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No. 3--11--0182

Order filed June 27, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

<i>In re</i> A.E.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
a Minor	)	Peoria County, Illinois,
	)	
(The People of the State of	)	
Illinois,	)	No. 10--JA--46
	)	
Petitioner-Appellee,	)	
	)	
v.	)	
	)	
Jerrold E.,	)	
	)	Honorable Chris L. Fredericksen,
Respondent-Appellant).	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Wright concurred in the judgment.  
Justice McDade dissented.

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**ORDER**

*Held:* The trial court's order finding that it was in the minor's best interest to terminate the respondent's parental rights was not against the manifest weight of the evidence.

The respondent, Jerrold E., appeals from an order terminating his parental rights to A.E. On appeal, he argues that the trial court erred by finding that it was in the minor's best interest to terminate his parental rights. We affirm.

#### FACTS

A.E. is the daughter of the respondent and R.E.W. The minor was approximately four months old at the time these proceedings began.

This case came to the attention of the Department of Children and Family Services (DCFS) after a hotline report alleged that the minor was admitted to OSF St. Francis Medical Center. A.E. was diagnosed with a fracture to her arm. R.E.W. reported observing a small bruise on the inside of A.E.'s elbow several days prior to seeking medical attention for her. When questioned by medical staff, neither parent could provide a reasonable explanation for how A.E. sustained the injury. A skeletal survey also revealed the presence of healing fractures in both legs. Ultimately, the respondent admitted to causing the minor's injuries, and he pled guilty to aggravated battery of a child. 720 ILCS 5/12--4.3 (West 2008).

On October 6, 2010, the State filed a petition to terminate the respondent's parental rights. The petition alleged that "[the respondent], legal father, is an unfit person as that term is defined in Illinois Compiled Statutes, Chapter 750, Section 50/1(D)(q), in that he was criminally convicted for the offense of Aggravated Battery of a Child." At the fitness hearing, the State entered into evidence a certified copy of the respondent's conviction. The record reveals that, after conferring with the other attorneys who were present, the respondent's attorney decided not to put on any evidence at the fitness hearing and instead decided to wait until the best interest hearing to present evidence. The court then ruled:

"All right, first of all, this matter brought--the Petition is brought under Section 50/1(D)(q), where that statute indicates that a parent, if convicted of the offense of aggravated battery to a child, is per se--there is a presumption, not even a presumption, it's per se that he is an unfit parent.

The State has submitted State's Exhibit 1 which clearly indicates that the father, \*\*\* was convicted of aggravated battery of a child.

I have previously taken a look at the case law, specifically In re JB 328 Ill.App.3d 175 where the Court has found that Section to be Constitutional. Therefore, the Court finds based on the evidence that the Petition filed on October 6, 2010, is proven by clear and convincing evidence."

Having found the respondent unfit, the matter proceeded to a best interest hearing. At the hearing, the respondent called R.E.W., who testified that A.E. was currently in her care. R.E.W. was not married or engaged, and no one was waiting to adopt the minor. The respondent also testified, and stated that he was taking child development classes and working on a certificate for culinary arts. He was also receiving alcohol and drug treatment while in the Department of Corrections (DOC). The respondent further stated that he did not know why he injured A.E., but that he regretted his actions. He was set to be released from DOC custody on April 29, 2017.

After hearing the evidence, the court found that it was in the best interest of A.E. to terminate the respondent's parental rights. The court explained that A.E. had suffered horrendous injury at the hands of the respondent, and it expressed doubt that the minor would ever be safe in

the respondent's presence. The court also found that there was no bond between the respondent and A.E., and that he was going to be incarcerated until 2017. In addition, A.E. was currently in a safe and secure environment with her mother.

The trial court then terminated the respondent's parental rights. He appealed.

#### ANALYSIS

On appeal, the respondent claims that the trial court erred by finding that it was in the best interest of A.E. to terminate his parental rights. We will not reverse a trial court's decision to terminate parental rights unless such a decision was contrary to the manifest weight of the evidence. *In re R.L.*, 352 Ill. App. 3d 985 (2004). A decision is against the manifest weight of the evidence where the opposite result is clearly evidenced from the record. *In re D.F.*, 201 Ill. 2d 476 (2002).

As an initial matter, we note that the petition to terminate the respondent's parental rights was brought under section 1(D)(q) of the Adoption Act. However, in 2005 our supreme court found this section unconstitutional as a violation of due process and equal protection. *In re D.W.*, 214 Ill. 2d 289 (2005). Specifically, in *D.W.*, the court took issue with the fact that section 1(D)(q) did not allow parents the opportunity to rebut the statutory finding of unfitness. *Id.* Instead, parents were automatically found to be unfit based on a conviction for aggravated battery of a child. *Id.* The current version of the Adoption Act leaves section 1(D)(q) blank. 750 ILCS 50/1(D)(q) (West 2008).

In addition, it appears from the record that the trial court relied upon this unconstitutional provision in rendering its unfitness finding because it held that the respondent was *per se* unfit due to his conviction. Moreover, the case cited by the court, *In re J.B.*, 328 Ill. App. 3d 175

(2002), was vacated on other grounds and decided prior to the supreme court's decision in *D.W.*

Despite this apparent error, we do not reach this issue on appeal because it was not addressed in the court below or in the respondent's brief. Although the respondent's notice of appeal requests that this court reverse both the finding of unfitness and the best interest order, on appeal the respondent's only argument is that it was not in the best interest of A.E. to terminate his parental rights. Issues that are not argued in the appellant's brief are waived. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). This rule applies to even constitutional issues. *Ming Kow Hah v. Stackler*, 66 Ill. App. 3d 947 (1978). In addition, our supreme court has recently "discouraged" appellate courts from *sua sponte* considering issues that were never argued in the trial court or addressed in the parties' briefs. See *People v. Hunt*, 234 Ill. 2d 49 (2009); *People v. Givens*, 237 Ill. 2d 311 (2010). Therefore, we decline to address this matter on appeal.

Turning to the respondent's actual argument, we find that the trial court's best interest finding was not against the manifest weight of the evidence. The respondent argues that it was not in the best interest of A.E. to terminate his parental rights because the termination order also relieves him of his financial obligations toward A.E. The State cites *Illinois Department of Healthcare and Family Services v. Warner*, 227 Ill. 2d 223 (2008), for the proposition that the respondent's financial obligations continue even after his parental rights are terminated. However, that case holds that an order empowering the minor's guardian to consent to an adoption of the minor relieves the parents of all parental responsibilities. *Id.* In the instant case, R.E.W. was given the power to consent to the adoption of A.E. This indicates that the respondent's financial obligations may have been terminated. Regardless, respondent's

argument is without merit.

The fact that A.E. would lose respondent's financial support does not lead one to the conclusion that respondent's parental rights should be preserved. Moreover, maintaining a financial obligation is not one of the best interest factors that a court must consider when determining what is in the best interest of a child. 705 ILCS 405/1--3(4.05) (West 2008). Any benefits provided by financial support cannot offset the impact of repeated physical abuse of a child.

Case law supports the trial court's finding that it was in A.E.'s best interest to terminate the respondent's parental rights. For example, in the case of *In re S.M.*, 314 Ill. App. 3d 682 (2000), the appellate court found that no issue existed as to the trial court's finding that termination was in the minor's best interest where: (1) the respondent caused the child's permanent injuries; (2) the minor could not be returned to the respondent because he was serving a prison sentence; and (3) the mother was working toward regaining custody of the minor. Similarly, we do not find that the trial court's finding was against the manifest weight of the evidence where: (1) the respondent was responsible for the minor's broken bones; (2) he is currently scheduled to remain in prison until 2017; and (3) the minor's mother has successfully regained custody of the minor and both are doing extremely well. Although the respondent has been taking classes, he still cannot explain why he caused the injuries to A.E.; the trial court expressed additional concern that the minor would never be safe in the respondent's care.

The respondent also argues that terminating his parental rights was premature because there currently is no father figure willing to adopt A.E., and the minor had achieved permanency with R.E.W. prior to the termination of his parental rights. This argument, too, is without merit.

The question before the trial court at a best interest hearing is whether it is in the minor's best interest to terminate the respondent's parental rights. *In re S.O.*, 272 Ill. App. 3d 144 (1995). At a best interest hearing, the parent's interest in maintaining a parent/child relationship must yield to the child's interest in a stable, loving home life. *In re D.T.*, 212 Ill. 2d 347 (2004).

The fact that there is not someone waiting to adopt A.E. is not dispositive of whether it was in the minor's best interest to terminate the respondent's parental rights. The argument that a child is better off with a father who repeatedly breaks her bones than no father at all leaves us cold. In addition, the fact that the minor has achieved permanency and is in a loving, stable environment is a factor that works against the respondent. See 705 ILCS 405/1--3(4.05)(g) (West 2008). Ultimately, we also find that the trial court's finding that A.E. would be in danger while in respondent's custody is a compelling factor in affirming the trial court's decision. The evidence that A.E. was found with both fresh and healing fractures coupled with respondent's admissions fully support the trial court's ruling. Accordingly, we find that the trial court did not err by terminating the respondent's parental rights.

#### CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.

JUSTICE McDADE, dissenting:

I believe the circuit court's finding of unfitness must be vacated and the finding that termination of respondent's parental rights is in the best interest of the minor child must be reversed.

As acknowledged by the majority, the basis for the trial court's finding that respondent was unfit was its express reliance on section 50/1(D)(q) of the Adoption Act. (750 ILCS 50/1(D)*et seq.*). Slip op at 3-4. Again, as acknowledged by the majority, section 50/1(D)(q) was declared unconstitutional as violative of both due process and equal protection. *In Re D.W.*, 214 Ill. 2d 289 (2005). Slip op at 5. This court issued an opinion in 2005 expressly noting the supreme court's finding of unconstitutionality and applying it to the case the appellate panel was currently considering. *In re R.S., K.S., and P.S., Minors*, 358 Ill. App. 3d 781 (2005).

Subsection (q) was unconstitutional and had been replaced in the statute by the word "(blank)" at the time the State asserted it in 2010 as the basis for its petition of unfitness. It was unconstitutional and absent from the statute at all times that defense counsel failed to challenge its invocation in the trial court and on appeal. It was unconstitutional at the time the trial court *expressly* based its *per se* finding of unfitness on the statutory provision that did not exist.

I understand and appreciate the supreme court's *caveat* about consideration of issues not raised in the trial court or in defendant's appellate brief. However, in light of the particular facts in this case, I do not believe waiver is the issue. The trial court's finding of unfitness was premised solely on a non-existent provision of the Adoption Act and was, therefore, a void order. An order is void where the court exceeds its authority, and a void order may be attacked at any time. (*Schak v. Blom*, 334 Ill. App. 3d 129, 134 (2002). "[C]ourts have an independent duty to vacate void orders and may vacate a void order *sua sponte* even if it is not challenged by the parties." *People v. Brown*, 225 Ill. 2d 188, 195 (2007). Moreover, the majority's application of the waiver doctrine does not comport with maintaining the integrity of our criminal justice system to confirm a decision against a respondent which is neither authorized by law nor

constitutionally sound and where, inexplicably, the State, the defendant's trial counsel, the trial court, and neither attorney on appeal knew that the law on which they relied to reach that decision no longer existed.

In summary, the finding of unfitness was based on the application of a statutory section that had been found unconstitutional and removed from the statute five years before the petition was filed and the finding was made. Thus, the order is void. Without a proper finding of unfitness, the trial court's consideration of the child's best interest was premature and cannot be affirmed on appeal.

For these reasons, I respectfully dissent.