed a "Motion for Change in Gender Marker and for Issuance of New Birth Certificate" and set it for hearing.

The district court heard the motion on March 25, 2024. Petitioner introduced the following evidence: (1) petitioner's original birth certificate; (2) a copy of the court's December 4, 2023 judgment granting the name change; (3) the September 28, 2023 operative report of Tulane Medical Center for petitioner's gender reassignment surgery; and (4) a letter dated October 30, 2023 from petitioner's surgeon in support of petitioner's "application to change their legal gender marker on their driver's license." The DHH-VRR was present at the hearing and did not object to the introduction of petitioner's evidence.

Following a review of the records, the district court ruled from the bench and denied the motion. The district court also issued a judgment with reasons on March 25, 2024. As discussed further below, the district court stated it had anticipated additional evidence being offered at the hearing, including testimony from petitioner's doctor.

On March 28, 2024, petitioner filed a motion for new trial, which offered to satisfy the court's requirement of live testimony by having the petitioner's treating physician testify that "Ms. Strain has been properly diagnosed as a transexual, the information [the physician] gathered in the pre-operative process confirmed the diagnosis, that the patient was an appropriate candidate for the sex reassignment surgery, that the corrective surgery was performed, and the results of the surgery." The motion represented that the DHH-VRR had no opposition to the motion for new trial and re-setting the hearing.

The district court denied the motion for new trial without reasons on April 2, 2024.

Law and Analysis

On appeal, petitioner asserts two assignments of error: (1) the district court erred in failing to grant the issuance of a new birth certificate after anatomical change of sex by surgery based on the evidence presented at the hearing pursuant to La. R.S. 40:62; and (2) alternatively, the district court abused its discretion in failing to grant the motion for new trial to allow additional testimony as requested in its reasons for judgment.

As to petitioner's first assignment of error, this Court begins its analysis by looking at all relevant legislation, as legislation is superior to any other source of law and is a solemn expression of legislative will. *Martin v. Thomas*, 21-1490 (La. 6/29/22), 346 So.3d 238, 242; La. C.C. art. 2. Moreover, the well-established rules of statutory construction provide that the interpretation of any statutory provision starts with the language of the statute itself. *In re Succession of Faget*, 10-188 (La. 11/30/10), 53 So.3d 414, 420; *Wallace C. Drennan, Inc. v. St. Charles Par.*, 16-177 (La. App. 5 Cir. 9/22/16), 202 So.3d 535, 543. Thus, when the provision is clear and unambiguous and its application does not lead to absurd consequences, its language must be given effect, and its provisions must be construed to give effect to the purpose indicated by a fair interpretation of the language used. La. C.C. art. 9; La. R.S. 1:4; *Drennan*, 202 So.3d at 543.

The statute at issue, La. R.S. 40:62, entitled "Issuance of new birth certificate after anatomical change of sex by surgery" was enacted in 1979 and was amended in 1986. It provides in pertinent part:

> A. Any person born in Louisiana who has sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of a sex other than that which appears on the original birth certificate of the individual, may petition a court of competent jurisdiction as provided in this Section to obtain a new certificate of birth.
>
> B. Suits authorized by this Section shall be filed contradictorily against the state registrar in the judicial district court having jurisdiction over the parish in which the petitioner resides or over the parish in which the petitioner was born. A nonresident born in Louisiana shall file the petition in

> the parish of birth. The suit of any petitioner born in Louisiana shall be filed contradictorily against the state registrar. In the event the petitioner is married, the spouse shall also be a necessary party to the suit. To the extent that the petitioner's name is to be changed, the district attorney shall also be a necessary party. In all cases the petition shall be accompanied by a certified copy of the petitioner's original birth record, in which case the short-form birth certificate card shall not be sufficient.
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> C. The court **shall require such proof as it deems necessary to be convinced** that the petitioner was **properly diagnosed** as a transsexual or pseudo-hermaphrodite, that sex reassignment or corrective surgery has been **properly performed** upon the petitioner, and that as a result of such surgery and subsequent medical treatment the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner.
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> If the court shall find that the **evidence sustains the required proof**, the court shall render a judgment ordering the issuance of a new birth certificate changing the sex designated thereon from that shown upon the petitioner's original certificate of birth. The petitioner may in the same suit seek to have the name of the petitioner changed, and the court may render judgment in accordance with law upon this additional petition at the same time.
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> ***

(Emphasis added.)

The statute is not vague. It is clear and unambiguous. Any person who wishes to obtain a new certificate of birth must petition the court and introduce "such proof as [the court] deems necessary to be convinced that the petitioner was properly diagnosed **…** that sex reassignment or corrective surgery has been properly performed upon the petitioner, and that … the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner" during a contradictory hearing. La. R.S. 40:62(C). Further, a plain reading of the statute shows that the legislature expressly provided that the trial courts "shall render a judgment ordering the issuance of a new birth certificate changing the sex designated" **only** "if the court … find[s] that the evidence sustains the required proof." *Id.*

At the conclusion of the brief hearing, the district court recessed to consider the evidence submitted, and after careful consideration of the evidence, found that petitioner had failed to provide sufficient evidence to convince it that the diagnosis and the procedure were proper. The district court ruled as follows from the bench:

> This Court has carefully considered all of the documents; however, the Court cannot find that the evidence submitted sustains the required proof under Louisiana Revised Statute Title 40, Section 62. While the motion and supporting exhibits are not disputed, this Court was anticipating additional evidence being offered at the hearing; more specifically, testimony from petitioner's doctors which could have assisted the Court in considering questions surrounding [the] long-term effect of this and the permanence of these medical procedures, which have been very few.
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> This petition is asking the Court to permanently change a vital State record and to seal the previous vital record based on three pages of medical records and a letter. This is simply not enough to determine whether the diagnostic procedures were proper in accordance with the Statute.
>
> After a careful analysis of Louisiana Revised Statute Title 40, Section 62, the Court finds that the Legislature intended to give Judges discretion in these matters and not just to rubber stamp the petition.

Petitioner correctly notes that in reviewing a trial court's factual findings, Louisiana courts of appeal apply the manifest error standard of review in civil cases. *George v. White*, 12-101 (La. App. 5 Cir. 10/30/12), 101 So.3d 1036, 1041-42. The manifest error standard of review precludes the setting aside of a district court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety. *Id.* at 1042. Despite this recognition, petitioner complains that there is not enough law on the required burden of proof and suggests that this Court take into account the few other cases that have been litigated when weighing whether or not the trial court erred. But a reviewing court may not merely decide if it would have found the facts of the case differently, which is exactly what petitioner is asking this Court to do here. *Id.* Instead, the reviewing court should affirm the district court where the district court judgment is not manifestly erroneous. *Id.*

After considering the evidence presented, we cannot say that the trial court's conclusion is manifestly erroneous. As explained above, La. R.S. 40:62 instructs the trial court that it "shall require such proof as it deems necessary to be convinced" before ordering the issuance of a new birth certificate changing petitioner's sex. In its reasons, the trial court recognized that petitioner's motion and exhibits were not disputed, but indicated that it had additional questions

regarding the diagnostic and medical procedures that were not satisfied by three pages of medical records and a letter. The letter from Dr. Jansen is not a letter detailing petitioner's diagnosis as a transexual. It is a letter in support of petitioner's "application to change their legal gender marker on their driver's license."[1] Additionally, there is no explanation in the operative notes of petitioner's diagnosis as a transexual. The operative notes only note in fill-in-the-blank fashion that a "gender dysmorphic therapist" cleared the genital reassignment surgery. Furthermore, Dr. Jansen is presumably an expert in plastic surgery not psychiatry or psychology, so it is understandable if the trial court wanted to hear from petitioner's doctors to convince it that that the petitioner had been **properly diagnosed**. It is also clear that the trial court had questions about the procedure itself that Dr. Jansen could have answered to convince it that the sex reassignment surgery had been **properly performed**.

Thus, this Court cannot say that the trial court erred by finding that three pages of uncertified medical records and an unsworn letter failed to constitute proof necessary to convince it of the factual elements set forth in La. R.S. 40:62(C), as required by law. Further, as noted by the trial court, La. R.S. 40:62 requires it to conduct a contradictory hearing, not rubber stamp any petition filed.

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[1] If Dr. Jensen's concern is allowing a gender change on petitioner's driver's license, then his letter satisfies the Office of Motor Vehicles' requirement for a gender change. A court order is only required for a name change, which was already granted by the trial court. *See* La. Dept. Pub. Safety, Office of Motor Vehicles, Policy 22.01 § 1 (Rev. 03/12/2009), https://public.powerdms.com/ladpsc/documents/368304.

> Policy 22.01, entitled "Gender Change / Reassignment", of the Louisiana Department of Public Safety Office of Motor Vehicles, provides:
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> **Definition:** If an applicant for or a holder of a Louisiana driver's license/identification card indicates that he has undergone a gender change/reassignment procedure and desires to change the gender identification on his driver's license/ID card, the change will be noted and a new driver's license/ID card will be issued.
>
> **Requirements**:
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> • A medical statement signed by a physician stating that the applicant has undergone a successful gender change/reassignment.
>
> • In addition, should the applicant or holder of a Louisiana driver's license/ID card seek a name change due to the gender change/reassignment, a certified or true copy of a court order must be presented.

The petitioner's second assignment of error is that the trial court abused its discretion in failing to grant the motion for a new trial to allow additional testimony as requested in its reasons for judgment.

Articles 1972 and 1973 of the Louisiana Code of Civil Procedure provide the basis for the granting of a new trial. These articles provide as follows.

La. C.C.P. art. 1972 provides peremptory grounds for granting a new trial:

> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
> (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

Article 1973 provides discretionary grounds for granting a new trial: "A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law." The appellate standard of review of the ruling on a motion for new trial is whether the trial court abused its discretion. *Giglio v. ANPAC Louisiana Ins. Co.*, 20-209 (La. App. 5 Cir. 12/23/20), 309 So.3d 416, 422.

As discussed above, petitioner has not shown any peremptory grounds under Article 1972 for the granting of a new trial. And the suggestion that petitioner is entitled to a new trial because the trial court didn't tell petitioner's counsel what evidence it would take to carry petitioner's burden and convince the trial court that the diagnosis and procedure were proper before the hearing is not "good grounds" under Article 1973.

Accordingly, we affirm the district court. The district court's conclusions were not manifestly erroneous and its denial of petitioner's motion for new trial was not an abuse of discretion.[2]

AFFIRMED

[2] The district court did not deny petitioner's "Motion for Change in Gender Marker and for Issuance of New Birth Certificate" with prejudice. Thus, there is nothing preventing petitioner from filing another motion supported by additional evidence.

IN RE: ADAM CHRISTOPHER STRAIN NO. 24-CA-234

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

MARCEL, J., DISSENTS WITH REASONS

Respectfully, I dissent.

I find merit in appellant's assignments of error and would render judgment in appellant's favor, or, in the alternative, remand the case for a new trial. I write now to explain why I believe the majority's decision to affirm the judgments below, a decision that depends on an indeterminate and inconclusive interpretation of La. R.S. 40:62, is legally incorrect. Even under the manifest error standard of review, which I do not believe applicable in light of the trial court's legal error, the trial court's decision is clearly wrong in light of the evidence presented. Furthermore, as articulated below, I find both peremptory and discretionary grounds for granting the motion for a new trial.

The Indeterminate and Inconclusive Interpretation of La. R.S. 40:62

The majority's interpretation of La. R.S. 40:62 raises concerning questions about the fair and just application of this statute both in general and in this specific case. Of particular concern is the majority's failure to articulate the applicable *burden of proof* and the majority's repeated, vague emphasis on the word "proper". I address these below after a brief examination of the statute.

Louisiana's Vital Statistics Laws are set forth in Chapter 2, Title 40 of the Louisiana Revised Statutes, La. R.S. 40:32, *et seq*. The statutes in this chapter set forth rules and requirements for certificates of birth, death, and

marriage, paternity acknowledgments, divorce judgments, name changes, as well as various procedures for the amendment of birth certificates including changes to maternal or paternal biological filiation and other information after the original birth certificate has been prepared. *See* La. R.S. 40:46, *et seq*. Two statutes provide for the issuance of birth certificates with amended sex designations in situations where there has been an anatomical change of sex by surgery or where a hereditary genetic defect or hormone deficiency led to an erroneous sex designation on the original certificate. *See* La. R.S. 40:62 and 40:62.1.

As far back as 1979, the Louisiana Legislature recognized that there are a rare number of individuals who undergo sex reassignment surgery as part of their medical treatment and created a procedure whereby such individuals may petition the courts to have this corrected sex accurately reflected in the State's vital records. La. R.S. 40:62 states in its entirety:

> A. Any person born in Louisiana who has sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of a sex other than that which appears on the original birth certificate of the individual, may petition a court of competent jurisdiction as provided in this Section to obtain a new certificate of birth.
>
> B. Suits authorized by this Section shall be filed contradictorily against the state registrar in the judicial district court having jurisdiction over the parish in which the petitioner resides or over the parish in which the petitioner was born. A nonresident born in Louisiana shall file the petition in the parish of birth. The suit of any petitioner born in Louisiana shall be filed contradictorily against the state registrar. In the event the petitioner is married, the spouse shall also be a necessary party to the suit. To the extent that the petitioner's name is to be changed, the district attorney shall also be a necessary party. In all cases the petition shall be accompanied by a certified copy of the petitioner's original birth record, in which case the short-form birth certificate card shall not be sufficient.
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> C. The court shall require such proof as it deems necessary to be convinced that the petitioner was properly diagnosed as a transsexual or pseudo-hermaphrodite, that sex reassignment or corrective surgery has been properly performed upon the

> petitioner, and that as a result of such surgery and subsequent medical treatment the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner.
>
> If the court shall find that the evidence sustains the required proof, the court shall render a judgment ordering the issuance of a new birth certificate changing the sex designated thereon from that shown upon the petitioner's original certificate of birth. The petitioner may in the same suit seek to have the name of the petitioner changed, and the court may render judgment in accordance with law upon this additional petition at the same time.
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> D. (1) A certified copy of the petition and judgment for a new certificate pursuant to this Section shall be furnished to the state registrar of vital records at New Orleans within ten days after the judgment is rendered. The registrar shall issue to the petitioner a new certificate or certified copy thereof; whereupon the original birth certificate and the copy of the petition and judgment received by the registrar shall be sealed in a package and filed in the archives of the vital records registry.
> (2) This sealed package shall be opened only upon demand of the individual to whom the new certificate was issued, and then only by order of the court which rendered the judgment ordering the issuance of the new certificate.

On its face, Subsection C sets forth what facts must be proven before a judgment ordering the issuance of a birth certificate with an amended sex designation: (1) that the petitioner was properly diagnosed as a transsexual or pseudo-hermaphrodite; (2) that sex reassignment or corrective surgery has been properly performed; and (3) that the surgery has resulted in a change in the anatomical sex of the petitioner.

Unlike its companion statute La. R.S. 40:62.1 which specifies the form and content of evidence supporting the request for a new birth certificate[1], no part of La. R.S. 40:62 expressly states what type, kind, or quantity of evidence should accompany the petition. Instead, the statute states "[t]he court shall require such proof as it deems necessary to be

[1] La. R.S. 40:62.01 requires the request for a new birth certificate to be accompanied by competent medical evidence in the form of affidavits from two or more physicians certifying and establishing by medical diagnosis that the original erroneous sex designation was due to a hereditary genetic defect or hormone deficiency.

convinced" that there has been a proper diagnosis, surgery, and anatomical change of sex.

The Mystery Burden of Proof

In the course of their discussion of Petitioner's first assignment of error, the majority states, "[p]etitioner complains that there is not enough law on the required burden of proof and suggests that this Court take into account the few other cases that have been litigated when weighing whether or not the trial court erred. But a reviewing court may not merely decide if it would have found the facts of the case differently, which is exactly what petitioner is asking this Court to do here." This statement misconstrues and disregards Petitioner's valid legal arguments concerning the burden of proof.[2] [3] As articulated more fully below, in the course of its plain language analysis, the majority articulates no definite claim or statement regarding a petitioner's burden of proof under the statute. It is unclear how a factfinder could engage in a fair and just application of the statute in the absence of a clear articulation of the burden of proof.

It is well understood under the law of evidence that the phrase "burden of proof" may be used to refer to describe two different concepts: the burden of producing evidence and the burden of persuasion. *See generally* The Burdens of Proof: the Burden of Producing Evidence and the Burden of Persuasion, 2 McCormick on Evidence § 336 (8th ed.); BURDEN OF PROOF, Black's Law Dictionary (12th ed. 2024). Generally, in civil

[2] In the forty five years since La. R.S. 40:62 has been enacted, there have been no reported cases directly interpreting its provisions: the legal questions of what the statute requires and how those requirements may be met are *res nova* issues for this Court, legitimately raised by Petitioner in her first assignment of error, and I believe they should be addressed as such, not dismissed as a mere matter of deciding the facts differently.

[3] That there is a legitimate legal question presented concerning the trial court's interpretation and application of the statute is also indicated by the trial court's *sua sponte* declaration on the record that "the Court finds that the Legislature intended to give Judges discretion in these matters and not just to rubber stamp the petition."

matters, the party seeking relief bears the initial burden of producing evidence to the court to establish the existence of a fact alleged in the petition. *See generally* Proof of Facts, 19 La. Civ. L. Treatise, Evidence and Proof § 4.2 (2d ed.). It is both undisputed and clear from the statutory language that the burden of production is on the petitioner to provide evidence to prove the facts required under La. R.S. 40:62.

What is less clear, and what cannot be determined from the majority's interpretive analysis, is Petitioner's burden of persuasion under La. R.S. 40:62. The burden of persuasion is the degree of certainty to which a trier of fact believes, on the evidence presented, that the alleged fact is true. McCormick, *supra*. It becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced. *Id*. This obligation to establish by evidence a requisite degree of belief concerning a fact in the mind of the court may also be stated as a preponderance of the evidence, clear and convincing proof, or proof beyond a reasonable doubt. La. C.E. art. 302(1).

Rather than adopting on of these classic evidentiary standards, the majority states only that the statute "instructs the trial court that it 'shall require *such proof as it deems necessary* to be convinced' before ordering the issuance of a new birth certificate changing petitioner's sex." (Emphasis supplied.) This claim is not the conclusive statement of law the majority would have the reader believe. Instead of adopting a "preponderance of the evidence" standard or "proof beyond reasonable doubt" standard, the majority proposes a new "whatever proof the court deems necessary" standard. How this "whatever proof the court deems necessary" burden of persuasion is to be met is not explained and remains a mystery.

Such a claim raises serious constitutional questions. Accepting this interpretation would allow the judge hearing a La. R.S. 40:62 petition in one division to apply a "preponderance of the evidence" burden while a judge in another division hearing a similar petition could apply a "proof beyond reasonable doubt" burden, resulting in two similarly situated petitioners presenting the same evidentiary documents receiving different rulings. Alternatively, the majority's interpretation that the burden of proof is whatever the trial judge deems necessary suggests that one judge could "shift the goal posts" or apply different burdens of persuasion at different stages of the same proceeding. I am unaware of any law that permits a judge to change the burden of proof or the burden of persuasion at their own discretion.

Vague and Confusing Emphasis of "Proper"

In addition to the problematic refusal to articulate a clear burden of persuasion and adoption of a novel "whatever proof the court deems necessary" mystery standard, the majority, in its interpretation of La. R.S. 40:62, repeatedly emphasizes the word "proper" as used in the statute. For example, in restating Subsection C, the majority states, "Any person who wishes to obtain a new certificate of birth must petition the court and present during a contradictory hearing 'such proof as [the court] **deems necessary to be convinced** that the petitioner was **properly diagnosed**… that sex reassignment or corrective surgery has been **properly performed** upon the petitioner, and that … the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner.'" (Emphasis by majority.)

No explanation is offered for this emphasis on the word "proper". The majority's analysis suggests that it is within the discretion of the trial

court to determine what constitutes a "proper" diagnosis of transsexual or pseudo-hermaphrodite and what constitute "proper" surgical procedures for sex reassignment surgery. In other words, the majority's interpretation of the word "proper" proposes the trial judge may weigh his own subjective evaluation as to the correctness or validity of a medical diagnosis or surgical procedure against the evaluation of credentialed medical professionals. As with the adoption of the mystery burden of proof, this interpretation is radical and unprecedented. Judges are not medical experts. They do not have the medical training, education, expertise, or experience to make such an evaluation.[4]

The express language of the statute contemplates that there are proper diagnosis and procedures whereby one may anatomically change their sex. However, the majority's proposed interpretation would sanction the denial of relief under La. R.S. 40:62 based solely on a judge's personal beliefs that there may never be a "proper" diagnosis of transsexual or a "proper" surgical procedure for anatomical change of sex, and therefore, no amount of medical evidence would ever "convince" them of the facts to be proven for granting the petition. Such an absurd outcome is contrary to purpose of the statute.

Where the language of the law is susceptible to different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. La. C.C. art. 10. When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole. La. C.C. art. 12. The alternative, and more

[4] The trial court's statements that "testimony from petitioner's doctors … could have assisted the Court in considering questions surrounding [the] long-term effect of this and the permanence of these medical procedures…" suggests that the court was looking for proof that the procedure in question was permanent, which is not a fact petitioner is required to prove under the plain language of the statute.

sensible interpretation of "proper" is to mean that the petitioner has received diagnosis and surgical procedures in accordance with established medical guidelines. I do not see the trial court's verification that petitioner has received such treatment as a "rubber stamp" function. Rather, I believe there is a valid state interest and purpose in ensuring that persons petitioning pursuant to La. 40:62 have received correct medical care. It is worth reiterating here that the evidence presented in this case includes a statement by petitioner's treating physician that all of petitioner's medical interventions have been done in accordance with established medical guidelines. There is no evidence to the contrary, and no rational basis for challenging the veracity of this statement.

Clear Error under the Manifest Error Standard

Neither the trial court nor the majority have articulated a clear burden of proof or burden of persuasion to be applied in this specific case or in general, and I believe the application of the manifest error standard of review in light of such legal error is improper. Where one or more legal errors interdict the fact-finding process, the manifest error is no longer applicable, and, the appellate court should make its own independent *de novo* review of the record and render judgment if the record is otherwise complete. *Thomas v. Thomas*, 22-141 (La. App. 5 Cir. 12/28/22), 356 So.3d 548, 556, *writ denied*, 23-00124 (La. 4/4/23), 358 So.3d 868. Nevertheless, even overlooking the trial court's legal error, application of the manifest error standard of review to the facts presented in the record of this case would result in an outcome opposite of that proposed by the majority.

When reviewing the determinations of the trial court under the manifest error standard of review, the issue before the appellate court is not whether the trier of fact was right or wrong, but whether the fact finder's

conclusion as a reasonable one. *Jurado v. Phillips*, 23-373 (La. App. 5 Cir. 3/28/24), 384 So.3d 1155, 1158. As stated above, La. R.S. 40:62 requires that three facts be proven by the evidence: (1) that the petitioner was properly diagnosed as a transsexual or pseudo-hermaphrodite; (2) that sex reassignment or corrective surgery has been properly performed; and (3) that the surgery has resulted in a change in the anatomical sex of the petitioner.[5] The petitioner has the burden of proving these facts by a preponderance of the evidence.[6] Proof by a preponderance of the evidence means that the evidence, when taken as a whole, shows that the fact to be proven is more probable than not. *Gonzalez v. Wricks*, 23-298 (La. App. 5 Cir. 5/8/24), 389 So.3d 218, 225. In other words, in light of the uncontroverted evidence, is it more likely than not that Ms. Strain received a proper diagnosis and proper surgical treatment resulting in an anatomical change of sex. Applying the manifest error standard of review, the question becomes was the trial court unreasonable in concluding these facts were not proven by the evidence presented? I believe this question must be answered affirmatively: the trial court clearly erred.

The evidence offered by Petitioner to prove these facts in this case includes the operative notes of the September 28, 2023 surgery performed at Tulane University Medical Center by Dr. David Jansen, Clinical Chief of the Division of Plastic Surgery. These operative notes dictated by Dr. Jansen include Petitioner's pre- and post-operative diagnoses, a brief medical history, and detailed descriptions of the surgical procedures performed as part of genital reassignment surgery, including a penectomy, vaginoplasty,

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[5] It should be reiterated that the law requires no other facts to be proven such as facts concerning the long-term effects or permanence of the surgical procedures as queried by the trial judge.

[6] I adopt this evidentiary burden of persuasion, the same applied to all other civil proceedings unless otherwise stated by law, rather than the majority's "whatever proof the court deems necessary" mystery burden of persuasion.

clitoroplasty, and bilateral labioplasty. Also presented as evidence was a letter from Dr. Jensen (on the letterhead of Jansen Plastic Surgery) unequivocally supporting a gender marker change and affirming that proper medical treatment was provided to petitioner.[7] Dr. Jensen documents the medical care given to Ms. Strain - hormone therapy, counseling, and the gender reassignment surgery - as interventions "in accordance with established medical guidelines." The letter concludes an invitation to contact him with any questions or requests for additional information and contact information whereby he may be reached.

Here it should be noted that there is no conflict in testimony or contradictory evidence. Neither DHH-VRR nor the trial court raised any questions regarding the credibility of the medical evidence presented. Even the trial court's statements that "petitioner's doctors could have assisted the Court in considering questions surrounding [the] long-term effect of this and the permanence of these medical procedures…" imply that the trial court had no doubts as to Dr. Jansen's credibility or competence to provide expert medical testimony that would aid the fact-finder.[8]

The majority's analysis of the evidence makes much of the fact that Petitioner's evidence doesn't provide "details" or "explanations" of Petitioner's diagnosis as transsexual. As such, the majority opines, one can reasonably conclude that Petitioner has not been "properly" diagnosed.[9] I do not believe such a claim can stand in light of the evidence presented.

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[7] The majority in its analysis makes much of the fact that this letter was addressed to unknown officials at the Office of Motor Vehicles rather than DHH-VRR, but offers no explanation as to how this is relevant to the veracity of Dr. Jansen's statements. The majority also offers no explanation as to why the evidence deemed sufficient by one government agency for a change in gender marker on a government identification is not sufficient to change the gender marker on the government identification issued by another agency.

[8] These statements also imply that, as a factual matter, the trial court believed Ms. Strain had been diagnosed and received surgical treatment.

[9] The plain language of La. R.S. 40:62 states no requirement for details or explanations of petitioner's diagnosis as transsexual.

Accepting the majority's conclusion in light of the evidence presented, particularly the operative notes, requires one to believe that the medical professionals at Tulane University Hospital are performing surgeries and major operations, including genital reassignment surgeries, without prior proper medical diagnoses. This proposition is illogical and unreasonable. It is an assumption that Tulane University Hospital, Dr. Jansen and Ms. Strain's medical providers have committed medical malpractice by operating on her without a proper diagnosis.

Similarly, it is also illogical and unreasonable to assume, that the supposed "fill-in-the-blank" language of the operative notes indicates that the surgery was not "properly" performed in accordance with standards of the medical profession.[10] The majority's criticism of the evidence presented infers that the medical professionals involved have committed medical malpractice by failing to properly diagnose Petitioner and by performing improper surgical procedures not in accordance with accepted standards of medical care. Such speculation is unwarranted and unreasonable.

In my opinion, the operative notes and the letter from Dr. Jansen prove the facts that are required to be proven under La. R.S. 40:62. There is no rational basis to conclude otherwise from this evidence, and therefore the trial court was clearly wrong in denying the petition.

On a *de novo* review, I would also find that Petitioner has proven by a preponderance of the evidence the facts required to be proven under La. R.S. 40:62 and would therefore reverse the decision of the trial court and render judgment in favor of Petitioner on the evidence presented.

[10] This assumption is directly contradicted by the express statements by Dr. Jansen.

Discretionary Grounds for Granting the Motion for New Trial

A new trial may be granted in any case if there is good ground therefore, except as otherwise provided by law. La. C.C.P. art. 1973. The granting or denying of a motion for new trial is within the discretion of the trial court. *131 Beverly Knoll, LLC v. Clipper Constr., LLC*, 18-486 (La. App. 5 Cir. 5/15/19), 273 So.3d 1243, 1250. The trial court's determination shall not be disturbed absent an abuse of that discretion. *Id*. This standard of review is highly deferential, but a trial court abuses its discretion if its ruling is based on an erroneous application of the law. *Lepree v. Dorsey*, 22-0853 (La. App. 4 Cir. 8/11/23), 370 So.3d 1191, 1205, *writ denied*, 23-01238 (La. 12/5/23), 373 So.3d 982.

At issue here is whether the trial court abused its discretion when it denied the motion for a new trial for allowing Petitioner to offer testimony of her treating physician after the trial judge stated he wanted such testimony in making his determination at the original hearing. There are very few cases concerning the absence of witnesses as a discretionary basis for granting a new trial. It has been held that a new trial will not be granted to a plaintiff who failed to summon witnesses when the necessity and nature of their testimony was known prior to trial. *Simoneaux v. Lebermuth & Israel Planting Co.*, 1 Pelt. 179, 183 (La. App. 4 Cir. 1918).[11]

However, there is no indication in the record before us that Petitioner actually knew or should have known that the trial court would require live testimonial evidence from her treating physician at the March 25 hearing. There is nothing in the plain language of La. R.S. 40:62 that requires such evidence. Nor are there any prior reported cases concerning La. R.S. 40:62

[11] This is consistent with La. C.C.P. art. 1972(2) that mandates the granting of a new trial when the party has discovered, since the trial, evidence important to the cause, which she could not, with due diligence, have obtained before or during the trial.

that inform a petitioner of the form of evidence required to satisfy the burden of proof at a hearing.[12] There is no basis for applying a rule mandating live testimonial evidence of a treating physician at a hearing under La. R.S. 40:62.

In this instance, the relief sought by Petitioner was unopposed. Petitioner offered documentary evidence that was admitted into evidence without objection. However, the trial judge denied Petitioner's motion because she did not present live testimonial evidence of her treating physician, then denied Petitioner motion for new trial where that testimonial evidence could be offered. Based on the circumstances presented, I believe the trial judge has abused his discretion in denying Ms. Strain's motion for new trial.

In affirming the trial court's denial of Petitioner's motion for new trial, the majority states "the suggestion that plaintiff is entitled to a new trial because the trial court didn't tell plaintiff's counsel what evidence it would take to convince the trial court that the diagnosis and procedure were proper before the hearing is not 'good grounds' under Article 1973." I disagree. This statement is unsupported by citation to legal authority. I am not suggesting La. R.S. 40:62 imposes a duty on the trial court to inform petitioner of the form of evidence required before the hearing. Nevertheless, I do find the facts presented in this case require granting Petitioner a new trial.

[12] At least one reported case suggests that it is proper for the trial judge to allow the record to remain open for presentation of testimony of an absent witness when the necessity of an absent witness's testimony becomes apparent during trial. *Succession of McKay v. Mount*, 449 So.2d 189, 193 (La. App. 3 Cir. 1984).

Peremptory Grounds for Granting the Motion for New Trial

La. C.C.P. art. 1972(1) states that a new trial shall be granted, upon contradictory motion of any party, when the judgment appears clearly contrary to the law and the evidence. The majority states that Petitioner has not shown any peremptory grounds under Article 1972 for the granting of a new trial. This conclusory statement is not supported by an examination of the evidence in the record in light of the requirements of La. R.S. 40:62 under a clearly articulated burden of proof.

As stated above, the trial court's denial of a motion for new trial is reviewed under the abuse of discretion standard. *Beverly Knoll, LLC, supra*. Generally, an abuse of discretion results from a conclusion reached capriciously or in an arbitrary manner. *Cox, Cox, Filo, Camel & Wilson, LLC v. Louisiana Workers' Comp. Corp.*, 20-408 (La. App. 3 Cir. 3/31/21), 318 So.3d 964, 974, *writ granted*, 21-00566 (La. 6/29/21), 319 So.3d 279, *and aff'd as amended*, 21-00566 (La. 3/25/22), 338 So.3d 1148; *Boone Servs., LLC v. Clark Homes, Inc.*, 23-0299 (La. App. 1 Cir. 10/18/23), 377 So.3d 304, 311; *Boudreaux v. Bollinger Shipyard*, 15-1345 (La. App. 4 Cir. 6/22/16), 197 So.3d 761, 771; *Coliseum Square Ass'n v. City of New Orleans*, 528 So.2d 205, 208 (La. App. 4 Cir. 1988), *writ granted*, 532 So.2d 138 (La.1988), *and aff'd*, 544 So.2d 351 (La.1989). A conclusion is "capricious" when there is no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence. *Id*. The word "arbitrary" implies a disregard of evidence or the proper weight thereof. *Id*.

As has been previously noted, the evidence offered by Petitioner was uncontroverted and unopposed, its veracity and authenticity unquestioned. No evidence was introduced to suggest that Ms. Strain was not properly diagnosed, that the surgery was not properly performed, or that there had not

been a change in the anatomical sex structures. Only through an erroneous application of the statute could a trier of fact conclude that Petitioner's evidence does not prove the required facts. Because the ruling of the trial court is clearly contrary to the evidence and the law, I believe the trial court abused its discretion in denying the motion for a new trial, and that the motion should have been granted pursuant to La. C.C.P. art. 1972(1).

Conclusion

The majority's interpretation of La. R.S. 40:62 that adopts a novel and unclear "whatever proof the court deems necessary" burden of persuasion and their claim that a judge considering a La. R.S. 40:62 petition may disregard uncontroverted medical evidence and substitute his own idea of what is a "proper" diagnosis or surgical procedure present radical and unprecedented departures from sound legal principles.

The factual questions presented in this case are simple: either Petitioner received a proper diagnosis and proper surgical treatment resulting in an anatomical change of sex or she did not. In lieu of helpful or explanatory statements about what kind, type, or quantity of evidence a petitioner should bring to court to satisfy its mystery burden of proof, the majority turns a critical eye towards the evidence presented and finds it lacking. In the name of plain language analysis, the majority creates fictional benchmarks not stated in the text of the statute. Under their interpretation, Petitioner should have arrived to the unopposed hearing with both her treating surgeon and her treating psychiatrist to provide additional live testimony. However, because the majority makes no affirmative statements as to how facts are to be proven under the statute, it's unclear whether even this testimony would be sufficient. Further, the majority's

conclusion that the petitioner failed to meet her evidentiary burden rests on unreasonable speculation that the medical professionals treating Petitioner have engaged in medical malpractice by failing to properly diagnose or properly operate in accordance with appropriate standards of medical care.

The evidence of the operative notes and the letter from her treating physician are sufficient to establish the facts required to be proven under La. R.S. 40:62 under a preponderance of the evidence standard on either *de novo* or manifest error standard of review.

Finally, the rationale for the majority's support for the trial court's decision to deny petitioner the opportunity to present evidence to support her case on the motion for a new trial is unclear and unsupported. Mere recitation of the language of La. C.C.P. Art. 1972 without analysis and conclusory statements unsupported by citation to any legal authority are not bases for denying petitioners access to the justice system.

For the foregoing reasons, the trial court's decisions denying the motion for a new trial and denying the petition should be reversed, and the Motion for Change in Gender Marker and for Issuance of a New Birth Certificate pursuant to La. R.S. 40:62 should be granted.[13]

[13] In the alternative, at a minimum and in the interest of justice, the judgment of the trial court should be amended to state that the petition is denied without prejudice so that Petitioner may present her evidence.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 30, 2024** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Curtis B. Pursell

CURTIS B. PURSELL
CLERK OF COURT

24-CA-234

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE DONALD A. ROWAN, JR. (DISTRICT JUDGE)
DONALD F. DEBOISBLANC, JR. (APPELLANT)
DONALD F. DEBOISBLANC, SR. (APPELLANT)

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