THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a)

Nos. 121939 & 121961 (consolidated)

IN THE
SUPREME COURT OF ILLINOIS

IN THE INTEREST OF N.G. a/k/a N.F., a Minor PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. FLOYD F., Defendant-Appellee.	) On Leave to Appeal from the) Appellate Court of Illinois, Third) Judicial District, No. 3-16-0277)) There on Appeal from the Circuit) Court of the Twelfth Judicial) Circuit, Will County, Illinois,) No. 11-JA-152)) The Honorable) PAULA GOMORA,) Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

LISA MADIGAN
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellant

MARY C. LABREC
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2093
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
mlabrec@atg.state.il.us

E-FILED
8/14/2017 4:09 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

Page

NATURE OF THE CASE

This is an appeal from a juvenile court proceeding to terminate parental rights. The People of the State of Illinois ("People") brought a motion against Defendant Floyd F. ("Defendant") seeking to terminate his rights to parent his minor child, N.G., on the ground that his three felony convictions established a rebuttable presumption of depravity. Although an appeal of one of the convictions was pending, the circuit court held that the People's evidence supported the presumption and that Defendant had failed to rebut it. It then found that Defendant was an unfit parent and that it was in N.G.'s best interests to terminate his parental rights. Defendant appealed, arguing for the first time that one of his convictions was void because it was based on a facially unconstitutional statute and thus could not serve as a predicate for the presumption of depravity. The appellate court agreed, vacated the challenged conviction as void, and reversed the circuit court's unfitness and best-interests determinations. Both the People and N.G. petitioned for leave to appeal, which this Court granted.

ISSUES PRESENTED FOR REVIEW

(1) Whether the appellate court erred in allowing Defendant to challenge his criminal conviction in an appeal from an order entered in a juvenile court proceeding.

(2) Whether the appellate court erred in relieving Defendant of a statutory disability predicated on his conviction before that conviction was properly vacated.

STATEMENT OF FACTS

I. Background

In December 2011, the People removed N.G. and her two half-brothers from the home where they lived with their mother based on charges of abuse and neglect. (C 2-4, 16; R 4-5).[1] Shortly afterward, N.G. was placed in shelter care with her maternal grandmother as a ward of the Illinois Department of Children and Family Services ("DCFS"). (C 16; R 5-6). Defendant — who then, as now, was incarcerated — was notified of the proceedings as N.G.'s putative father. (*See* C 6, 8; R 5, 12).

Originally, the goal of DCFS's involvement was to keep the children safe while it provided services to N.G.'s mother so that they could be returned to her. (*See* R 84-86, 91-93). However, two and a half years later, N.G.'s mother was still unable to maintain a safe and stable environment and did not foresee being able to do so in the near future. (C 587-92). The People then decided to seek termination of both parents' rights so that N.G. could be adopted by her maternal grandmother. (C 412; R 146-47).

II. The Motions for Termination of Parental Rights

In August 2014, the People moved the circuit court to terminate N.G.'s mother's and Defendant's rights, arguing that they were "unfit person[s]"

---

[1] The three-volume common law record is cited as "C __," and the one-volume report of proceedings is cited as "R __." The briefs of the parties in the appellate court are cited, respectively, as "Def. Op. Br. __," "People Br. __," "Minor Br. __," and "Def. Reply Br. __."

within the meaning of the Illinois Adoption Act ("Act") [750 ILCS 50/1D(b), (m)(i), (m)(ii)] because they had failed to make sufficient progress toward regaining custody of N.G. (C 473-76). The People asked the court to give DCFS's Guardian Administrator guardianship of N.G. and the power to consent to N.G.'s adoption. (C 474).

The circuit court continued the hearing on this motion twice: first, so that Defendant could take a paternity test (R 97, 99-101), which showed that he was N.G.'s biological father (C 495, 594); and second, because the court was concerned that Defendant might not have received proper notice that his parental rights were at risk or a sufficient opportunity to participate in DCFS's services (R 144-45). In September 2015, the court found N.G.'s mother unfit (C 632; R 161-62), but ruled that the People had failed to make their case against Defendant (C 633; R 155-58). It was unwilling to find Defendant unfit until he had had an opportunity to engage in services for "at least another nine months." (R 157-58).

In February 2016, the People filed a second motion to terminate Defendant's parental rights (C 647-49), this time arguing that he was unfit under the Act's provision for application of a rebuttable presumption of depravity where a parent had been criminally convicted of at least three felonies under Illinois law, as long as at least one of them took place within five years of the filing of the motion to terminate parental rights (C 647-48 (citing 750 ILCS 50/1(D)(i))).

III. The Circuit Court's Decision

At the merits hearing on their second motion to terminate parental rights, the People presented three certified statements of conviction for Defendant's three felony convictions: a 2008 conviction for aggravated unlawful use of a weapon; a 2009 conviction for unlawful use of a weapon by a felon; and a 2011 conviction for being an armed habitual criminal. (C 673-78; R 175-76). Defendant's counsel objected to admission of the certified statement of the 2011 conviction because an "appeal" of the conviction was pending. (R 177). He admitted that he was "not exactly sure how" that fact would affect the court's decision, but said that he "couldn't let it go by." (*Id.*). The circuit court did not believe that the appeal had "any effect on the judgment of conviction" and admitted the certified statement over the objection. (*Id.*).

Defendant attempted to rebut the presumption of depravity and unfitness, arguing, among other things, that he was already spending time with his daughter once or twice a month, that he was willing to accept services, and that he expected to be released from prison shortly. (R 194-98). He claimed that the statute under which he was convicted of unlawful use of a weapon in 2008 was unconstitutional and that, as soon as that conviction was removed from his record, his 2011 offense would no longer be classified as Class X and he would be entitled to immediate release. (R 192). He added,

moreover, that even if his appeal of the 2011 conviction were not successful, he was scheduled to be released in 2019. (R 197).

The circuit court rejected these arguments, explaining that Defendant could not have adequately demonstrated that he had reformed his behavior because he had been imprisoned almost continuously from July 2008 to the present. (R 198-200). It then took evidence on the question of N.G.'s best interests (R 200-08), and found it in her best interests to terminate "all residual rights" of her mother and father and appoint a guardian with authority to consent to her adoption (R 210-11). The court issued an order terminating Defendant's parental rights on May 12, 2016. (C 654-55). He timely appealed six days later. (C 659-61).

IV. Proceedings in the Appellate Court

In his opening brief on appeal, Defendant argued for the first time that the circuit court could not rely on his 2008 conviction as a predicate for the presumption of depravity because the statutory provision under which he was convicted had been found unconstitutional in *People v. Aguilar*, 2013 IL 112116. (Def. Op. Br. 19-20). He acknowledged that he had not raised this issue before the circuit court, but argued that the appellate court should excuse his forfeiture "due to the novelty of the issue and the liberty interest at stake." (*Id.* at 20).

The People and N.G. responded with three principal arguments: (1) Defendant had forfeited the issue and failed to ask for consideration of his

claim under the plain error doctrine (People Br. 5; Minor Br. 3-6); (2) under this Court's decision in *People v. McFadden*, 2016 IL 117424, *cert. denied*, 85 U.S.L.W. 3601 (U.S. June 26, 2017) (No. 16-7346), the invalidity of the underlying statute did not render a conviction void but only made it subject to vacatur, and Defendant had not obtained a vacatur of his 2008 conviction (People Br. 5-6; Minor Br. 6-8); and (3) the record (including the certified statements of conviction) contained no evidence that Defendant was convicted under the provision found unconstitutional in *Aguilar* (People Br. 6; Minor Br. 4). Defendant replied that refusing to invalidate his conviction simply because he did not move to vacate it in his criminal case elevated "form over substance" and was especially inappropriate given the fundamental liberty interest at stake. (Def. Reply Br. 3-4).

After briefing, the appellate court, acting *sua sponte*, obtained from the criminal court that entered Defendant's 2008 conviction a copy of the indictment, the "amended judgment-sentence," and the docket entry stating that the court accepted Defendant's guilty plea, to verify that he was convicted under the provision found unconstitutional in *Aguilar*. *In re N.G.*, 2017 IL App (3d) 160277, ¶¶ 8-9. The court ordered the parties to file supplemental briefs on whether it could "take judicial notice of the identified documents as a factual basis for finding the 2008 conviction at issue in this appeal void," which the parties filed. *Id.* at ¶¶ 9-10.

V. The Appellate Court's Decision

On January 20, 2017, the appellate court issued an opinion that "vacate[d]" Defendant's 2008 conviction and reversed the circuit court's unfitness finding and best-interests determination. *Id.* at ¶ 31. It noted that, under *McFadden*, a conviction must be "'treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack,'" *id.* at ¶ 18 (quoting *McFadden*, 2016 IL 117424, ¶ 31), but concluded that Defendant's conviction could be collaterally attacked in the current action, *id.* at ¶¶ 18-20. It justified its vacatur of the conviction under this Court's decisions in *People v. Dennis Thompson*, which classified a conviction based on a facially unconstitutional statute as void, *id.* at ¶ 21 (citing 2015 IL 118151, ¶ 32), and *People v. Ernest Thompson*, which stated that a void judgment could be "'attacked at any time or in any court, either directly or collaterally,'" *id.* at ¶ 22 (citing 209 Ill. 2d 19, 27 (2004)).

The appellate court also held that Defendant's argument was not forfeited because, under *Ernest Thompson*, an argument that a judgment is void is not subject to forfeiture, and a court may *sua sponte* declare the judgment void. *Id.* at ¶¶ 22-23 (citing 209 Ill. 2d at 27). The court acknowledged that in *McFadden*, this Court did not *sua sponte* invalidate the challenged conviction, but held that a different result was warranted in this case because: (1) Defendant was challenging the predicate conviction rather than a conviction that was predicated on it; and (2) it was able to verify that

Defendant's conviction was based on a provision that was unconstitutional under *Aguilar*. *Id.* at ¶¶ 24-29. Further, it concluded that vacating the conviction was necessary to avoid "an *unfounded* deprivation" of Defendant's "fundamental liberty interest" in parenting his child. *Id.* at ¶ 27 (italics in original).

One justice dissented, explaining that he agreed that a "unique solution" was required "to prevent a miscarriage of justice," *id.* at ¶ 36, but that, in his view, the case should be remanded to the circuit court with instructions to postpone the hearing on the petition to terminate Defendant's parental rights until the criminal court ruled on his pending appeal, *id.* at ¶ 37. He disagreed with the decision to vacate the conviction because of "concerns that the precedent flowing from this decision to vacate a criminal conviction in a juvenile case would have far reaching, but unintended consequences we have yet to consider." *Id.* at ¶ 39.

The People and N.G., through her guardian ad litem, petitioned this Court for leave to appeal the appellate court's decision. This Court allowed leave to appeal and consolidated the petitions.

ARGUMENT

This appeal is governed by this Court's decisions in *Malone v. Cosentino*, 99 Ill. 2d 29 (1983), and *McFadden*, 2016 IL 117424. *Malone* held that a final judgment rendered by a court having jurisdiction of the parties and the subject matter cannot be collaterally attacked except through the forms of action authorized by statute. 99 Ill. 2d at 32-33. *McFadden* held that a conviction may serve as predicate for a subsequent judgment that is based on the convicted person's status as a felon until the prior conviction has been properly vacated. 2016 IL 117424, ¶¶ 31, 48. Defendant's challenge to the validity of his 2008 conviction in this case was improper both because it amounted to an impermissible collateral attack under *Malone* and because the conviction had not been properly vacated within the meaning of *McFadden*. Accordingly, the circuit court properly relied on the conviction to establish a presumption of depravity, find Defendant unfit, and terminate his parental rights.

The appellate court decided that it could avoid the general prohibition on collateral attack, and supply the vacatur that was missing in *McFadden*, on the authority of this Court's statement in *Dennis Thompson*, 2015 IL 118151, ¶ 32, that a conviction based on a facially unconstitutional statute was "void." *See In re N.G.*, 2017 IL App (3d) 160277, ¶ 21. This was incorrect. Defendant's 2008 conviction was not void but voidable within the meaning of Illinois's voidness doctrine and therefore could not be collaterally attacked in a

juvenile court proceeding. And even if collateral attack were otherwise appropriate, the appellate court could not relieve Defendant of a statutory disability predicated on his felon status until that status was changed in the criminal court.

I. The Standard of Review Is *De Novo*.

Where, as here, the facts are undisputed and the question on appeal is limited to the application of the law to those facts, this Court's review is *de novo*. *City of Champaign v. Torres*, 214 Ill. 2d 234, 241 (2005). Independently, the question whether a judgment is void or voidable is reviewed *de novo, see People v. Hauschild*, 226 Ill. 2d 63, 72 (2007) (citing *People v. Rodriguez*, 355 Ill. App. 3d 290, 293–94 (2d Dist. 2005)), as is the question of a court's authority to act, *see In re S.B.*, 305 Ill. App. 3d 813, 816-17 (3d Dist. 1999).

II. The Appellate Court Erred in Allowing Defendant to Challenge His 2008 Conviction In an Appeal From an Order Entered in a Juvenile Court Proceeding.

Malone held that, if a judgment is not void, collateral attack is limited to the three forms of action authorized by statute. *See* 99 Ill. 2d at 32-33. And all three forms of action generally must be brought in the court that entered the challenged judgment. *See* 735 ILCS 5/10-103 (habeas corpus); 725 ILCS 5/122-1(b) (post-conviction); 735 ILCS 5/2-1401(b) (relief from judgment). Accordingly, if Defendant's 2008 conviction is not void — and it is not, under this Court's voidness doctrine — it may not be challenged in juvenile court.

This Court's opinion in *Malone* does not use the words "void" or "voidable," but its analysis clearly tracks the voidness doctrine when it states that a final judgment by a court that has jurisdiction of the parties and the subject matter may not be questioned in "'any collateral action or proceeding.'" 99 Ill. 2d at 32 (quoting 49 C.J.S. *Judgments* § 401 (1947)). It excludes judgments entered in the absence of jurisdiction, which make up the quintessential category of void judgments, *see People v. Castleberry*, 2015 IL 116916, ¶¶ 11, 15, and states that the remaining judgments cannot be collaterally attacked, which is the essence of the distinction between void and voidable judgments. A "void" judgment may be collaterally attacked; all other judgments, which are distinguished as "voidable," may not. *See, e.g.*, *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993). Thus, effectively, *Malone* restates the traditional rule that a voidable judgment may not be collaterally attacked.

But there are statutory exceptions to this rule. *Malone* went on to clarify what the rule against collateral attack means in practical terms, given the exceptions. It explains that voidable judgments can be challenged only through actions under the Habeas Corpus Act (735 ILCS 5/10-101 *et seq.*; the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.*); and section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401). *See Malone*, 99 Ill. 2d at 32-33. It does not specify that these actions may only be brought in the court that issued the judgment, but the statutes themselves essentially do. *See* 725 ILCS 5/122-1(b) (post-conviction) (proceeding shall be commenced by filing with the

clerk of the court where the conviction took place); 735 ILCS 5/2-1401(b) (section 2-1401) (petition "must be filed in the same proceeding in which the order or judgment was entered"); *cf.* 735 ILCS 5/10-103 (habeas corpus) (application must be made to this Court, circuit court of county where person is imprisoned or restrained, or circuit court where person was sentenced or committed). Accordingly, if a successful challenge would show that Defendant's 2008 conviction was voidable as opposed to void, that challenge could not properly be raised in the juvenile court proceedings.

The fact that this case involves a challenge to a conviction based on a facially unconstitutional statute makes no difference. It is true that *Malone* declined to address how the voidness analysis might be applied in such a case. *See* 99 Ill. 2d at 35 (distinguishing cases where there was "an unconstitutional conviction to be expunged from the defendants' records"). And this Court has recently characterized a conviction based on a facially unconstitutional statute as "void." *Dennis Thompson*, 2015 IL 118151, ¶ 32 (cited by *People v. Ligon*, 2016 IL 118023, ¶ 9, and *People v. Price*, 2016 IL 118613, ¶ 31). But neither decision suggests any satisfactory reason for treating such convictions as void.[2]

In *Dennis Thompson*, this Court distinguished three "type[s] of voidness challenge": (1) a challenge based on a lack of personal or subject matter

[2] Moreover, as explained in Section III *infra*, this Court's decision in *McFadden*, 2016 IL 117424, strongly suggests that such convictions should be treated as voidable rather than void.

jurisdiction; (2) a challenge based on a facially unconstitutional statute; and (3) a challenge to a sentence "that does not conform to the applicable sentencing statute." *Id.* at ¶¶ 31-33. But even as it did so, it made clear that the third type of voidness challenge already had been rejected in *Castleberry*. *Id.* at ¶ 33. And the same reasoning compels rejection of the second.

Until now, this Court has not had occasion to follow the logic of its cases on the voidness doctrine to conclusion in a case involving a facially unconstitutional statute because it has not previously encountered a case in which the outcome turned on whether the conviction was void or voidable. The outcome in *Dennis Thompson* did not, because the defendant brought an as-applied rather than facial challenge. *See id.* at ¶¶ 35-39. Moreover, *Dennis Thompson*, *Ligon*, and *Price* all involved proceedings under section 2-1401, so this Court was not required to determine whether the convictions could be collaterally attacked outside the three avenues approved in *Malone*. This Court should decline to uphold the collateral attack in this case for at least three reasons.

A. Finding Defendant's Conviction Void Is Inconsistent With This Court's Definition of Voidness as Jurisdictional.

First, finding a conviction based on a facially unconstitutional statute to be void is inconsistent with this Court's historical articulation of the voidness doctrine, and even more so with its recent retrenchment in cases like *Castleberry* and *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 42. The doctrine was designed to cover a very narrow class of cases. This Court has

repeatedly held that whether a judgment is void or voidable is a question of jurisdiction. *See Castleberry*, 2015 IL 116916, ¶ 11; *LVNV Funding*, 2015 IL 116129, ¶ 27; *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998); *Davis*, 156 Ill. 2d at 155. Classification of a judgment as void is reserved for "'only the most fundamental defects, *i.e.*, a lack of personal jurisdiction or lack of subject matter jurisdiction.'" *Castleberry*, 2015 IL 116916, ¶ 15 (quoting *LVNV Funding*, 2015 IL 116129, ¶¶ 30-38).

Because a void judgment was rendered by a court that lacked jurisdiction, review is permitted virtually without restriction. A void judgment may be attacked at any time, in any court, either directly or collaterally, *People v. Davis*, 2014 IL 115595, ¶ 26; *Ernest Thompson*, 209 Ill. 2d at 25, 27, and is "not subject to forfeiture or other procedural restraints," *Price*, 2016 IL 118613, ¶ 30 (citation and quotation omitted). The only limitation is that the challenge must be raised in a properly pending action in a court that possesses jurisdiction. *See Ernest Thompson*, 209 Ill. 2d at 28 (citing *People v. Flowers*, 208 Ill. 2d 291 (2003)).

In the past, Illinois courts extended the voidness doctrine beyond what is usually encompassed by the categories of personal and subject matter jurisdiction. *See Castleberry*, 2015 IL 116916, ¶¶ 12-13 (citing *Davis*, 156 Ill. 2d at 156). They did so under the theory that limitations on what courts have authority to do are jurisdictional in a broader sense. *See, e.g.*, *Davis*, 156 Ill. 2d at 156 (noting that "[s]ome authorities, including this court, have held that

the power to render the particular judgment or sentence is as important an element of jurisdiction as is personal jurisdiction and subject matter jurisdiction"); *People v. Sharifpour*, 402 Ill. App. 3d 100, 120 (2d Dist. 2010) (remarking that "[s]ome courts characterize" a court's inherent power to render a particular judgment "as a subspecies of subject matter jurisdiction while others characterize it as a situation where a court acts in excess of its jurisdiction"). That theory is no longer tenable after *Castleberry* and *LVNV Funding*, in which this Court repudiated the idea that authority or power to render a certain judgment was an aspect of jurisdiction that justified application of the voidness doctrine. *See Castleberry*, 2015 IL 116916, ¶¶ 11-19; *LVNV Funding*, 2015 IL 116129, ¶¶ 27-38. Thus, the fact that a court lacks authority to convict a person in violation of the federal Constitution does not mean that such a conviction is void for lack of jurisdiction.

To be sure, *Castleberry* and *LVNV Funding* concerned the branch of the doctrine addressing violation of *statutory* requirements, *see Castleberry*, 2015 IL 116916, ¶ 13; *LVNV Funding*, 2015 IL 116129, ¶ 29, and the type of voidness alleged in this case involves *constitutional* ones. But the lesson of those cases remains: jurisdiction is defined by the Illinois Constitution, and that all that it takes to invoke the circuit court's jurisdiction is for a party to present a justiciable matter, *i.e.*, one that is appropriate for review by the court because it is definite and concrete, rather than hypothetical or moot, and

touches upon the legal relations of parties with adverse legal interests. *See Castleberry*, 2015 IL 116916, ¶ 15; *LVNV Funding*, 2015 IL 116129, ¶ 35.

Under identical reasoning, an error in applying constitutional law does not affect the circuit court's jurisdiction. The charges against Defendant that led to his conviction were clearly a justiciable matter, and nothing in the Illinois Constitution suggests that a court acts in excess of its jurisdiction by entering a conviction under a statute later deemed constitutionally invalid. There also is justification for the same result in the general rule that once a court has acquired jurisdiction, it will not lose it due to any subsequent error or irregularity. *Davis*, 156 Ill. 2d at 156. This Court has adhered to that rule even in the face of allegations of infringement of fundamental rights such as due process and equal protection. *Id.* at 156-58.

B. Finding Defendant's Conviction Void Is Not Necessary to Protect His Constitutional Rights.

Due process does not entitle persons convicted under facially unconstitutional statutes to what application of the voidness doctrine would grant them: *i.e.*, a virtually unlimited ability to challenge their convictions, including the right to do so in any court. The void *ab initio* doctrine does not require this, and declining to accord such a right will not leave Defendant without a remedy for the constitutional violation.

Dennis Thompson suggested that a conviction based on a facially unconstitutional statute was void under the void *ab initio* doctrine, which states that a facially unconstitutional statute is infirm from the moment of

enactment, and therefore unenforceable. *See* 2015 IL 118151, ¶ 32 (citing *Davis*, 2014 IL 115595, and *People v. Blair,* 2013 IL 114122). But that doctrine is about retroactivity on review: it does not address the *kind* of review that should be afforded. This Court has repeatedly held that if a statute is void *ab initio*, the decision invalidating the statute must be applied retroactively on direct appeal or collateral review in one of the three types of statutory proceedings identified in *Malone*. *See, e.g.*, *People v. Holmes*, 2017 IL 120407, ¶ 12; *McFadden*, 2016 IL 117424, ¶¶ 17-19; *People v. Gersch,* 135 Ill. 2d 384, 399 (1990).

These forms of review have been considered adequate to protect constitutional rights generally. In *Price*, 2016 IL 118613, ¶ 32, this Court rejected a request to declare a judgment void that did not conform to a later-announced constitutional standard on the ground that "defendants whose convictions are final may seek the benefit of that rule through appropriate collateral proceedings." And a quick consultation of federal law refutes any idea that the special nature of challenges to facially unconstitutional statutes requires application of the voidness doctrine and its total lack of limitation on collateral attack. The federal habeas corpus statutes, which address these kinds of challenges, contain statutes of limitations, *see* 28 U.S.C. § 2255(f)(3) (providing for one-year period of limitation for federal prisoners); 28 U.S.C. § 2244(d)(1)(C) (same for state prisoners), and the remedies are available only in the court that entered the conviction and sentence, *see* 28 U.S.C. § 2255(a)

(prisoner "may move the court which imposed the sentence to vacate, set aside or correct the sentence"); 28 U.S.C. § 2241(d) (application may be filed in court for district where prisoner is in custody, or in district where prisoner was convicted or sentenced; and district court has discretion to transfer case filed in either eligible district to other district "in furtherance of justice").

Moreover, there is no circumstance in Defendant's case that would require application of the voidness doctrine. It is sometimes invoked, as it was in *Dennis Thompson*, 2015 IL 118151, ¶ 30, to avoid forfeiture and the statute of limitations under section 2-1401. But this is unnecessary. Courts may always override considerations of waiver or forfeiture where necessary to achieve a just result or maintain a sound and uniform body of precedent. *See Jackson v. Bd. of Election Comm'rs of City of Chi.*, 2012 IL 111928, ¶ 33.

To be sure, Defendant's noncompliance with that statute of limitations would have to be excused. He would likely have to rely upon section 2-1401 to obtain his vacatur because he is no longer in custody under the 2008 conviction.[3] Unlike the federal habeas corpus provisions, *cf.* 28 U.S.C. § 2255(f)(3); 28 U.S.C. § 2244(d)(1)(C), section 2-1401 contains no provision allowing a new limitations period to run from the time that a decision affecting the conviction's constitutionality is entered, and its two-year limitations period

[3] Defendant is incarcerated but currently serving a sentence under his 2011 conviction. *See* https://www.illinois.gov/idoc/OFFENDER/Pages/InmateSearch.aspx (last visited on Aug. 14, 2017).

running from the time of entry of judgment, *see* 735 ILCS 5/2-1401(c), had run before the statute underlying Defendant's conviction was declared unconstitutional in *Aguilar*.

But section 2-1401 is inherently equitable. Although the statute of limitations is sometimes said to be strictly construed, *Parker v. Murdock*, 2011 IL App (1st) 101645, ¶ 16, it incorporates an express provision for equitable tolling during the time in which a person seeking relief is "under legal disability or duress or the ground for relief is fraudulently concealed." 735 ILCS 5/2-1401(c). And even if Defendant's circumstances do not fall under those terms, this Court has excused noncompliance with various conditions of obtaining collateral review where doing so was necessary to avoid a substantial denial of constitutional rights. *See People v. Meyerowitz*, 61 Ill. 2d 200, 205-06 (1975);[4] *People v. Warr*, 54 Ill. 2d 487, 493-94 (1973).

In any event, it is preferable to excuse noncompliance with a statute of limitations on collateral review than to stretch the voidness doctrine to achieve the same result, for the reasons discussed below.

[4] *Meyerowitz* invoked the voidness doctrine, *see* 61 Ill. 2d at 206, but did not explain why it applied. On the other hand, it cited several cases in which requirements for collateral review were excused, *id.* at 205-06, and the motions for termination of probation that gave rise to the appeal were functionally equivalent to petitions for post-conviction relief or relief from judgment. The motions were addressed to the convictions and filed in the courts that issued the convictions. *Id.* at 202-04. Thus, that case did not involve an impermissible collateral attack.

C. Finding Defendant's Conviction Void Would Have Unintended and Undesirable Consequences.

This Court is generally willing to deem judgments void "only when no other alternative is possible" "[b]ecause of the disastrous consequences which follow when orders and judgments are allowed to be collaterally attacked." *J.S.A. v. M.H.*, 224 Ill. 2d 182, 211 (2007) (citation and quotation omitted). One adverse consequence of finding convictions based on facially unconstitutional statutes void is that, as the appellate court in this case recognized, it would allow them to be attacked in any court. There are at least three reasons why that would be undesirable.

First, removing challenges from the court where the conviction was entered increases the risks of error in the adjudication because the reviewing court is less familiar with the case records and the law. If the appellate court's interpretation of the voidness doctrine is correct, in future disputes over the validity of convictions that may affect determinations of parental unfitness, the records and law will be construed by a circuit court judge and attorneys who are specialists in juvenile court law, not criminal law. Illinois has chosen to adopt specialized courts, but if challenges to convictions may be brought in any court, that specialization will be transformed from a strength into a weakness.

Second, allowing challenges in any court could disadvantage the State where, as in this case, the conviction is based on a guilty plea. The rule against collateral attack has two benefits in such cases. It requires the

convicted person to seek vacatur in order to obtain relief from the conviction, and when a conviction is vacated as unconstitutional, prosecutors are entitled to reinstate any relinquished offenses. *See People v. Shinaul*, 2017 IL 120162, ¶ 14. It also gives convicted persons an incentive to seek vacatur earlier rather than later, which is important because defenses such as the statutes of limitations on commencing prosecution of criminal offenses apply to reinstated charges. *See id.* at ¶¶ 15-18. If convicted persons could nullify their convictions in incidental collateral civil proceedings, they might strategically choose not to seek vacatur at all, or to delay seeking it until after expiration of the applicable statute of limitations.

Third, if convictions can be attacked in any court, nobody will know where to look for nullification of a criminal conviction, and this could result in inconsistent judgments. For instance, the same conviction that played a role in determining a person's parental rights might become relevant in an administrative proceeding against that person's professional license, *see, e.g., Hayashi v. Ill. Dep't of Fin. & Prof'l Regulation*, 2014 IL 116023, or a subsequent prosecution of that person as an armed habitual criminal. Adjudicators in those proceedings would probably be unaware of earlier collateral determinations as to the validity of the conviction, unless the convicted person chose to disclose them. Inconsistent judgments can occur in connection with judgments that are void for lack of jurisdiction, but they present a particular problem with respect to convictions based on facially

unconstitutional statutes because the invalidation of a statute in one case may affect many other cases and because many determinations under both civil and criminal laws are based on the status of prior convictions.

Malone held that if a judgment is not void, challenges are limited to direct attacks in the court that issued the judgment. Finding Defendant's conviction void would be inconsistent with this Court's definition of voidness as jurisdictional, is not necessary to protect Defendant's constitutional rights, and would have unintended and undesirable consequences. Therefore, the appellate court erred in allowing Defendant to challenge his 2008 conviction in this juvenile court proceeding.

III. The Appellate Court Erred in Relieving Defendant of a Statutory Disability Predicated on His 2008 Conviction Before That Conviction Was Properly Vacated.

Even if Defendant's 2008 conviction were subject to collateral attack in a juvenile court proceeding, it would still provide an adequate basis for the circuit court's finding of depravity because the conviction has not been properly vacated within the meaning of *McFadden*, nor has Defendant been relieved of his disability through other affirmative means such as a pardon. And in this case, insisting on a proper vacatur is considerably less consequential than it was in *McFadden* because Defendant is not completely barred from obtaining one.

In *McFadden*, this Court held that a prior conviction based on a statute that was subsequently declared facially unconstitutional may nonetheless

serve as a predicate offense for unlawful use of a weapon by a felon. 2016 IL 117424, ¶¶ 21, 48. This Court explained that a conviction is not invalidated simply because the statute on which it was based is void: a decision finding a statute unconstitutional does not "automatically overturn" a judgment of conviction. *Id.* at ¶ 31. Rather, to invalidate it, some action must be taken against the conviction itself. *See id.* This Court noted that the United States Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 60-61 (1980), indicated that the appropriate action would be vacatur or other "affirmative action," *McFadden*, 2016 IL 117424, ¶¶ 23-24, which *Lewis* defined as a "qualifying pardon" or statutory dispensation, *see* 445 U.S. at 60-61.

The determination that vacatur was necessary was fatal to McFadden's cause because, by the time that the question of the validity of the prior conviction was presented for ruling, it was already too late for any action affecting his felon status. *See McFadden*, 2016 IL 117424, ¶ 37. The unlawful use of a weapon by a felon statute required him to "clear his felon status before obtaining a firearm," *id.*, but he took no action of any kind before that deadline. So he lost any chance to challenge the conviction as a predicate felony.

Here, on the other hand, there was no deadline that already had passed before the proceedings were brought. The operative provision of the Act stated that "[t]here is a rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least 3 felonies . . . ." 750 ILCS

50/1D(i). Thus, the only limitation on taking action against the conviction was that the action needed to take place before the circuit court entered its ruling on depravity. Because the timing of the hearing on the issue of unfitness was within the circuit court's discretion — if the other equities, including N.G.'s best interests, permitted — the circuit court could have continued the proceedings to allow Defendant a reasonable opportunity to seek to vacate his conviction through action under section 2-1401.

This majority in the appellate court concluded, contrary to the suggestion of the dissent, *see In re N.G.*, 2017 IL App (3d) 160277, ¶¶ 37-38, that there was no need for a stay because they had authority to "vacate" Defendant's conviction in the juvenile court proceeding. But this was incorrect. *McFadden* strongly suggests that vacatur occurs only in the context of a direct appeal or collateral attack through the three statutory methods identified in *Malone*, and that a convicted person cannot simply ask another court to nullify the effect of his conviction while the conviction itself goes unchallenged in the records of the criminal court.

This Court held it "axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared" and added that a conviction must be "treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack." *McFadden*, 2016 IL 117424, ¶ 31. It also noted that the defendant could seek vacatur by "filing an appropriate pleading," *id.* at ¶ 21, which is the language

of actions for post-judgment relief; cited a number of cases in which convictions *were* vacated on direct appeal or through postconviction petitions, *id.* at ¶¶ 19-20; and cited an opinion from the United States Court of Appeals for the Fifth Circuit for the proposition that vacatur was necessary "even where [a] predicate felony was subject to nullification on collateral attack," *id.* at ¶ 24. Moreover, in *Shinaul*, this Court construed *McFadden* as indicating that "the only way" for a person who pleaded guilty to a charge under a facially unconstitutional statute to receive relief from his conviction after he had completed the full term of his sentence was to claim that the plea was defective and seek to vacate the conviction "through the filing of a section 2-1401 petition." 2017 IL 120162, ¶ 14 (citing *McFadden*, 2016 IL 117424, ¶¶ 20, 31-32).

The reasons adduced in *McFadden* for requiring vacatur rather than permitting nullification on collateral attack are equally applicable to this case. In *McFadden*, this Court explained that a statute that depends on a prior conviction is concerned with the defendant's "felon status" rather than whether he actually committed the predicate offense. 2016 IL 117424, ¶¶ 27-29. Reliance on the conviction lightens the burden of proof in the subsequent action, *see id.* at ¶ 27, and provides an incentive for the defendant to clarify his status in appropriate proceedings before taking action that may be affected by the conviction, *id.* at ¶ 30. Likewise, the Act's provision establishing the presumption of depravity is concerned with felon status. Nothing in it

suggests that the legislature intended the circuit court to conduct a mini-trial on the validity of a parent's convictions, and just as in *McFadden*, it is appropriate for parents to get such issues resolved properly so that a juvenile court may make a determination about their fitness to care for their children.

And there is nothing unjust about applying *McFadden's* rule in this case. Defendant could not have been denied due process by the circuit court's reliance on his 2008 conviction because, while a constitutionally infirm statute is unenforceable, *id.* at ¶¶ 17-18, a statute conditioned on a prior conviction is "not concerned with prosecuting or enforcing the prior conviction," even when it gives rise to a new criminal prosecution, *id.* at ¶ 29. Moreover, this case involves purely civil proceedings. Termination of parental rights is not punishment. *See In re Marriage of T.H.*, 255 Ill. App. 3d 247, 256 (5th Dist. 1993). "[T]he purpose of the statute allowing termination of parental rights based on a finding of depravity is not to punish the parent for a criminal act but to protect and safeguard the welfare of children." *Id.*

Finally, just as in *McFadden*, Defendant was not without a remedy apart from this collateral proceeding: he could have brought an action to vacate his judgment of conviction before the proceedings to terminate his parental rights commenced. *Cf.* 2016 IL 117424, ¶ 34. In fact, as noted earlier, he might even have been able to do so afterward.

In sum, the appellate court in this case could not "vacate" Defendant's 2008 conviction within the meaning of *McFadden* because vacatur would

require him to attack his conviction directly on appeal or on collateral review. And the reasons behind this Court's decision in *McFadden* suggest no basis for departing from it here. Therefore, the appellate court in this juvenile court action could not relieve Defendant of the presumption of depravity predicated on his conviction before that conviction was properly vacated.

CONCLUSION

For the foregoing reasons, this Court should reverse the appellate court's judgment, thereby reinstating the judgment of the circuit court or, in the alternative, reverse the judgments of both courts and remand the case to the circuit court with instructions to consider whether it would be appropriate to stay the proceedings to give Defendant an opportunity to seek a proper vacatur of his 2008 conviction.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellant

MARY C. LABREC
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2093
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
mlabrec@atg.state.il.us

August 14, 2017

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 29 pages.

/s/ Mary C. LaBrec
MARY C. LABREC
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2093
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
mlabrec@atg.state.il.us

APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

PAGES

2017 IL App (3d) 160277
Appellate Court of Illinois,
Third District.

IN RE N.G., a/k/a N.F., a Minor
(The People of the State of
Illinois, Petitioner–Appellee,
v.
Floyd F., Respondent–Appellant).

Appeal No. 3–16–0277
|
Opinion filed January 20, 2017

Synopsis

Background: The State sought to terminate father's parental rights to child. The Circuit Court of the 12th Judicial Circuit, Will County, Paula Gomora, J., terminated parental rights. Father appealed.

[Holding:]The Appellate Court, McDade, J., held that father's conviction for aggravated unlawful use of a weapon was null and void, and thus the conviction could not be used as a basis for a depravity consideration.

Reversed and remanded.

Wright, J., filed a dissenting opinion.

West Headnotes (4)

[1] Infants
Conviction of crime;criminal history

Father's conviction for aggravated unlawful use of a weapon was null and void, as the statutory provision under which father pled guilty was found unconstitutional, and thus the conviction could not be used as a basis for a depravity consideration in termination of parental rights proceeding. 720 Ill. Comp. Stat. Ann. § 5/24–1.6(a)(1), (a)(3)(A); 750 Ill. Comp. Stat. Ann. § 50/1(D)(i).

Cases that cite this headnote

[2] Infants
Parental unfitness or incompetence

A circuit court's determination that a parent is an unfit person, for the purpose of a motion to terminate parental rights, will not be overturned unless it is against the manifest weight of the evidence. 750 Ill. Comp. Stat. Ann. § 50/1(D)(i).

Cases that cite this headnote

[3] Statutes
Effect of Total Invalidity

When a statute is held to be unconstitutional on its face, it is said to be void ab initio.

Cases that cite this headnote

[4] Judgment
Collateral nature of proceeding in general

A "collateral attack on a judgment" is an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment.

Cases that cite this headnote

***437** Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Circuit No. 11–JA–152, The Honorable Paula Gomora, Judge, presiding.

Attorneys and Law Firms

Neil J. Adams, of Joliet, for appellant.

James Glasgow, State's Attorney, of Joliet (Richard T. Leonard, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

Kristen N. Messamore, of Joliet, guardian ad litem.

OPINION

JUSTICE McDADE delivered the judgment of the court, with opinion.

¶ 1 The circuit court entered orders finding the respondent, Floyd F., to be an unfit parent and terminating his parental rights to the minor, N.G. On appeal, the respondent argues that the circuit court's finding of unfitness based on depravity was error because his 2008 felony conviction was based on a statute that was declared unconstitutional by the supreme court and it must be vacated. We reverse and remand the case for further proceedings.

¶ 2 FACTS

¶ 3 On December 19, 2011, a juvenile petition was filed that alleged the minor was neglected due to an injurious environment. The minor's mother admitted the allegations of the petition and the minor was adjudicated neglected on September 19, 2012. After a dispositional hearing, the circuit court made the minor a ward of the court, granted guardianship to the Department of Children and Family Services with the right to place, and found, *inter alia*, the respondent to be an unfit parent.

¶ 4 In February 2016, the State sought to terminate the respondent's parental rights to the minor, alleging he was depraved based on his three felony convictions: (1) a Class 4 felony conviction for ***438** aggravated unlawful use of a weapon (circuit court case No. 08–CF–910); (2) a Class 2 felony conviction for unlawful use of a weapon by a felon (circuit court case No. 09–CF–10); and (3) a Class X felony conviction for armed habitual criminal (circuit court case No. 11–CF–201).

¶ 5 At the termination hearing in May 2016, the State presented certified copies of the respondent's three felony convictions. Counsel for the respondent informed the court that there was an appeal pending regarding the respondent's 2008 conviction and objected to the introduction of the certified copy of that conviction. The court overruled the objection, stating, "I don't believe the appeal has any effect on the judgment of conviction." The transcript of that hearing reflects the following discussion:

> "MR. PAVUR: Your Honor, my client tells me that on the third exhibit, that there is a pending appeal going on. And I am not exactly sure how that would effect [sic] it. But I just couldn't let it go by.
>
> So I do have an objection to that one based on the fact there is an ongoing appeal having been filed challenging the constitutionality of the arrest.
>
> MS. RIPPY: Judge, I have no information, nor has this conviction been reversed. If there is an appeal pending, this conviction still stands until the Appellate Court states otherwise. So I ask to admit People's Exhibit 3.
>
> THE COURT: I don't believe the appeal has any effect on the judgment of conviction. Over your objection, People's 3 is admitted."

¶ 6 Other evidence presented at the termination hearing established that the respondent was currently incarcerated on his armed habitual criminal conviction, for which he received a sentence of 9½ years of imprisonment, and he was projected to be paroled in 2019. At the close of the hearing, the circuit court found that the respondent was depraved and, therefore, unfit. After a best interest hearing on the same date, the court found that it was in the minor's best interest to terminate the respondent's parental rights. The respondent appealed.

¶ 7 Supplemental Briefing

¶ 8 We sought and obtained documents from the Will County circuit court regarding the respondent's 2008 conviction for aggravated unlawful use of a weapon and 2011 conviction for armed habitual criminal. Those documents indicated that the respondent pled guilty to aggravated unlawful use of a weapon in the 2008 case pursuant to section 24–1.6(a)(1), (a)(3)(A) of the Criminal Code of 1961 (720 ILCS 5/24–1.6(a)(1), (a)(3)(A) (West 2008)) and that there was no appeal or other matter pending regarding that case at any time after October 2008. However, there is a pending postconviction petition in the 2011 case, which alleges that the respondent's armed habitual criminal conviction cannot stand because it was predicated in part on his 2008 conviction, which has been rendered a nullity by *People v. Aguilar*, 2013 IL 112116, 377 Ill.Dec. 405, 2 N.E.3d 321.

¶ 9 Upon receipt of these documents, we asked the parties to provide additional briefing pursuant to the following minute order:

"The panel assigned to the above-captioned case has secured, *sua sponte*, (1) the indictment in case number 08–CF–910, reciting that the respondent in the instant case was charged with two counts of aggravated unlawful use of a weapon in violation of 720 ILCS 5/24–1.6(a)(1)(3)(A) (West 2008), the section of the statute found unconstitutional by the Illinois Supreme Court in ***439** *People v. Aguilar*, 2013 IL 112116 [377 Ill.Dec. 405, 2 N.E.3d 321], (2) the amended judgment-sentence showing he was found guilty of violating 720 ILCS 5/24–1.6(a)(1)(3), a Class 4 felony, and (3) the circuit court's docket entry that states the court accepted the defendant's guilty plea to aggravated unlawful use of a weapon (Class 4 felony) as charged in Count II of the indictment.

The parties are asked to answer the following question and to submit additional documents pertinent to supporting your answer: ARE THE PARTIES AWARE OF ANY REASON WHY THIS COURT COULD NOT TAKE JUDICIAL NOTICE OF THE IDENTIFIED DOCUMENTS AS A FACTUAL BASIS FOR FINDING THE 2008 CONVICTION AT ISSUE IN THIS APPEAL VOID?"

¶ 10 The parties filed their supplemental briefs, which we have considered in reaching the following disposition.

¶ 11 ANALYSIS

[1] ¶ 12 The respondent's sole issue in this appeal is his contention that the circuit court erred when it found him to be an unfit parent based on depravity. The sole basis for this contention is that his 2008 conviction is a nullity because the statutory provision under which he was prosecuted and pled guilty in 2008 was found unconstitutional by our supreme court in *Aguilar*. Resolution of this issue places us at the junction of several recent supreme court decisions: *Aguilar*, 2013 IL 112116, 377 Ill.Dec. 405, 2 N.E.3d 321, *People v. McFadden,* 2016 IL 117424, 406 Ill.Dec. 470, 61 N.E.3d 74; *People v. Castleberry,* 2015 IL 116916, 398 Ill.Dec. 22, 43 N.E.3d 932; *People v. Ernest Thompson*, 209 Ill.2d 19, 282 Ill.Dec. 183, 805 N.E.2d 1200 (2004); and *People v. Dennis Thompson,* 2015 IL 118151, 398 Ill.Dec. 74, 43 N.E.3d 984.

¶ 13 In its original responsive brief, the State asserted that the respondent had forfeited this issue by failing to raise it in the trial court and by failing, in his initial brief, to ask this court to consider his claim under the plain error doctrine. We reserve resolution of the State's forfeiture challenge to a later point in this decision.

[2] ¶ 14 We begin with the State's asserted basis for the finding of depravity. In relevant part, section 1(D)(i) of the Adoption Act provides that a rebuttable presumption arises that a parent is depraved (and is therefore an unfit person) if he or she has been convicted of at least three felonies in Illinois and at least one of those convictions has occurred within the five years preceding the filing of the termination petition. 750 ILCS 50/1(D)(i) (West 2014). A circuit court's determination that a parent is an unfit person will not be overturned unless it is against the manifest weight of the evidence. *In re E.C.*, 337 Ill.App.3d 391, 398, 272 Ill.Dec. 51, 786 N.E.2d 590 (2003).

¶ 15 Here, the respondent admits that his three convictions technically satisfied these requirements such that he could legally be found an unfit person due to depravity. See 750 ILCS 50/1(D)(i) (West 2014). However, the respondent argues that the circuit court should not have included his 2008 conviction (for Class 4 felony aggravated unlawful use of a weapon) in the depravity determination because the specific section of the statute under which he was prosecuted and convicted has since been declared unconstitutional.

[3] ¶ 16 In relevant part, the version of the aggravated unlawful use of a weapon statute which served as the basis for the respondent's 2008 conviction stated as follows:

***440** "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm * * *

* * *

and

(3) One of the following factors is present:

> (A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense." 720 ILCS 5/24–1.6 (West 2008).

In *Aguilar*, our supreme court held that section 24–1.6(a)(1), (a)(3)(A) of the aggravated unlawful use of a weapon by a felon statute was unconstitutional on its face. *Aguilar*, 2013 IL 112116, ¶ 22, 377 Ill.Dec. 405, 2 N.E.3d 321; see also *People v. Burns*, 2015 IL 117387, ¶ 21, —— Ill.Dec. ——, ——N.E.3d ——. When a statute is held to be unconstitutional on its face, it is said to be void *ab initio*. *Hill v. Cowan*, 202 Ill.2d 151, 156, 269 Ill.Dec. 875, 781 N.E.2d 1065 (2002). In other words, "the statute was constitutionally infirm from the moment of its enactment and, therefore, is unenforceable." *People v. McFadden*, 2016 IL 117424, ¶ 17, 406 Ill.Dec. 470, 61 N.E.3d 74.

¶ 17 We noted that the certified copies of respondent's criminal convictions included in the original record in this civil case did not reflect the specific provision under which the respondent was convicted for aggravated unlawful use of a weapon. Because *Aguilar* did not invalidate the entirety of the aggravated unlawful use of a weapon statute, that information is vital in this case. We have, therefore, supplemented the record with documents from the Will County circuit court that confirm the statutory basis of the respondent's 2008 conviction. The parties' responses to our request for supplemental briefing have not identified any compelling reason why we cannot take judicial notice of these documents for the purposes of resolving the instant appeal. The question becomes, then, whether we are able to grant the relief the respondent requests in this case based on a clearly meritorious claim that his 2008 conviction for aggravated unlawful use of a weapon is a nullity.

¶ 18 The supreme court majority stated in *McFadden*:

> "It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. Although *Aguilar* may provide a basis for vacating defendant's prior 2002 [aggravated unlawful use of a weapon] conviction, *Aguilar* did not automatically overturn that judgment of conviction. Thus, at the time defendant committed the [unlawful use of a weapon] by a felon offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms." *Id.* ¶ 31.

Clearly, invalidation of the instant respondent's 2008 conviction for aggravated unlawful use of a weapon did not occur automatically; it must be invalidated through a direct appeal or a collateral attack. *Id.*

¶ 19 There are two statutory options for collaterally attacking an invalid judgment in a criminal case: a postconviction petition filed pursuant to the Post–Conviction Hearing Act (725 ILCS 5/122–1 *et seq.* (West 2014)) or a petition filed pursuant to ***441** section 2–1401 of the Code of Civil Procedure (735 ILCS 5/2–1401 (West 2014)). *People v. Helgesen*, 347 Ill.App.3d 672, 675–76, 283 Ill.Dec. 113, 807 N.E.2d 718 (2004) (citing *Sarkissian v. Chicago Board of Education*, 201 Ill.2d 95, 105, 267 Ill.Dec. 58, 776 N.E.2d 195 (2002) and *People v. Thompson*, 209 Ill.2d 19, 282 Ill.Dec. 183, 805 N.E.2d 1200 (2004)). The respondent has pursued a postconviction petition in his 2011 criminal case claiming that his 2008 conviction was a nullity and could not serve as a basis for an armed habitual criminal charge. That petition is not, however, before us in this civil appeal.

[4] ¶ 20 While this case is neither a direct appeal from the respondent's 2008 conviction, nor a postconviction or section 2–1401 challenge to that conviction, the respondent does, nonetheless, seek to have the conviction vacated in an action that is collateral to the criminal case. "A collateral attack on a judgment is an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment. [Citation.]" Black's Law Dictionary 261 (6th ed. 1990). The instant case is a civil action to determine the appropriate custody of the minor, N.G., and, more specifically, the fitness of his biological father to maintain a role in N.G.'s life. The continued existence of the 2008 conviction is pivotal to that determination on the basis asserted by the State. This action is clearly collateral to respondent's 2008 criminal case.

¶ 21 We now turn to the question of whether we have the ability, in this proceeding, to vacate the respondent's conviction, and we find that our authority to do so is explicitly grounded in supreme court precedent. In *People v. Dennis Thompson,* 2015 IL 118151, 398 Ill.Dec. 74, 43 N.E.3d 984, the supreme court described, as follows, three forms of voidness recognized by Illinois law:

> "A voidness challenge based on a lack of personal or subject matter jurisdiction is not subject to forfeiture or other procedural restraints because a judgment entered by a court without jurisdiction 'may be challenged in perpetuity.' [Citation.]" *Id.* ¶ 31.
>
> "A second type of voidness challenge that is exempt from forfeiture and may be raised at any time involves a challenge to a final judgment based on a facially unconstitutional statute that is void *ab initio.* When a statute is declared facially unconstitutional and void *ab initio*, it means that the statute was constitutionally infirm from the moment of its enactment and, therefore, unenforceable. [Citation.]" *Id.* ¶ 32.
>
> "A third type of voidness challenge to a final judgment under section 2–1401 recognized by this court is a challenge to a sentence that does not conform to the applicable sentencing statute. [Citation.] This type of challenge is based on the 'void sentence rule' [citation], holding that a sentence that does not conform to a statutory requirement is void. Recently, however, this court abolished the void sentence rule. *People v. Castleberry*, 2015 IL 116916, ¶ 19 [398 Ill.Dec. 22, 43 N.E.3d 932]. Consequently, that type of challenge is no longer valid." *Id.* ¶ 33.

¶ 22 In a pre-*Castleberry* case, the court considered a claim, raised for the first time in a postconviction proceeding, that the extended-term portion of a sentence for violation of an order of protection was void and could be attacked at any time. *People v. Ernest Thompson*, 209 Ill.2d 19, 282 Ill.Dec. 183, 805 N.E.2d 1200 (2004). The court agreed with the defendant, finding:

> "A void order may be attacked at any time or in any court, either directly or collaterally. An argument that an order or judgment is void is not subject to waiver. Defendant's argument that the ***442** extended-term portion of his sentence is void does not depend for its viability on his postconviction petition. *In fact, courts have an independent duty to vacate void orders and may sua sponte declare an order void.* [Citation.]" (Emphasis added.) *Id.* at ¶ 27. (Emphasis added.)

Even though Dennis Thompson's *basis* for voidness was invalidated in *Castleberry,* the 2015 *Ernest Thompson* decision makes it clear that the procedural voidness principles articulated in the earlier decision still apply to the two remaining valid bases for voidness (lack of jurisdiction and void *ab initio*).

¶ 23 The two *Thompson* cases amply demonstrate that the State's forfeiture challenge lacks merit. Again, the respondent's claim may be raised at any time in any court. *Id.*

¶ 24 Despite the language stating that courts have an independent duty to *sua sponte* declare an order void, the *McFadden* court declined to do so. We, therefore, consider whether its reasons for not doing so are equally applicable to the instant case. For the reasons that follow, we conclude that this case is significantly different and those reasons do not apply here. The *McFadden* majority first noted that the defendant:

> "is not seeking to apply the void *ab initio* doctrine to vacate his prior 2002 AUUW conviction. Rather, defendant is seeking to reverse his 2008 conviction for UUW by a felon, a constitutionally valid offense, by challenging the sufficiency of the evidence to convict him. This distinction presents a different question, namely whether a prior conviction, which is asserted to be based on a statute that has been subsequently declared facially unconstitutional, may nevertheless serve as proof of the predicate felony conviction in prosecuting the offense of UUW by a felon." *McFadden*, 2016 IL 117424, ¶ 21, 406 Ill.Dec. 470, 61 N.E.3d 74.

¶ 25 In the instant case, the respondent is not claiming, as McFadden was, that his void conviction served as the predicate for a second conviction, both of which occurred prior to the invalidation of the statute and only the second of which he is seeking to vacate. While that may be the posture of the postconviction petition in the respondent's 2011 habitual criminal case, it is not his argument in the instant case. Rather, here he is contending that his 2008 conviction had been declared a nullity in 2013; that that conviction should be recognized as null and void, and vacated; and that this void conviction could not serve in 2016 as a basis for the imposition of a civil penalty—the loss of his parental rights. We believe these differences distinguish the instant case from *McFadden* in legally significant ways and that *McFadden* does not preclude, on this basis, the action we take here.

¶ 26 The court's second reason for rejecting McFadden's argument was that, "[a]lthough for purposes of this

appeal, the State does not dispute that defendant's 2002 conviction is premised on an unconstitutional statute, the record does not confirm defendant's assertion." *Id.* ¶ 32. The court notes that although six separate charges under various statutory sections were alleged, defendant was only convicted on one, and there is no confirmation in the record that he pled guilty to the unconstitutional section. *Id.* ¶ 33.

¶ 27 As previously indicated, we have, *sua sponte*, supplemented the record in this case. We have done so because we believe that a refusal to vacate the 2008 conviction at this juncture would elevate form over substance, constitute an affront to judicial economy, and, perhaps most importantly, result in an *unfounded* deprivation ***443** of a fundamental liberty interest (see, *e.g.*, *Obergefell v. Hodges*, 576 U.S. ——, ——, 135 S.Ct. 2584, 2600, 192 L.Ed.2d 609 (2015) (recognizing, while analyzing the right to marry, the great importance of parental rights and quoting *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) for the statement that "the right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause [citation]")).

¶ 28 The additions to the record include documents from the 2008 felony case confirming that respondent was charged in 2008 with two counts of AUUW, both of which alleged violations of the same unconstitutional section of the statute; that he pled guilty to one count; and that the judgment expressly confirmed his conviction under the section that had been declared unconstitutional. There can be no doubt that respondent's 2008 conviction was pursuant to a statute that was void *ab initio* and was, therefore, a nullity. This fact, too, constitutes a significant distinction from *McFadden*, allowing us to reach a different outcome.

¶ 29 Under *Aguilar*, the respondent's 2008 conviction for aggravated unlawful use of a weapon was a nullity from the moment it was entered. It is a nullity now; one that has not yet been officially vacated. In this case, the State chose to pursue the termination of the respondent's parental rights based only on depravity premised on three felony convictions. Without the 2008 conviction, the State cannot establish that the respondent was depraved pursuant to section 1(D)(i) of the Adoption Act (750 ILCS 50/1(D)(i) (West 2014)), and therefore the respondent's parental rights could not have been terminated on that basis.

¶ 30 We find: this is an action collateral to the 2008 criminal prosecution; there is, unlike the situation in *McFadden*, no dispute about which conviction the respondent is attacking and no dispute about which section of the statute was the basis for that conviction; and we are indisputably a court with reviewing authority.

¶ 31 We therefore find the respondent's 2008 conviction for aggravated unlawful use of a weapon null and void and hold that it cannot serve as a basis for a depravity consideration pursuant to section 1(D)(i) of the Adoption Act (750 ILCS 50/1(D)(i) (West 2014)). See Ill. S. Ct. R. 366(a)(5) (eff. Feb. 7, 1994) (stating that a reviewing court has the discretion to "enter any judgment and make any order that ought to have been given or made, and make any other further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require"); *People v. Stoffel*, 239 Ill.2d 314, 330, 346 Ill.Dec. 589, 941 N.E.2d 147 (2010) (addressing the merits of a postconviction petition, rather than remanding the case for the merits to be considered, "[i]n the interests of judicial economy"). Accordingly, we vacate the 2008 conviction, reverse the circuit court's unfitness finding and, reverse, by necessity, the court's best interest determination, and remand the case for further proceedings consistent with this decision.

¶ 32 CONCLUSION

¶ 33 The judgment of the circuit court of Will County is reversed and the case is remanded for further proceedings.

¶ 34 Reversed and remanded.

Justice O'Brien concurred in the judgment and opinion.

Justice Wright dissented, with opinion.

***444** ¶ 35 JUSTICE WRIGHT, dissenting.

¶ 36 I agree that a unique solution is required in this case to prevent a miscarriage of justice with respect to father's parental rights. I respectfully observe the juvenile

court judge was not fully informed that the viability of the conviction in case No. 11–CF–201 was *simultaneously* being considered by another judge in the same circuit.

¶ 37 Based on this unique record, I would take a conservative approach and vacate the order terminating father's parental rights without addressing the merits of the pending petitions in case No. 11–CF–201. Upon remand, the trial court should be directed to postpone the hearing on the petition to terminate father's parental rights pending the ruling of the circuit court in the criminal proceedings. I respectfully suggest that the interests of judicial economy may warrant the assignment of one judge to hear both cases in an expedited fashion.

¶ 38 Here, the record is unique because the viability of father's conviction in case No. 11–CF–201 was *simultaneously* under consideration in a different division of the circuit court on the date he lost his parental rights. For reasons not apparent of record, neither father's attorney, the child's guardian *ad litem*, nor the attorney representing the State asked the trial court to postpone the juvenile proceeding or consolidate the criminal matter with the juvenile case in the spirit of Illinois Supreme Court Rule 903 (eff. Mar. 8, 2016). This is a classic case of one hand not being aware of what the other hand was doing, simply due to the volume of pending cases in various courtrooms of a busy circuit court.

¶ 39 I respectfully disagree that this court should vacate the 2008 criminal conviction in order to resolve the serious issues in this appeal. I have concerns that the precedent flowing from this decision to vacate a criminal conviction in a juvenile case would have far reaching, but unintended consequences we have yet to consider.

All Citations

2017 IL App (3d) 160277, 72 N.E.3d 436, 411 Ill.Dec. 16

C0000654

COPY

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS
JUVENILE DIVISION

IN THE INTEREST OF
Anthony Gilbert
Nevaeh Guerrero -AKA- Nevaeh Faint

No. 11JA151 / 11JA152

FILED
16 MAY 12 PM 3:19
CLERK

ORDER AS TO PARENTAL FITNESS, BEST INTEREST AND TERMINATION OF PARENTAL RIGHTS

Present in Court:
□Minor ☒GAL CASA □Attorney
□Mother [served by □summons □publication □certified mail] □Attorney
☒Father Floyd Faint, JR. (DOC) [served by □summons □publication □certified mail] ☒Attorney Pavur
□Father [served by □summons □publication □certified mail] □Attorney
□Father [served by □summons □publication □certified mail] □Attorney
☒ASA Rippy
□DCFS □Catholic Charities ☒OHU Deana Sheika
□Easter Seals □Guardian Angel Home ☒CASA as GAL
☒Other grandparents; Uncle

This Cause coming on for Hearing as to Parental Fitness AND/OR Best Interest of the Child(ren) on this 12th day of May, 2016, 2nd motion to Terminate Parental Rights as to Nevaeh Faint, only

I. Jurisdiction-Mother

□That there is no appearance by respondent(s) mother nor anyone on her behalf;
□The Court finds the respondent mother has been served with notice of these proceedings by: } mother previously found unfit on 9-14-15
□Personal presence in court on ;
□Service pursuant to Supreme Court Rule 11 on ;
□Publication
□The Court further finds that the Motion of the Petitioner for default judgment is allowed and the respondent **mother is defaulted;**

Jurisdiction - Father(s) and All Whom it May Concern as to Floyd Faint, only

□That there is no appearance by respondent father(s) nor anyone on his behalf
☒The Court finds the respondent father(s) has been served with notice of these proceedings by:
☒Personal presence in court on ;
□Service pursuant to Supreme Court Rule 11 on ;
□Publication
□The Court further finds that the Motion of the Petitioner for default judgment is allowed and the respondent father **is defaulted;**

□That no appearance by TO ALL WHOM IT MAY CONCERN nor anyone on behalf. The Court finds TO ALL WHOM IT MAY CONCERN has been served with notice of these proceedings by Publication; and the Court further finds that TO ALL WHOM IT MAY CONCERN is in default. The Motion of the Petitioner for default judgment is allowed and **TO ALL WHOM IT MAY CONCERN is defaulted.**

☒That the Court has jurisdiction of the persons and subject matter before it;

II. Parental Fitness

A. ☒ Court having **previously found** the mother, Quinntin Gilbert -AKA- Antonio Gilbert and All Whom it May Concern to be unfit on 9-14-15 matter proceeds to Best Interest Hearing; mother unfit as to both minors Quinntin Gilbert -AKA- Antonio Gilbert + AWIMC, as to Anthony Gilbert, only

B. □ Court having heard evidence and arguments of counsel **finds by clear and convincing evidence that:**
□That the **natural mother,** , is an unfit person within the meaning of 750 ILCS, 50/1 Illinois Revised Statutes for the following reason(s):
_ that she failed to maintain a reasonable degree of interest, concern, or responsibility as the child(s) welfare;
_ that she failed to make reasonable efforts to correct the conditions which were the basis for the removal of the child from such parent said time period being ;

05/13/16 09:29:34 RVJC

__ that she failed to make reasonable progress toward the return of the child to such parent within 9 months after an adjudication of neglected minor, abused minor or dependent minor under the Juvenile Court Act of the Juvenile Court Act of 1987 or during any 9 month period after the initial 9 months period as specified in the motion to terminate parental rights said time period being _____;

__ OTHER:_____

X That the **respondent father (s),** Floyd Faint, is an unfit person within the meaning of 750 ILCS 50/1 of the Illinois Revised Statutes for the following reason(s):

__ that he failed to maintain a reasonable degree of interest, concern, or responsibility as the child(s) welfare;

__ that he failed to make reasonable efforts to correct the conditions which were the basis for the removal of the child from such parent said time period being _____;

__ that he failed to make reasonable progress toward the return of the child to such parent within 9 months after an adjudication of neglected minor, abused minor or dependent minor under the Juvenile Court Act of the Juvenile Court Act of 1987 or during any 9 month period after the initial 9 month period as specified in the motion to terminate parental rights said time period being _____;;

X OTHER: pursuant to 750 ILCS 50/1(D)(i) Father is depraved in that he is depraved in that he has been criminally convicted of at least 3 felonies under IL State law + at least one of those convictions took place within 5 years of filing the State's 2nd motion to Terminate Parental Rights; 08CF910, 09CF10 AND 11CF201.

□ That **TO ALL WHOM IT MAY CONCERN** is an unfit person within the meaning of 750 ILCS 50/1 of the Illinois Revised Statutes for the following reasons:

__ that he failed to maintain a reasonable degree of interest, concern, or responsibility as the child(s) welfare;

□ That the **People have not sustained their burden** to prove the parent(s) _____ are unfit by clear and convincing evidence and the Motion to Terminate Parental Rights is dismissed.

III. Best Interest of the Child(ren)

X That it is in the **best interests** of the minor(s) and the public that all residual parental rights of Melissa Guerrero, Quinntin Gilbert -AKA- Antonio Gilbert + Floyd Faint and All Whom it May Concern with respect to the minor(s) Anthony Gilbert + Nevaeh Guerrero -AKA- Nevaeh Faint be terminated and a guardian of the person be appointed with authority to consent to the adoption of the minor(s);

X That the minor(s) ~~was~~/were previously made a ward of the Court;

X Permanency Review hearing is set for 8-3-16 @ 11am And the goal is set at Adoption.

WHEREFORE, THE COURT ORDERS:

I. That acting Guardianship Administrator of the Illinois Department of Children and Family Services, or any successor in office, is continued as Guardian and Custodian of the minor(s) Anthony Gilbert + Nevaeh Guerrero -AKA- Nevaeh Faint and given power and authority to consent to the adoption of the minor(s);

II. That all residual rights and responsibilities of Melissa Guerrero, Quinntin Gilbert -AKA- Antonio Gilbert, Floyd Faint and All Whom It May Concern is/are hereby terminated and the minor(s) is/are relieved of all obligations of maintenance and obedience with respect to Melissa Guerrero, Quinntin Gilbert -AKA- Antonio Gilbert, Floyd Faint and All Whom It May Concern

ENTERED THIS 12th DAY OF May 2016

JUDGE OF THE TWELFTH JUDICIAL CIRCUIT

05/13/16 09:29:34 RVJC

THIS APPEAL INVOLVES A QUESTION OF CHILD CUSTODY, ADOPTION, TERMINATION OF PARENTAL RIGHTS OR OTHER MATTER AFFECTING THE BEST INTREST OF THE CHILD

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

IN THE INTEREST OF:

NEVAEH GUERRERO –AKA-)
NEVAEH FAINT) No. 11 JA 152
MINOR.)

NOTICE OF APPEAL

An Appeal is taken from the Order of Judgement described below

COURT TO WHICH APPEAL IS TAKEN

Third District Appellate Court
1004 Columbus Street
Ottawa, Illinois 61350

NAME AND ADDRESS OF APPELLANT ON APPEAL

Name- Floyd Faint
Address- Dixon Correctional Center
2600 North Brinton Ave.
Dixon, Illinois 61021

DATE OF JUDGEMENT OR ORDER: December 28, 2011- Shelter Care Order finding Minor is neglected

JUDGE Honorable Paula Gomora

NATURE OF ORDER APPEALED FROM: Order of Juvenile Court shelter care order entered on December 28, 2011 finding minor to be neglected and environment injurious to her welfare.

05/18/16 16:26:53 RVJC

DATE OF JUDGEMENT OR ORDER: September 19, 2012- Adjudicatory Hearing Order finding Minor is dependent

JUDGE Honorable Paula Gomora

NATURE OF ORDER APPEALED FROM: Order of Juvenile Court adjudicatory hearing order entered on September 19, 2012 finding minor to be neglected and the minor's environment is injurious to her welfare.

DATE OF JUDGEMENT OR ORDER: October 30, 2012- Dispositional Order finding father unfit

JUDGE Honorable Paula Gomora

NATURE OF ORDER APPEALED FROM: Order of Juvenile Court dispositional order entered herein on October 30, 2012 finding Father unfit based on Fathers incarnation in the Illinois Department of Corrections and unable to care for the minor.

DATE OF JUDGEMENT OR ORDER: May 12, 2016- Termination of Parental Rights and Best Interest Order

JUDGE Honorable Paula Gomora

NATURE OF ORDER APPEALED FROM: Order of Juvenile Court with accompanying finding that Respondent/Father, Floyd Faint is unfit by a standard of clear and convincing evidence, and that it is in the best interest of the minor child that his parental rights should be terminated. Appellant/Respondent respectfully requests that the Order of the Trial Court be Reversed.

FOLYD FAINT,
Appellant/Respondent
Gerald Kielian., Public Defender

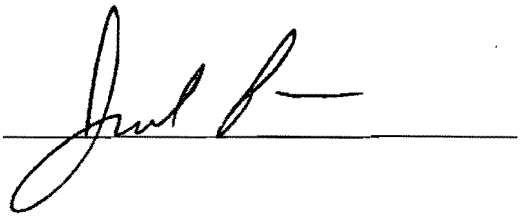
By: _____
JOSEPH PAVUR
Assistant Public Defender

JOSEPH PAVUR
Assistant Public Defender
Will County Public Defender's Office – Juvenile Division
River Valley Justice Center
3202 W. McDonough Street
Joliet, Illinois 60431
(815) 730-7090

05/18/16 16:26:53 RVJC

PROOF OF SERVICE

The undersigned certifies and states that a copy of the foregoing instrument was served upon the parties of record on the Service List attached hereto on the 18th day of May, 2016 by hand delivery to the Will County States Attorney's Office and by facsimile to all other parties and the telephone number identified herein



05/18/16 16:26:53 RVJC

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 750. Families
Act 50. Adoption Act (Refs & Annos)

750 ILCS 50/1
Formerly cited as IL ST CH 40 ¶1501

50/1. Definitions

Effective: January 1, 2017
Currentness

§ 1. Definitions. When used in this Act, unless the context otherwise requires:

A. "Child" means a person under legal age subject to adoption under this Act.

B. "Related child" means a child subject to adoption where either or both of the adopting parents stands in any of the following relationships to the child by blood, marriage, adoption, or civil union: parent, grand-parent, great-grandparent, brother, sister, step-parent, step-grandparent, step-brother, step-sister, uncle, aunt, great-uncle, great-aunt, first cousin, or second cousin. A person is related to the child as a first cousin or second cousin if they are both related to the same ancestor as either grandchild or great-grandchild. A child whose parent has executed a consent to adoption, a surrender, or a waiver pursuant to Section 10 of this Act or whose parent has signed a denial of paternity pursuant to Section 12 of the Vital Records Act or Section 12a of this Act, or whose parent has had his or her parental rights terminated, is not a related child to that person, unless (1) the consent is determined to be void or is void pursuant to subsection O of Section 10 of this Act; or (2) the parent of the child executed a consent to adoption by a specified person or persons pursuant to subsection A-1 of Section 10 of this Act and a court of competent jurisdiction finds that such consent is void; or (3) the order terminating the parental rights of the parent is vacated by a court of competent jurisdiction.

C. "Agency" for the purpose of this Act means a public child welfare agency or a licensed child welfare agency.

D. "Unfit person" means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption. The grounds of unfitness are any one or more of the following, except that a person shall not be considered an unfit person for the sole reason that the person has relinquished a child in accordance with the Abandoned Newborn Infant Protection Act: [1]

(a) Abandonment of the child.

(a-1) Abandonment of a newborn infant in a hospital.

(a-2) Abandonment of a newborn infant in any setting where the evidence suggests that the parent intended to relinquish his or her parental rights.

(b) Failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare.

(c) Desertion of the child for more than 3 months next preceding the commencement of the Adoption proceeding.

(d) Substantial neglect of the child if continuous or repeated.

(d-1) Substantial neglect, if continuous or repeated, of any child residing in the household which resulted in the death of that child.

(e) Extreme or repeated cruelty to the child.

(f) There is a rebuttable presumption, which can be overcome only by clear and convincing evidence, that a parent is unfit if:

(1) Two or more findings of physical abuse have been entered regarding any children under Section 2-21 of the Juvenile Court Act of 1987, [2] the most recent of which was determined by the juvenile court hearing the matter to be supported by clear and convincing evidence; or

(2) The parent has been convicted or found not guilty by reason of insanity and the conviction or finding resulted from the death of any child by physical abuse; or

(3) There is a finding of physical child abuse resulting from the death of any child under Section 2-21 of the Juvenile Court Act of 1987.

No conviction or finding of delinquency pursuant to Article V of the Juvenile Court Act of 1987 shall be considered a criminal conviction for the purpose of applying any presumption under this item (f).

(g) Failure to protect the child from conditions within his environment injurious to the child's welfare.

(h) Other neglect of, or misconduct toward the child; provided that in making a finding of unfitness the court hearing the adoption proceeding shall not be bound by any previous finding, order or judgment affecting or determining the rights of the parents toward the child sought to be adopted in any other proceeding except such proceedings terminating parental rights as shall be had under either this Act, the Juvenile Court Act [3] or the Juvenile Court Act of 1987. [4]

(i) Depravity. Conviction of any one of the following crimes shall create a presumption that a parent is depraved which can be overcome only by clear and convincing evidence: (1) first degree murder in violation of paragraph 1 or 2 of subsection (a) of Section 9-1 of the Criminal Code of 1961 or the Criminal Code of 2012 [5] or conviction of second degree murder in violation of subsection (a) of Section 9-2 of the Criminal Code of 1961 or the Criminal Code of

2012 [6] of a parent of the child to be adopted; (2) first degree murder or second degree murder of any child in violation of the Criminal Code of 1961 or the Criminal Code of 2012; [7] (3) attempt or conspiracy to commit first degree murder or second degree murder of any child in violation of the Criminal Code of 1961 or the Criminal Code of 2012; (4) solicitation to commit murder of any child, solicitation to commit murder of any child for hire, or solicitation to commit second degree murder of any child in violation of the Criminal Code of 1961 or the Criminal Code of 2012; (5) predatory criminal sexual assault of a child in violation of Section 11-1.40 or 12-14.1 of the Criminal Code of 1961 or the Criminal Code of 2012; [8] (6) heinous battery of any child in violation of the Criminal Code of 1961; or (7) aggravated battery of any child in violation of the Criminal Code of 1961 or the Criminal Code of 2012.

There is a rebuttable presumption that a parent is depraved if the parent has been criminally convicted of at least 3 felonies under the laws of this State or any other state, or under federal law, or the criminal laws of any United States territory; and at least one of these convictions took place within 5 years of the filing of the petition or motion seeking termination of parental rights.

There is a rebuttable presumption that a parent is depraved if that parent has been criminally convicted of either first or second degree murder of any person as defined in the Criminal Code of 1961 or the Criminal Code of 2012 within 10 years of the filing date of the petition or motion to terminate parental rights.

No conviction or finding of delinquency pursuant to Article 5 of the Juvenile Court Act of 1987 shall be considered a criminal conviction for the purpose of applying any presumption under this item (i).

(j) Open and notorious adultery or fornication.

(j-1) (Blank).

(k) Habitual drunkenness or addiction to drugs, other than those prescribed by a physician, for at least one year immediately prior to the commencement of the unfitness proceeding.

There is a rebuttable presumption that a parent is unfit under this subsection with respect to any child to which that parent gives birth where there is a confirmed test result that at birth the child's blood, urine, or meconium contained any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act [9] or metabolites of such substances, the presence of which in the newborn infant was not the result of medical treatment administered to the mother or the newborn infant; and the biological mother of this child is the biological mother of at least one other child who was adjudicated a neglected minor under subsection (c) of Section 2-3 of the Juvenile Court Act of 1987. [10]

(*l*) Failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth.

(m) Failure by a parent (i) to make reasonable efforts to correct the conditions that were the basis for the removal of the child from the parent during any 9-month period following the adjudication of neglected or abused minor under Section 2-3 of the Juvenile Court Act of 1987 or dependent minor under Section 2-4 of that Act, or (ii) to make reasonable progress toward the return of the child to the parent during any 9-month period following the adjudication of neglected or abused minor under Section 2-3 of the Juvenile Court Act of 1987 or dependent minor under Section

2-4 of that Act. If a service plan has been established as required under Section 8.2 of the Abused and Neglected Child Reporting Act [11] to correct the conditions that were the basis for the removal of the child from the parent and if those services were available, then, for purposes of this Act, "failure to make reasonable progress toward the return of the child to the parent" includes the parent's failure to substantially fulfill his or her obligations under the service plan and correct the conditions that brought the child into care during any 9-month period following the adjudication under Section 2-3 or 2-4 of the Juvenile Court Act of 1987. Notwithstanding any other provision, when a petition or motion seeks to terminate parental rights on the basis of item (ii) of this subsection (m), the petitioner shall file with the court and serve on the parties a pleading that specifies the 9-month period or periods relied on. The pleading shall be filed and served on the parties no later than 3 weeks before the date set by the court for closure of discovery, and the allegations in the pleading shall be treated as incorporated into the petition or motion. Failure of a respondent to file a written denial of the allegations in the pleading shall not be treated as an admission that the allegations are true.

(m-1) (Blank).

(n) Evidence of intent to forgo his or her parental rights, whether or not the child is a ward of the court, (1) as manifested by his or her failure for a period of 12 months: (i) to visit the child, (ii) to communicate with the child or agency, although able to do so and not prevented from doing so by an agency or by court order, or (iii) to maintain contact with or plan for the future of the child, although physically able to do so, or (2) as manifested by the father's failure, where he and the mother of the child were unmarried to each other at the time of the child's birth, (i) to commence legal proceedings to establish his paternity under the Illinois Parentage Act of 1984, [12] the Illinois Parentage Act of 2015, or the law of the jurisdiction of the child's birth within 30 days of being informed, pursuant to Section 12a of this Act, that he is the father or the likely father of the child or, after being so informed where the child is not yet born, within 30 days of the child's birth, or (ii) to make a good faith effort to pay a reasonable amount of the expenses related to the birth of the child and to provide a reasonable amount for the financial support of the child, the court to consider in its determination all relevant circumstances, including the financial condition of both parents; provided that the ground for termination provided in this subparagraph (n)(2)(ii) shall only be available where the petition is brought by the mother or the husband of the mother.

Contact or communication by a parent with his or her child that does not demonstrate affection and concern does not constitute reasonable contact and planning under subdivision (n). In the absence of evidence to the contrary, the ability to visit, communicate, maintain contact, pay expenses and plan for the future shall be presumed. The subjective intent of the parent, whether expressed or otherwise, unsupported by evidence of the foregoing parental acts manifesting that intent, shall not preclude a determination that the parent has intended to forgo his or her parental rights. In making this determination, the court may consider but shall not require a showing of diligent efforts by an authorized agency to encourage the parent to perform the acts specified in subdivision (n).

It shall be an affirmative defense to any allegation under paragraph (2) of this subsection that the father's failure was due to circumstances beyond his control or to impediments created by the mother or any other person having legal custody. Proof of that fact need only be by a preponderance of the evidence.

(*o*) Repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter.

(p) Inability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of mental impairment, mental illness or an intellectual disability as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, [13] or developmental disability as

defined in Section 1-106 of that Code, [14] and there is sufficient justification to believe that the inability to discharge parental responsibilities shall extend beyond a reasonable time period. However, this subdivision (p) shall not be construed so as to permit a licensed clinical social worker to conduct any medical diagnosis to determine mental illness or mental impairment.

(q) (Blank).

(r) The child is in the temporary custody or guardianship of the Department of Children and Family Services, the parent is incarcerated as a result of criminal conviction at the time the petition or motion for termination of parental rights is filed, prior to incarceration the parent had little or no contact with the child or provided little or no support for the child, and the parent's incarceration will prevent the parent from discharging his or her parental responsibilities for the child for a period in excess of 2 years after the filing of the petition or motion for termination of parental rights.

(s) The child is in the temporary custody or guardianship of the Department of Children and Family Services, the parent is incarcerated at the time the petition or motion for termination of parental rights is filed, the parent has been repeatedly incarcerated as a result of criminal convictions, and the parent's repeated incarceration has prevented the parent from discharging his or her parental responsibilities for the child.

(t) A finding that at birth the child's blood, urine, or meconium contained any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act, or a metabolite of a controlled substance, with the exception of controlled substances or metabolites of such substances, the presence of which in the newborn infant was the result of medical treatment administered to the mother or the newborn infant, and that the biological mother of this child is the biological mother of at least one other child who was adjudicated a neglected minor under subsection (c) of Section 2-3 of the Juvenile Court Act of 1987, after which the biological mother had the opportunity to enroll in and participate in a clinically appropriate substance abuse counseling, treatment, and rehabilitation program.

E. “Parent” means a person who is the legal mother or legal father of the child as defined in subsection X or Y of this Section. For the purpose of this Act, a parent who has executed a consent to adoption, a surrender, or a waiver pursuant to Section 10 of this Act, who has signed a Denial of Paternity pursuant to Section 12 of the Vital Records Ac [15] t or Section 12a of this Act, or whose parental rights have been terminated by a court, is not a parent of the child who was the subject of the consent, surrender, waiver, or denial unless (1) the consent is void pursuant to subsection O of Section 10 of this Act; or (2) the person executed a consent to adoption by a specified person or persons pursuant to subsection A-1 of Section 10 of this Act and a court of competent jurisdiction finds that the consent is void; or (3) the order terminating the parental rights of the person is vacated by a court of competent jurisdiction.

F. A person is available for adoption when the person is:

(a) a child who has been surrendered for adoption to an agency and to whose adoption the agency has thereafter consented;

(b) a child to whose adoption a person authorized by law, other than his parents, has consented, or to whose adoption no consent is required pursuant to Section 8 of this Act;

(c) a child who is in the custody of persons who intend to adopt him through placement made by his parents;

(c-1) a child for whom a parent has signed a specific consent pursuant to subsection O of Section 10;

(d) an adult who meets the conditions set forth in Section 3 of this Act; or

(e) a child who has been relinquished as defined in Section 10 of the Abandoned Newborn Infant Protection Act.

A person who would otherwise be available for adoption shall not be deemed unavailable for adoption solely by reason of his or her death.

G. The singular includes the plural and the plural includes the singular and the "male" includes the "female", as the context of this Act may require.

H. (Blank).

I. "Habitual residence" has the meaning ascribed to it in the federal Intercountry Adoption Act of 2000 and regulations promulgated thereunder.

J. "Immediate relatives" means the biological parents, the parents of the biological parents and siblings of the biological parents.

K. "Intercountry adoption" is a process by which a child from a country other than the United States is adopted by persons who are habitual residents of the United States, or the child is a habitual resident of the United States who is adopted by persons who are habitual residents of a country other than the United States.

L. (Blank).

M. "Interstate Compact on the Placement of Children" is a law enacted by all states and certain territories for the purpose of establishing uniform procedures for handling the interstate placement of children in foster homes, adoptive homes, or other child care facilities.

N. (Blank).

O. "Preadoption requirements" means any conditions or standards established by the laws or administrative rules of this State that must be met by a prospective adoptive parent prior to the placement of a child in an adoptive home.

P. “Abused child” means a child whose parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent:

(a) inflicts, causes to be inflicted, or allows to be inflicted upon the child physical injury, by other than accidental means, that causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;

(b) creates a substantial risk of physical injury to the child by other than accidental means which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;

(c) commits or allows to be committed any sex offense against the child, as sex offenses are defined in the Criminal Code of 2012 and extending those definitions of sex offenses to include children under 18 years of age;

(d) commits or allows to be committed an act or acts of torture upon the child; or

(e) inflicts excessive corporal punishment.

Q. “Neglected child” means any child whose parent or other person responsible for the child's welfare withholds or denies nourishment or medically indicated treatment including food or care denied solely on the basis of the present or anticipated mental or physical impairment as determined by a physician acting alone or in consultation with other physicians or otherwise does not provide the proper or necessary support, education as required by law, or medical or other remedial care recognized under State law as necessary for a child's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter; or who is abandoned by his or her parents or other person responsible for the child's welfare.

A child shall not be considered neglected or abused for the sole reason that the child's parent or other person responsible for his or her welfare depends upon spiritual means through prayer alone for the treatment or cure of disease or remedial care as provided under Section 4 of the Abused and Neglected Child Reporting Act. [16] A child shall not be considered neglected or abused for the sole reason that the child's parent or other person responsible for the child's welfare failed to vaccinate, delayed vaccination, or refused vaccination for the child due to a waiver on religious or medical grounds as permitted by law.

R. “Putative father” means a man who may be a child's father, but who (1) is not married to the child's mother on or before the date that the child was or is to be born and (2) has not established paternity of the child in a court proceeding before the filing of a petition for the adoption of the child. The term includes a male who is less than 18 years of age. “Putative father” does not mean a man who is the child's father as a result of criminal sexual abuse or assault as defined under Article 11 of the Criminal Code of 2012. [17]

S. “Standby adoption” means an adoption in which a parent consents to custody and termination of parental rights to become effective upon the occurrence of a future event, which is either the death of the parent or the request of the parent for the entry of a final judgment of adoption.

T. (Blank).

T-5. “Biological parent”, “birth parent”, or “natural parent” of a child are interchangeable terms that mean a person who is biologically or genetically related to that child as a parent.

U. “Interstate adoption” means the placement of a minor child with a prospective adoptive parent for the purpose of pursuing an adoption for that child that is subject to the provisions of the Interstate Compact on Placement of Children.

V. (Blank).

W. (Blank).

X. “Legal father” of a child means a man who is recognized as or presumed to be that child's father:

(1) because of his marriage to or civil union with the child's parent at the time of the child's birth or within 300 days prior to that child's birth, unless he signed a denial of paternity pursuant to Section 12 of the Vital Records Act or a waiver pursuant to Section 10 of this Act; or

(2) because his paternity of the child has been established pursuant to the Illinois Parentage Act, the Illinois Parentage Act of 1984, or the Gestational Surrogacy Act; or

(3) because he is listed as the child's father or parent on the child's birth certificate, unless he is otherwise determined by an administrative or judicial proceeding not to be the parent of the child or unless he rescinds his acknowledgment of paternity pursuant to the Illinois Parentage Act of 1984; or

(4) because his paternity or adoption of the child has been established by a court of competent jurisdiction.

The definition in this subsection X shall not be construed to provide greater or lesser rights as to the number of parents who can be named on a final judgment order of adoption or Illinois birth certificate that otherwise exist under Illinois law.

Y. “Legal mother” of a child means a woman who is recognized as or presumed to be that child's mother:

(1) because she gave birth to the child except as provided in the Gestational Surrogacy Act; or

(2) because her maternity of the child has been established pursuant to the Illinois Parentage Act of 1984 or the Gestational Surrogacy Act; or

(3) because her maternity or adoption of the child has been established by a court of competent jurisdiction; or

(4) because of her marriage to or civil union with the child's other parent at the time of the child's birth or within 300 days prior to the time of birth; or

(5) because she is listed as the child's mother or parent on the child's birth certificate unless she is otherwise determined by an administrative or judicial proceeding not to be the parent of the child.

The definition in this subsection Y shall not be construed to provide greater or lesser rights as to the number of parents who can be named on a final judgment order of adoption or Illinois birth certificate that otherwise exist under Illinois law.

Z. "Department" means the Illinois Department of Children and Family Services.

AA. "Placement disruption" means a circumstance where the child is removed from an adoptive placement before the adoption is finalized.

BB. "Secondary placement" means a placement, including but not limited to the placement of a ward of the Department, that occurs after a placement disruption or an adoption dissolution. "Secondary placement" does not mean secondary placements arising due to the death of the adoptive parent of the child.

CC. "Adoption dissolution" means a circumstance where the child is removed from an adoptive placement after the adoption is finalized.

DD. "Unregulated placement" means the secondary placement of a child that occurs without the oversight of the courts, the Department, or a licensed child welfare agency.

EE. "Post-placement and post-adoption support services" means support services for placed or adopted children and families that include, but are not limited to, counseling for emotional, behavioral, or developmental needs.

Credits

Laws 1959, p. 1269, § 1, eff. Jan. 1, 1960. Amended by Laws 1963, p. 1631, § 1, eff. July 1, 1964; Laws 1967, p. 2273, § 1, eff. July 31, 1967; P.A. 78-854, § 1, eff. Oct. 1, 1973; P.A. 79-1363, § 1, eff. Oct. 1, 1976; P.A. 80-558, § 1, eff. Oct. 1, 1977; P.A. 81-337, § 6, eff. Aug. 31, 1979; P.A. 82-224, § 1, eff. Jan. 1, 1982; P.A. 82-437, § 2, eff. Jan. 1, 1982; P.A. 82-783, Art. III, § 25, eff. July 13, 1982; P.A. 83-138, § 3, eff. Aug. 19, 1983; P.A. 83-870, § 1, eff. Sept. 26, 1983; P.A. 83-1362, Art. II, § 50, eff. Sept. 11, 1984; P.A. 84-1427, § 1, eff. Jan. 1, 1987; P.A. 85-517, § 1, eff. Jan. 1, 1988; P.A. 85-1209, Art. III, § 3-38, eff. Aug. 30, 1988; P.A. 85-1417, § 2, eff. Jan. 1, 1989; P.A. 85-1440, Art. II, § 2-54, eff. Feb. 1, 1989; P.A. 86-403, § 2, eff. Aug. 30, 1989; P.A. 86-659, § 5, eff. Sept. 1, 1989; P.A. 86-883, § 2, eff. Jan. 1, 1990; P.A. 86-1028, Art. II, § 2-26, eff. Feb. 5, 1990; P.A. 87-617, § 2, eff. Jan. 1, 1992; P.A. 87-1158, § 2, eff. Sept. 18, 1992; P.A. 88-20, § 5, eff. Jan. 1, 1994; P.A. 88-550, Art. 9, § 975, eff. July 3, 1994; P.A. 88-691, § 15, eff. Jan. 24, 1995; P.A. 89-235, Art. 2, § 2-160, eff. Aug. 4, 1995; P.A. 89-704, § 10, eff. Jan. 1, 1998; P.A. 90-13, § 5, eff. June 13, 1997; P.A. 90-15, § 20, eff. June 13, 1997; P.A. 90-27, § 45; P.A. 90-28, Art. 10, § 10-25; P.A. 90-443, § 15, eff. Aug. 16, 1997; P.A. 90-608, § 40, eff. June 30, 1998; P.A. 90-655, § 174, eff. July 30, 1998; P.A. 91-357, § 262, eff. July 29, 1999; P.A. 91-373, § 5, eff. Jan. 1, 2000; P.A. 91-572, § 5, eff. Jan. 1, 2000; P.A. 92-16, § 99, eff. June 28, 2001; P.A. 92-375, § 5, eff. Jan. 1, 2002; P.A. 92-408, § 97, eff. Aug. 17, 2001; P.A. 92-432, § 97, eff. Aug. 17, 2001; P.A. 92-651, § 89, eff. July 11, 2002; P.A. 93-732, § 5, eff. Jan. 1, 2005; P.A. 94-229, § 25, eff. Jan. 1, 2006; P.A. 94-563, § 5, eff. Jan. 1, 2006; P.A. 94-939, § 5, eff. Jan. 1, 2007; P.A. 96-1551, Art.

2, § 1110, eff. July 1, 2011; P.A. 97-227, § 165, eff. Jan. 1, 2012; P.A. 97-1109, § 15-95, eff. Jan. 1, 2013; P.A. 97-1150, § 770, eff. Jan. 25, 2013; P.A. 98-455, § 5, eff. Jan. 1, 2014; P.A. 98-532, § 5, eff. Jan. 1, 2014; P.A. 98-756, § 750, eff. July 16, 2014; P.A. 98-804, § 10, eff. Jan. 1, 2015; P.A. 99-49, § 10, eff. July 15, 2015; P.A. 99-85, § 972, eff Jan. 1, 2016; P.A. 99-642, § 590, eff. July 28, 2016; P.A. 99-836, § 15, eff. Jan. 1, 2017.

Formerly Ill.Rev.Stat.1991, ch. 40, ¶ 1501, transferred from Ill.Rev.Stat., ch. 4, ¶ 9.1-1.

Footnotes

1 325 ILCS 2/1 et seq.
2 705 ILCS 405/2-21.
3 Former Ill.Rev.Stat. ch. 37, ¶ 707-2 (repealed).
4 705 ILCS 405/1-1 et seq.
5 720 ILCS 5/9-1.
6 720 ILCS 5/9-2.
7 720 ILCS 5/1-1 et seq.
8 720 ILCS 5/11-1.40, 5/12-14.
9 720 ILCS 570/102.
10 705 ILCS 405/2-3.
11 325 ILCS 5/8.2.
12 750 ILCS 40/1 et seq.
13 405 ILCS 5/1-116.
14 405 ILCS 5/1-106.
15 410 ILCS 535/12.
16 325 ILCS 5/4.
17 720 ILCS 5/11-0.1 et seq.

750 I.L.C.S. 50/1, IL ST CH 750 § 50/1
Current through P.A. 100-25 of the 2017 Reg. Sess.

End of Document

COMPLETE TABLE OF CONTENTS OF RECORD ON APPEAL

VOLUME 2 of 3

Common Law Record (cont.)

(Continued in next volume)

VOLUME 3 of 3

Common Law Record (cont.)

Volume 1 of 1

Report of Proceedings

Volume 1 of 1

Impounded Trial Court Record

Briefs

July 6, 2016	Appellant Brief (Cited as Def. Op. Br.)
July 20, 2016	Brief and Argument For Minor-Appellee (Cited as Minor Br.)
July 20, 2016	Brief and Argument For Petitioner-Appellee (Cited as People Br.)
July 26, 2016	Appellant Reply Brief (Cited as Def. Reply Br.)
Oct. 6, 2016	Petitioner-Appellee's Supplemental Brief
Oct. 10, 2016	Minor-Appellee's Supplemental Brief
Oct. 11, 2016	Defendant's Supplemental Brief

CERTIFICATE OF FILING AND SERVICE

I certify that on August 14, 2017, I electronically filed the foregoing Brief and Appendix of Plaintiff-Appellant with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and thus were served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by those participants on August 14, 2017.

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

Neil J. Adams
adamslaw@comcast.net

Kristen Messamore
kristen@hammel-law.com

/s/ Mary C. LaBrec
MARY C. LABREC
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2093
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
mlabrec@atg.state.il.us