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IN THE
COURT OF APPEALS OF INDIANA

State of Indiana,

Appellant-Plaintiff,

v.

Kristine E. Barnett and Michael P. Barnett,

Appellees-Defendants.

August 25, 2021

Court of Appeals Case No. 20A-CR-1967

Appeal from the Tippecanoe Superior Court

The Honorable Steven P. Meyer, Judge

Trial Court Cause Nos. 79D02-1912-F3-41 79D02-1912-F3-42

Friedlander, Senior Judge.

[1] This matter stems from the 2010 adoption of Natalia Barnett by Kristine Barnett and Michael Barnett (collectively, "the Barnetts")[1] and a subsequent change in Natalia's birthdate from 2003 to 1989. In 2019, the State of Indiana charged the Barnetts, in separate cases, with multiple counts of neglect of a dependent, and the Barnetts filed separate motions to dismiss all charges alleging grounds that included res judicata, collateral estoppel, and statute of limitations. The trial court granted the motions in part, dismissing some but not all of the charged counts. The State filed motions seeking to have the trial court certify its orders, and the trial court granted the motions. The State then sought permission to file interlocutory appeals, and this Court granted its request and consolidated the appeals.

[2] On appeal, the State presents two issues for review, which we restate as:

> 1. Did the trial court abuse its discretion by finding that the State was precluded from presenting evidence to the jury of Natalia's age to prove that she was a dependent of the Barnetts during the charged period?
>
> 2. Did the trial court abuse its discretion by dismissing three of the counts charged against the Barnetts as being outside the statute of limitations period?

[3] We affirm.

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[1] At the time of the adoption, the Barnetts were married, but they divorced in 2014.

[4] In 2008, a New Hampshire couple adopted Natalia from a Ukrainian orphanage. According to the Ukrainian order authorizing the adoption, Natalia was born in 2003. She entered the United States in 2008.

[5] Natalia was born with a form of dwarfism called diastrophic dysplasia which results in musculoskeletal issues. As she grew older Natalia would require several corrective surgeries to improve her quality of life.

[6] Based on events not relevant to the instant matter, the New Hampshire couple placed Natalia for re-adoption; and, in 2010, the Barnetts agreed to adopt Natalia from the couple. At the time of the adoption, the Barnetts lived in Hamilton County, Indiana, and they petitioned to adopt Natalia in the Hamilton County Superior Court. Their petition was granted, and the adoption decree was issued on November 3, 2010. The decree listed Natalia's birthyear as 2003.

[7] Soon after the adoption, the Barnetts began to believe that Natalia was older than her date of birth suggested. Also, Natalia began to demonstrate threatening behaviors. Between 2010 and 2012, Natalia was medically and psychologically evaluated at several facilities located in Marion County, Indiana.

[8] In March 2012, the Hamilton County Department of Child Services ("HCDCS") received a report regarding the Barnetts and Natalia and began investigating the situation. While the investigation was pending, the Barnetts informed the HCDCS staff that they were seeking to change Natalia's birthyear.

[9] In June 2012, the Barnetts filed a petition in the Marion County Superior Court, Probate Division ("Marion County Probate Court" or "probate court"), to have Natalia's birthyear changed from 2003 to 1989, based on age estimates provided by a primary care physician and a social worker. Eleven days after the Barnetts filed their petition, the probate court issued its order changing Natalia's birthyear to 1989 ("age-change order"). Prior to granting the change order, the court did not appoint a guardian ad litem to represent Natalia or hold an evidentiary hearing, and the Barnetts did not appear in court. The petition was served on Natalia who was hospitalized in Marion County at the time. Thereafter, the HCDCS case was closed as unsubstantiated.

[10] After Natalia's birthdate was changed, the Barnetts moved her into her own apartment in Hamilton County and assisted Natalia in obtaining federal disability benefits and supportive services to help her transition to life as an adult. In August 2012, however, HCDCS received a report alleging that Natalia was a child victim of abuse or neglect, and the agency again opened an investigation. In May 2013, HCDCS filed in the Hamilton Superior Court a request for authority to file a Child In Need of Services ("CHINS") petition, based on its belief that Natalia was a child who had been abandoned and was in need of services. The court issued an order dismissing the petition, finding that it lacked jurisdiction over the CHINS matter because Natalia had been judicially determined to be an adult by the Marion County Probate Court.

[11] Due to events not relevant to the case before us, Natalia's lease at her Hamilton County apartment could not be renewed. So, in July 2013, the Barnetts moved

Natalia to an apartment in Tippecanoe County that was located on the public bus line and near various facilities that could provide Natalia with services and resources she might need. Soon thereafter, the Barnetts moved to Canada with their biological children. The Barnetts paid the first year's rent for Natalia's apartment but did not provide additional financial support; however, Natalia did receive $733 per month in federal disability benefits. Natalia never saw Kristine again and only saw Michael once at a court hearing held years later.

[12] Around the time that the Barnetts moved to Canada, Natalia met Antwon and Cynthia Mans (collectively, "the Manses"), a Tippecanoe County couple that befriended Natalia. Soon after meeting the Manses, Natalia moved in with them.

[13] In August and September 2013, Tippecanoe County Adult Protective Services conducted an investigation into whether Natalia was an endangered adult. Investigators interviewed Natalia and the Barnetts and became aware of (among other things) the 2012 order that changed Natalia's birthyear. The adult protective services case was closed without further action.

[14] In September 2014, the Tippecanoe County Sheriff's Department received a complaint from staff at a local adult reading academy, questioning Natalia's age classification as an adult. An investigation ensued which continued into 2015, and included meetings with the Tippecanoe County Prosecutor's Office. During the investigation, the Tippecanoe County Sheriff's Department was advised of the 2012 age-change order. The detective who investigated the

complaint sought help to obtain the records from the age-change case. The age-change case was filed as an adoption case type; thus, the court records were confidential. The detective (through testimony at a subsequent hearing) indicated that the Tippecanoe County Prosecutor's Office wanted to help stabilize Natalia's situation; at least two meetings regarding the matter were held in the prosecutor's office; and the prosecutor's office attempted to enlist local attorneys to assist in the matter pro bono.

[15] In April 2015, Marion County Deputy Prosecutor Cynthia Oetjen filed an appearance in the age-change case, indicating that she was appearing on behalf of Marion County Adult Protective Services ("MCAPS"). MCAPS was added to the chronological case summary ("CCS") under the heading "interested person." Appellant's App. Vol. 14, p. 120. Oetjen also filed on behalf of MCAPS a petition for appointment of a guardian ad litem for Natalia. On April 13, 2015, the probate court denied the petition. Oetjen, however, did not withdraw her appearance, and MCAPS remained listed as an interested person for the duration of the case.

[16] In March 2016, the Manses filed a petition in the Tippecanoe County Circuit Court seeking guardianship of Natalia. Michael filed an objection with the court, asserting that Natalia was an adult pursuant to the probate court's 2012 age-change order. The court appointed a guardian ad litem (GAL) to represent Natalia's interests. On April 26, 2016, the circuit court issued an order finding that the proceeding appeared to be a collateral attack on the age-change order. The court continued the guardianship proceeding and suggested that the

Manses pursue a motion to vacate the probate court's age-change order before attempting to seek guardianship over Natalia.

[17] In August 2016, the Manses filed in the Marion County Probate Court a combined motion to vacate the age-change order and motion for relief from judgment. A hearing was held on March 7, 2017, at which the Manses and Michael were each represented by counsel who called witnesses and presented argument.[2] Natalia was present and was represented by a GAL who testified at the hearing. The Manses argued that there was no statutory authority to change a child's age; the petition to change Natalia's age should have been filed in Hamilton County; and Natalia was not afforded due process because she received no notice of the matter that was initiated by the Barnetts in 2012, and, at that time, no hearing was held.

[18] During the March 7, 2017 hearing, the probate court recognized that its original 2012 order was issued without notice to all the parties and, therefore, with available evidence could be set aside. At the conclusion of the hearing, and immediately following the presentation of the evidence, the court issued its ruling, first noting that there had now been notice of the matter provided to all parties and a hearing had been held. The court then reaffirmed the 2012 order that changed Natalia's birthyear to 1989.

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[2] Kristine did not attend or participate in the March 7, 2017 hearing.

[19] Two and one-half years later, in September 2019, the State, in separate Tippecanoe County cases, charged Michael and Kristine each with six counts of neglect of a dependent and two counts of conspiracy to commit neglect of a dependent, alleging that the Barnetts committed the charged offenses as a continuous act from July 10, 2013, to February 28, 2016. Because of the duration of the charged period, which spanned the 2014 criminal code revision, there were two sets of charges: one set for events that occurred prior to July 1, 2014, which references *classes* of felonies and one set for events that occurred on or after July 1, 2014, which references *levels* of felonies – specifically:

Kristine Barnett—Charges Filed Under 79D02-1912-F3-41

Count	Offense	When Offense Allegedly Occurred
I	Neglect of a Dependent, a Class D felony	Before July 1, 2014
II	Neglect of a Dependent, a Level 3 felony	After July 1, 2014
III	Neglect of a Dependent Resulting in Bodily Injury, a Class D felony	Before July 1, 2014
IV	Neglect of a Dependent Resulting in Bodily Injury, a Level 5 felony	After July 1, 2014
V	Neglect of a Dependent Resulting in Bodily Injury, a Class B felony	Before July 1, 2014
VI	Neglect of a Dependent Resulting in Bodily Injury, a Level 3 felony	After July 1, 2014

VII	Conspiracy to Commit Neglect of a Dependent, a Class D felony	Before July 1, 2014
VIII	Conspiracy to Commit Neglect of a Dependent, a Level 6 felony	After July 1, 2014

Michael Barnett—Charges Filed Under 79D02-1912-F3-42

Count	Offense	When Offense Allegedly Occurred
I	Neglect of a Dependent, a Class D felony	Before July 1, 2014
II	Neglect of a Dependent, a Level 3 felony	After July 1, 2014
III	Neglect of a Dependent Resulting in Bodily Injury, a Class D felony	Before July 1, 2014
IV	Neglect of a Dependent Resulting in Bodily Injury, a Level 5 felony	After July 1, 2014
V	Neglect of a Dependent Resulting in Bodily Injury, a Class B felony	Before July 1, 2014
VI	Neglect of a Dependent Resulting in Bodily Injury, a Level 3 felony	After July 1, 2014
VII	Conspiracy to Commit Neglect of a Dependent, a Class D felony	Before July 1, 2014
VIII	Conspiracy to Commit Neglect of a Dependent, a Level 6 felony	After July 1, 2014

[20] On May 4, 2020, Kristine filed a motion to dismiss the charges filed against her—asserting, in relevant part, that the State lacked subject matter jurisdiction

to file the charges; the statute of limitations had expired for the filing of the charges alleged to have occurred before July 1, 2014; and the issue of Natalia's age was res judicata. The State filed its response, maintaining that (among other things) it was not collaterally estopped from litigating Natalia's age, and the statute of limitations was tolled by the Barnetts' alleged concealment of the crimes. A hearing on the matter was held on July 27, 2020. On August 14, the trial court issued a detailed order granting in part Kristine's motion to dismiss. Specifically, the court dismissed Counts I-VI "to the extent they rest upon the allegation Natalia was a dependent because of her age since, under the theory of *res judicata*, Natalia has been determined to be an adult during all times alleged." Appellant's App. Vol. 10, pp. 100-01 (cleaned up). The court also dismissed Counts I, III, and V "for the reason they fail to contain sufficient language for the fact-finder to conclude they fall within the statute of limitations." *Id.* at 101. The court determined, however, that the State "may proceed with the [remaining] Counts [under] the theory that Natalia was a dependent because of physical disability." *Id.*

[21] On August 7, 2020, Michael filed a motion in limine. Michael argued that the State should be precluded from presenting any evidence at trial which would be inconsistent with the probate court's 2012 age-change order. After the trial court issued its dismissal order in Kristine's case, Michael then filed in his case a motion to dismiss Counts I-VI and incorporated his motion in limine therein.

[22] The trial court held a hearing on Michael's motion to dismiss (inclusive of the motion in limine) on August 26, 2020. On September 1, the court issued its

order granting in part Michael's motion to dismiss. Specifically, the court dismissed Counts I-VI "to the extent the charges rely upon alleging Natalia was a dependent because of her age" and Counts I, III, and V "for the reason the State fails to allege facts sufficient to constitute an exception to the statute of limitations as previously held in the K. Barnett Order of Dismissal incorporated herein." Appellant's App. Vol. 15, p. 126. As in Kristine's case, the court also determined that "the State may proceed . . . on its allegation that Natalia was a dependent because of a physical disability." *Id.*

[23] The trial court certified for interlocutory appeal the orders issued in the Barnetts' respective cases. The State then filed motions for this Court to accept jurisdiction over the interlocutory appeals. This Court accepted jurisdiction and consolidated the appeals, and this appeal followed.

I. Standard of Review

[24] The State appeals the trial court's grant, in part, of the Barnetts' motions to dismiss the charges against them. We review a trial court's ruling on a motion to dismiss a charging information for an abuse of discretion, which occurs only if a trial court's decision is clearly against the logic and effect of the facts and circumstances. *Gutenstein v. State*, 59 N.E.3d 984 (Ind. Ct. App. 2016), *trans. denied*. A trial court also abuses its discretion when it misinterprets the law. *State v. Econ. Freedom Fund*, 959 N.E.2d 794 (Ind. 2011), *cert. denied*. Where, as here, the arguments presented are questions of law, we consider them de novo. *Study v. State*, 24 N.E.3d 947 (Ind. 2015), *cert. denied.*

[25] Generally, when a defendant files a motion to dismiss an information, the facts alleged in the information are to be taken as true. *State v. C.G.*, 949 N.E.2d 848 (Ind. Ct. App. 2011), *trans. denied*. Questions of fact to be decided at trial or facts constituting a defense are not properly raised by a motion to dismiss. *Id.* The hearing held on a motion to dismiss is not a trial of the defendant on the offense charged. *Id.*

II. Void Judgment and Res Judicata

[26] Specifically, the State argues that the trial court abused its discretion by giving preclusive effect to the Marion County Probate Court's 2012 age-change order, thus preventing the State from presenting to the jury evidence of what the State believes to be Natalia's true age. The State's argument is two-fold, presenting issues of void judgment and res judicata. We address each argument in turn.

A. Void Judgment—Collateral Attack

[27] First, the State argues that the trial court erred by finding that the age-change order was entitled to preclusive effect. According to the State, the Barnetts were required to return to the Hamilton County Superior Court (the "adoption court") to request a change in Natalia's age because the adoption court had, in 2010, found Natalia's birthyear to be 2003 when it issued its adoption decree. The State contends that by filing the age-change petition in the Marion County Probate Court, instead of in the adoption court, the Barnetts collaterally attacked the adoption court's 2010 order. The State asserts that the trial court in the instant criminal case—in finding the probate court's age-change order

was entitled to preclusive effect—"failed to recognize that the [probate court] could not enter an order purporting to establish Natalia's age because the [adoption court] had already entered such an order[.]" Appellant's Br. p. 22. Thus, the trial court erred by giving the probate court's age-change order preclusive effect, as the order should have been found to be void ab initio.[3] We disagree.

[28] A collateral attack is "a judicial proceeding pursued to avoid, defeat, evade or deny the validity and effect of a valid judgment or decree." *In re Chapman*, 466 N.E.2d 777, 780 (Ind. Ct. App. 1984), *trans. denied*. The term void ab initio means "void from the beginning" and "denotes an act or action that never had any legal existence at all because of some infirmity in the action or process." *Trook v. Lafayette Bank & Tr. Co.*, 581 N.E.2d 941, 944 (Ind. Ct. App. 1991), *trans. denied*. An order is void ab initio "if the trial court lacks the authority to provide the relief ordered under any set of circumstances." *In re Adoption of P.A.H.*, 992 N.E.2d 774, 775 (Ind. Ct. App. 2013).

[29] Here, neither the adoption court nor the probate court lacked authority to provide the relief ordered. The subject matter and judgment of the adoption court pertained to the adoption of Natalia, and the adoption proceedings effected the Barnetts' adoption of Natalia. This Court has held that

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[3] Michael argues that the State has waived its void-judgment argument; however, we disagree and address the argument on the merits.

> the purpose of adoption is to fix the status of an adopted child as nearly as possible [to] that of a natural child, and to give it the position in the family and all the rights and privileges of a child of both the husband and wife. The name of the child is changed; its identity merged into that of the adopting parents; and it becomes their child in all but blood.

Dunn v. Means, 48 Ind. App. 383, 95 N.E. 1015, 1017 (1911). This is what occurred when the adoption court entered its adoption decree. While the decree did contain the birthyear for Natalia that was listed in the Barnetts' verified Petition for Adoption, the adoption court was not required to determine Natalia's birthyear, per se.[4]

[30] When the Barnetts filed their petition in the probate court, they initiated the action to change Natalia's birthyear from 2003 to 1989, not to set aside the adoption. Natalia was physically located in Marion County at the time the age change was sought.

[31] While the matters addressed in the adoption court and in the probate court may have required consideration of facts relevant to both cases, there was no overlap of claims between the two cases. The adoption proceeding and the age-change action were two different claims. Each court had the authority to provide the

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[4] Under Indiana Code sections 31-19-12-1, –2 (1997), the adoption court was required to set forth in its decree all relevant information needed "to make possible the establishment of the birth records[,]" such that the clerk of the court could prepare a record that included "[a]ll facts necessary to: (A) locate and identify the certificate of birth of the individual adopted; and (B) establish a new certificate of birth for the individual adopted." Indiana Code section 31-19-2-6(a) (2009) provides, in relevant part, that a petition for adoption must specify the "age if known, *or if unknown, the approximate age*" of the adoptee. (Emphasis added.)

relief ordered. As such, the age-change action was not an impermissible collateral attack on the adoption proceeding, and the 2012 age-change order is not void ab initio.

B. Res Judicata—Defensive Collateral Estoppel

[32] Next, the State argues that, notwithstanding this Court finding that the age-change order is not void, the trial court still erred in applying issue preclusion to exclude evidence that Natalia was a minor when the Barnetts adopted her because: (1) the State was not a party to the age-change order proceedings; (2) the State did not have a full and fair opportunity to litigate Natalia's age; and (3) applying issue preclusion would be unfair.

[33] The State's argument involves the doctrine of res judicata, which encompasses the principles of issue preclusion and claim preclusion. *Freels v. Koches*, 94 N.E.3d 339 (Ind. Ct. App. 2018). Res judicata, whether in the form of claim preclusion or issue preclusion, aims to prevent repetitious litigation of disputes that are essentially the same by holding a prior final judgment binding against both the original parties and their privies.[5] *See, e.g.*, *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699 (Ind. Ct. App. 2005), *trans. denied*.

[5] "[A] 'privy' is one who after rendition of [a] judgment has acquired an interest in the subject matter affected by the judgment," or "whose interests are represented by a party to the action." *Becker v. State*, 992 N.E.2d 697, 700-01 (Ind. 2013) (quoting *MicroVote Gen. Corp. v. Ind. Election Comm'n*, 924 N.E.2d 184, 196 (Ind. Ct. App. 2010)).

[34] In contrast to claim preclusion, issue preclusion, also referred to as collateral estoppel, "applies where the causes of action are not the same, but where some fact or question has been determined and adjudicated in the former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties." *Peterson v. Culver Educ. Found.*, 402 N.E.2d 448, 460 (Ind. Ct. App. 1980). In this case, the State's claims sound in collateral estoppel. And where, as here, the Barnetts (the defendants) seek to prevent the State (the plaintiff) from relitigating the issue of Natalia's age that, according to the Barnetts, the State already litigated and lost in the probate court's age-change proceeding, the term "defensive" collateral estoppel characterizes the situation. *See Reid v. State*, 719 N.E.2d 451, 455 (Ind. Ct. App. 1999), *cert denied*; *see also Tofany v. NBS Imaging Sys., Inc.*, 616 N.E.2d 1034, 1037 (Ind. 1993); *see also Small v. Centocor, Inc.*, 731 N.E.2d 22, 28 (Ind. Ct. App. 2000), *trans. denied*. The trial court's decision to allow the defensive use of collateral estoppel will be reversed only upon an abuse of discretion. *Wilcox v. State*, 664 N.E.2d 379 (Ind. Ct. App. 1996).

[35] There are three requirements for the doctrine of collateral estoppel to apply: (1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of the issues; and (3) the party to be estopped was a party or the privity of a party in the prior action. *See Small*, 731 N.E.2d at 28. Furthermore, two additional considerations are relevant in deciding whether the defensive use of collateral estoppel is appropriate: "whether the party against whom the judgment is pled had a full and fair opportunity to litigate the issue, and

whether it would be otherwise unfair under the circumstances to permit the use of collateral estoppel." *Id.*; *Nat'l Wine & Spirits, Inc. v. Ernst & Young,* LLP, 976 N.E.2d 699, 704 (Ind. 2012). The burden is upon the party asserting collateral estoppel to show they are entitled to its use. *Reid*, 719 N.E.2d at 456.

1. Initial Requirements of Collateral Estoppel

[36] Regarding the first requirement, that there be a final judgment on the merits by a court of competent jurisdiction, the Marion County Probate Court was a court of competent jurisdiction,[6] and we have already determined that the adoption proceeding and the age-change action were two different claims such that the age-change order was not void ab initio. The probate court's judgment was a final one because it disposed of all issues as to all parties, thus ending the case. *See Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003); *see also* Ind. Appellate Rule 2(H)(1). And, the judgment was on the merits. While the original 2012 age-change order was issued without a hearing, a full evidentiary hearing—at which all interested parties were (or had an opportunity to be) present—was held in 2017, at the conclusion of which the probate court reaffirmed the 2012 order. *See Creech v. Town of Walkerton*, 472 N.E.2d 226, 228 (Ind. Ct. App. 1984) (quoting 46 Am. Jur. 2d, *Judgments* § 478 (1969)) ("If the case is brought to an issue, heard on evidence submitted pro and con, and

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[6] *See George S. May Int'l Co. v. King*, 629 N.E.2d 257, 262 (Ind. Ct. App. 1994) ("A court of 'competent jurisdiction' is any court which has jurisdiction over the defendant (personal jurisdiction), jurisdiction over the particular case, and jurisdiction over the subject matter of the dispute, and is thus competent to render a binding judgment in the case."), *trans. denied*.

decided by the verdict of a jury or the findings of a court, the judgment rendered is on the merits."). The first requirement of collateral estoppel is met.

[37] The second requirement of collateral estoppel is that there be an identity of the issues. This requirement is met when an issue that was necessarily adjudicated in the prior proceeding is the same issue presented in the subsequent lawsuit. *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170 (Ind. Ct. App. 2006). Collateral estoppel includes all matters which were in issue or might have been in the former suit. *Moxley v. Indiana Nat'l Bank*, 443 N.E.2d 374 (Ind. Ct. App. 1982). Here, quite clearly, the issue of Natalia's actual age was litigated and determined in the probate court proceedings. In the instant criminal matter, the issue the trial court precluded the State from litigating is Natalia's age. Thus, the "identity of issues" requirement of the collateral estoppel doctrine is met.

[38] Regarding the third requirement, that the parties to the two actions be the same parties or privies, the State maintains that it was not a party to any litigation in which Natalia's age was decided and that "although various governmental entities interacted with Natalia and the Barnetts, [the instant] case was the first opportunity the Tippecanoe [County] Prosecutor's Office had to bring criminal charges relating to neglect after it finally untangled the full extent of the Barnetts' complicated web of deceit." Appellant's Br. p. 18. The Barnetts argue that the State was the privy of the Marion County prosecutor and Adult Protective Services at the age-change proceedings, and the State was either a *party* to the 2013 HCDCS CHINS proceeding or *the privy* of the HCDCS for the CHINS proceedings. For guidance in determining whether the third

requirement is met, we look to an Indiana Supreme Court case where an analogous argument was presented.

[39] In *Becker v. State*, 992 N.E.2d 697 (Ind. 2013), defendant Becker petitioned the trial court to relieve him of certain sex offender registry obligations under the Ex Post Facto Clause of the Indiana Constitution. The trial court granted his petition in a 2008 Order, and the State, through the local prosecutor, did not appeal. Then, in 2011, Becker sought clarification from the trial court of the 2008 Order regarding another provision of his sex offender registry requirements. Becker and the local prosecutor entered into an Agreed Order that granted his request for clarification, and the trial court approved the agreement.

[40] Two weeks later, the Indiana Supreme Court held that the Ex Post Facto Clause did not apply in the manner in which Becker and the State had agreed. *See Lemmon v. Harris*, 949 N.E.2d 803 (Ind. 2011). Accordingly, *the State*, *through the Department of Correction* ("DOC"), intervened in Becker's case and sought to have the 2008 Order reversed. The trial court granted the DOC's request.

[41] Becker appealed, and the Indiana Supreme Court reversed. The Court concluded that "in this matter related to the sex offender registry, 'the State is the State,' whether it acts through the deputy prosecutor or through the [DOC]." *Becker*, 992 N.E.2d at 698. The Court held that, "when the State (via a local prosecutor) fails to appeal an adverse sex-offender registration ruling, the

State (via the DOC) becomes bound by it under principles of *res judicata.*" *Id.* at 699. The Court reasoned:

> The DOC does not dispute that the 2008 Order was a final judgment, but instead challenges its privity with the prosecutor. "[A] 'privy' is one who after rendition of [a] judgment has acquired an interest in the subject matter affected by the judgment," or "whose interests are represented by a party to the action.". . . "[A]n entity does not have to control a prior action . . . for privity to exist.". . . "[I]n determining the parties for *res judicata* purposes, [the] court looks beyond the nominal parties and treats those whose interest[s] are involved as the real parties." Under that standard, the DOC is in privity with the prosecutor, and is therefore bound by the prosecutor's failure to appeal the 2008 Order's final judgment about Becker's [sexually violent predator ("SVP")] status.

Id. at 700-01 (quoting *MicroVote Gen. Corp. v. Ind. Election Comm'n*, 924 N.E.2d 184, 196 (Ind. Ct. App. 2010)).

[42] Applying our Supreme Court's reasoning in *Becker* to the instant case, we find that the Tippecanoe County Prosecutor's Office ("TCPO") is in privity with the MCAPS (Marion County Adult Protective Services, as represented by the Marion County Prosecutor's Office through Deputy Prosecutor Oetjen). TCPO has the same interest in its criminal action against the Barnetts as MCAPS had when it filed a petition for appointment of guardian ad litem for Natalia in the Marion County Probate Court—that is, protecting Natalia from abuse and neglect. And, after judgment was rendered in the age-change proceeding, TCPO acquired an interest in the subject matter affected by the probate court's judgment—that is, Natalia's actual age.

[43] Finding that the three requirements for collateral estoppel have been met, we now consider the additional requirements of whether TCPO had a full and fair opportunity to litigate Natalia's age, and whether it would be otherwise unfair under the circumstances to permit the use of collateral estoppel.

2. Additional Requirements of Collateral Estoppel

[44] The State argues that it never had a full and fair opportunity to litigate the issue because it was never a party to a proceeding where that question was litigated. The State asserts that the issue "was not fully litigated by DCS or anyone in the Hamilton County CHINS proceeding[,]" and the State "did not litigate the question in the 2017 Marion County [Probate Court] proceeding[.]" Appellant's Br. p. 35. The State further argues that whether it appealed the 2015 denial of its MCAPS petition "would not alter the existence or preclusive effect . . . of the probate court's age[-]change order"; "[f]urther appeal could only have *possibly* given rise to further chances to *possibly* litigate the merits of Natalia's actual age;" and the "[p]otential to litigate and the actual full and fair opportunity to litigate are not the same." *Id.* at 40. We disagree.

[45] In April 2015, Marion County Deputy Prosecutor Oetjen filed an appearance in the original age-change case, indicating that she was appearing on behalf of MCAPS, and MCAPS was added to the case under the heading "interested person." App. Vol. 14, p. 120. Oetjen then filed on behalf of MCAPS a petition for appointment of a guardian ad litem for Natalia. The probate court denied the petition, and MCAPS did not appeal. Oetjen did not withdraw her

appearance from the case, and MCAPS remained listed as an interested person for the duration of the case.

[46] In 2016, the Manses—after first attempting to seek guardianship of Natalia in the Tippecanoe County Circuit Court—filed in the Marion County Probate Court their combined motion to vacate the probate court's 2012 age-change order and motion for relief from judgment. The Manses were also listed on the CCS as interested persons. *Id.* at 119. A hearing for the matter was originally scheduled for September 27, 2016. The CCS indicates that notice of the hearing was sent to all parties listed on the CCS, including Oetjen. The hearing was cancelled and rescheduled three times, and notice of such was sent to Oetjen.

[47] The evidentiary hearing to determine whether the probate court's 2012 age-change order should be set aside was ultimately held on March 7, 2017—at which the Manses, Michael, and Natalia (represented by a GAL) appeared. Oetjen did not appear at the hearing on behalf of MCAPS. At the conclusion of the hearing, the probate court determined that Natalia's birthyear would remain 1989.

[48] We have already determined that TCPO and MCAPS shared the same interest—protecting Natalia from abuse and neglect—and, thus, are in privity. We also find that under these circumstances, TCPO had a full and fair opportunity to litigate Natalia's age through its privy, MCAPS.

[49] Furthermore, because the State—via MCAPS—failed to appeal the denial of its petition for appointment of guardian ad litem and failed to participate in the

evidentiary hearing on the matter of whether the 2012 age-change order should be set aside, the State—via TCPO—is bound by the probate court's decision that Natalia's birthyear remains 1989. Returning to *Becker*, in which our Supreme Court explained:

> If the *res judicata* shoe were on the other foot in this case, Becker would be hard-pressed to avoid its preclusive effects. There is, after all, only one of him, with no alter egos to intervene on his behalf if a law later changed in a way favorable to his position. *Final judgments in a criminal case should be similarly binding against "the State"—not just the prosecutor, but also the various alter egos of the State whose substantial interests are adequately represented by the prosecutor.* In this case, the DOC is also "the State"—not because it is a State agency, but because it has the same substantial interests as the prosecutor in maximizing a sex offender's registration obligations. The DOC, being in privity with the prosecutor, is thus bound by the unappealed 2008 final judgment in Becker's favor.

Becker, 992 N.E.2d at 701-02 (emphasis added). While the TCPO may be unhappy with the result of the age-change litigation, in light of the circumstances of this case, we find no reason why the TCPO should be allowed to determine whether its evidence regarding Natalia's age would have resulted in the probate court setting aside the 2012 age-change order.

[50] A final consideration in the application of collateral estoppel is whether it would be otherwise unfair under the circumstances of the particular case to apply collateral estoppel. *Nat'l Wine & Spirits*, 976 N.E.2d at 708 (quotation and citation omitted). The State argues that the application of collateral estoppel is unfair because: (1) the Hamilton County adoption decree and the Marion

County Probate Court's 2012 age-change order are in conflict, and (2) the State "should be able to hold [the Barnetts] to account for abandoning a child to fend for herself without receiving the medical care she desperately needs" and for using deception to prevent others from helping her.

[51] First, there is no conflict between the adoption decree and the probate court's age-change order, as we already have determined that the adoption proceeding and the age-change action involved two different claims. Second, our conclusions in the case before us do not prevent the TCPO from pursuing prosecution of the Barnetts for neglect of Natalia under the theory that she was a dependent because of physical disability. Our conclusions prevent the TCPO from litigating Natalia's age.

[52] In sum, we find no error in the application of defensive collateral estoppel. The initial requirements for collateral estoppel to apply have been met, and the record reflects that TCPO, through its privy, had a full and fair opportunity to litigate the issue of Natalia's age. And, under these circumstances, it is not otherwise unfair to permit the use of collateral estoppel in this case.

III. Statute of Limitations

[53] Next, we address whether the trial court abused its discretion in granting the Barnetts' motions to dismiss Counts I, III, and V against them based upon the statute of limitations. We review a matter of statutory interpretation de novo because it presents a question of law. *Study*, 24 N.E.3d 947.

[54] Counts I, III, and V against the Barnetts alleged that the criminal conduct occurred from July 10, 2013, through and including June 30, 2014. In their motions to dismiss, the Barnetts claimed that the charges should be dismissed because the State filed the charging information for Count I on September 11, 2019, and the charging informations for Counts III and V on December 12, 2019—more than two months after the five-year statute of limitations expired. *See* Ind. Code § 35-41-4-2(a)(1) (2014).[7] In its response, the State argued that it could proceed with the charges under the continuous offense and the concealment exceptions to the statute of limitations. According to the State, the Barnetts' crimes constituted continuous offenses that tolled the statute of limitations, and the Barnetts acted to conceal the crimes for which they were charged. The trial court, however, found in favor of the Barnetts and dismissed the counts against them, concluding that the State failed to allege sufficient facts to constitute an exception to the statute of limitations.

[55] The primary purpose of statutes of limitations is to protect defendants from the prejudice that a delay in prosecution could bring, such as fading memories and stale evidence. *Study*, 24 N.E.3d at 953. Statutes of limitations are also intended to strike a balance between an individual's interest in repose and the State's interest in having sufficient time to investigate and build its case. *Id.*

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[7] Indiana Code section 35-41-4-2(a)(1) provides that "prosecution for an offense is barred unless it is commenced . . . within five (5) years after the commission of the offense, in the case of a Class B, Class C, or Class D felony (for a crime committed before July 1, 2014) or a Level 3, Level 4, Level 5, or Level 6 felony (for a crime committed after June 30, 2014)[.]"

Any exception to the limitation period must be construed narrowly and in a light most favorable to the accused. *Id.* "'[A]n information alleging a time outside the statute of limitations which does not allege facts sufficient to constitute an exception to the statute is subject to a motion to dismiss.'" *Reeves v. State*, 938 N.E.2d 10, 16 (Ind. Ct. App. 2010) (quoting *Greichunos v. State*, 457 N.E.2d 615, 617 (Ind. Ct. App. 1983)), *trans. denied*.

A. Continuous Offenses

[56] First, the State argues that this Court should reverse the trial court's dismissal of Counts I, III, and V because the alleged offenses constitute continuous offenses that tolled the statute of limitations period. The doctrine of continuing offenses holds, "Where there is a continuing duty to do some act, the statute of limitations does not apply where some portion of the offense is within the period of limitations." *Lebo v. State*, 977 N.E.2d 1031, 1037 (Ind. Ct. App. 2012) (quoting *DeHart v. State*, 471 N.E.2d 312, 315 (Ind. Ct. App. 1984), *trans. denied*). An offense should not be deemed continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that [the legislature] must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 860, 25 L. Ed. 2d 156 (1970).

[57] The State maintains that the charges against the Barnetts extend from 2013 through 2016 because, according to the State, the Barnetts continuously neglected Natalia during that period; they had a duty to support Natalia

through the charged period; and the charged period was within the statute of limitations. The State explains that it took an alternative approach to "charg[ing] each count of neglect because the period of the crime spanned the 2014 criminal code revision[.]" Appellant's Br. p. 44. Therefore, the State charged "one offense under the prior code, as a Class of felony, and a corresponding offense under the current code, as a Level of felony." *Id.*[8]

[58] Effective July 1, 2014, the criminal code was subject to a comprehensive revision pursuant to P.L. 158–2013 and P.L. 168–2014. Our General Assembly, in enacting the new criminal code, also enacted savings clauses. Specifically, both Indiana Code section 1-1-5.5-21 (2014) and section 1-1-5.5-22 (2014) state that the new criminal code "does not affect: (1) penalties incurred; (2) crimes committed; or (3) proceedings begun" before the effective date of the new criminal code sections, *i.e.*, July 1, 2014. These sections also provide that "[t]hose penalties, crimes, and proceedings continue and shall be imposed and enforced under prior law as if [the new criminal code] had not been enacted." *Id.* And, in no uncertain terms, these sections state: "The general assembly does not intend the doctrine of amelioration (*see Vicory v. State* [272 Ind. 683], 400 N.E.2d 1380 (1980)) to apply to any SECTION [of the new criminal

[8] The State does not ask this Court to determine whether the crime of neglect of a dependent itself imposes a continuing duty of care of a dependent such that violation of the duty constitutes a continuing offense; so, we make no such determination.

code]."[9] *Id.* Thus, it is clear from the statutes that our General Assembly intended the new criminal code to have no effect on criminal proceedings for offenses committed prior to the enactment of the comprehensive revision of the criminal code. *See, e.g., Marley v. State*, 17 N.E.3d 335, 340 (Ind. Ct. App. 2014) (In addressing the appropriateness of Marley's sentence, we "decline[d] to take into consideration the lesser penalties of the new criminal code" and proceeded "as if the new criminal code had not been enacted."), *trans. denied*.

[59] Here, in September 2019, the State charged the Barnetts with Class B and Class D felony neglect of a dependent under Indiana Code section 35-46-1-4 (2013), alleging that the criminal conduct occurred from July 10, 2013, through and including June 30, 2014. The new criminal code, however, does not affect crimes committed before the date the new criminal code was enacted, and those crimes and proceedings continue as if the new criminal code had not been enacted. *See* Ind. Code §§ 1-1-5.5-21 and 1-1-5.5-22. Also, the State makes no argument that the crime of neglect of a dependent itself imposes a continuing duty of care of a dependent such that violation of the duty constitutes a continuing offense. As such, the Barnetts were subject to the five-year statute of limitations in Indiana Code section 35-41-4-2(a)(1), and the State's initiation of prosecution against the Barnetts more than five years after the commission of

[9] The "doctrine of amelioration" does not apply where the legislature in a specific savings clause expressly states an intention that crimes committed before the effective date of the ameliorative amendment should be prosecuted under prior law. *Vicory*, 272 Ind. at 685, 400 N.E.2d at 1381.

those offenses was barred. Accordingly, the trial court did not abuse its discretion by dismissing Counts I, III, and V as untimely.

B. Concealment

[60] Next, the State argues that the statute of limitations period for filing Counts I, III, and V against the Barnetts was tolled because the Barnetts "conceal[ed] their criminal neglect of Natalia[,]" which constituted an exception to Indiana's statute of limitations under Indiana Code § 35-41-4-2(h)(2). Appellant's Br. p. 44. Indiana Code section 35-41-4-2(h) provides, in relevant part:

> The period within which a prosecution must be commenced does not include any period in which:
>
> * * *
>
> (2) the accused person conceals evidence of the offense, and evidence sufficient to charge the person with that offense is unknown to the prosecuting authority and could not have been discovered by that authority by exercise of due diligence[.]

[61] The State maintains that the Barnetts engaged in numerous "positive acts" to conceal their criminal neglect of Natalia, including:

> • Changing Natalia's age to conceal the illegality of abandoning her alone in an apartment and to repel others' efforts to intervene.
>
> • Filing the age-change petition in Marion County Probate Court under an adoption case type (which is excluded from public access) instead of in the Hamilton County adoption cause and failing to disclose to the probate court the results of certain

medical examinations and evaluations regarding Natalia's age.

• Interfering in the proceedings the Manses initiated to seek guardianship of Natalia.

Appellant's Br. p. 44; *see* Reply Brief to Brief of Appellee Michael Barnett, pp. 23-25 and Reply Brief to Brief of Appellee Kristine Barnett, pp. 25-26. The State clarifies in its reply briefs, however, that it is "not alleging that the Barnetts concealed that they were attempting to have Natalia's age changed or the age-change proceedings themselves." *See* Reply Brief to Brief of Appellee Michael Barnett, p. 23 and Reply Brief to Brief of Appellee Kristine Barnett, p. 24. The State is alleging that the criminal act the Barnetts attempted to conceal was their neglect of Natalia. In resolving this matter, we rely upon decisions issued in *Study* and in *Umfleet v. State*, 556 N.E.2d 339 (Ind. Ct. App. 1990), *disapproved of on other grounds by Sloan v. State*, 947 N.E.2d 917, 921 n.7 (Ind. 2011).[10]

[62] In *Study*, the State charged John Study with several counts of robbery, and Study moved to dismiss one of the counts on the grounds it was barred by the statute of limitations. 24 N.E.3d at 948-949. The charging information alleged that "concealment occurred when Study concealed his identity by wearing a

[10] In *Sloan*, our Supreme Court addressed an issue that is not before us in the instant case, that is, when tolling ends under Indiana Code section 35-41-4-2(h)(2) once concealment has been found. The Court held that once concealment has been established, statutes of limitations for criminal offenses are tolled under Indiana Code section 35-41-4-2(h) (2008) until a prosecuting authority becomes aware or should have become aware of sufficient evidence to charge the defendant. *Sloan*, 947 N.E.2d at 919 (Ind. 2011).

mask, and concealed the getaway car, clothes worn during the crime, items taken from a victim, the weapon used, and evidence linking the robbery to other robberies." 24 N.E.3d at 954. Our Supreme Court held that the trial court erred when it refused to grant Study's motion to dismiss the charge. *Id.* at 948. The Court observed that "[n]one of these actions would serve to prevent law enforcement from discovering that a bank had been robbed," and "[t]he State's ability to investigate the crime and develop a case was not thwarted." *Id.* at 954. The law enforcement officials had discovered the robbery and began investigating immediately, and "[t]herefore, the State's interest was sufficiently served as there was nothing delaying their ability to investigate." *Id.* The Court noted that "the concealment, to avoid the running of the statute, must be of the crime itself" and that Indiana courts have continued to hold that concealment tolls the statute of limitations only when there is a positive act performed by the defendant that is calculated to prevent the discovery that a crime has been committed. *Id.* at 957 (quoting *State v. Hoke*, 84 Ind. 137, 138 (1882)). The Court concluded that the defendant "did not engage in any positive act calculated to conceal the fact that a robbery occurred on March 21, 2006." *Id.* at 957-58. Consequently, the statute of limitations period for the robbery charge in question was not tolled, and the charge should have been dismissed.

[63] In *Umfleet*, as discussed by our Supreme Court in *Study*, strict application of the concealment-tolling provisions was demonstrated. Umfleet was charged with child molesting, and the charges were filed outside of the five-year statute of limitations. 556 N.E.2d at 340-41. This Court explained that "[a]bsent any

threatening conduct by the defendant, the victim's ignorance as to the criminal nature of an alleged wrongdoing will not stop the statutory period of limitation from running," and even "outside influences" that induce the victim's silence do not constitute positive acts by the defendant. *Id.* at 342. We further explained that the defendant's own denial that any abuse took place also was not a positive act to conceal the fact that an offense was committed.[11] *Id.*

[64] In the case before us, as in *Study* and *Umfleet*, a positive act of concealment did not occur. The charging informations alleged that concealment occurred when

> • the Barnetts changed Natalia's age in the Marion County Probate Court;
>
> • Kristine instructed Natalia to tell others that she was twenty-two years old;
>
> • the Barnetts moved Natalia to Tippecanoe County where she had no previous contacts and then moved to Canada and did not maintain contact with Natalia;
>
> • Michael interfered in the Tippecanoe County guardianship proceeding by filing an objection; and
>
> • Michael appeared at the 2017 age-change hearing held in the Marion County Probate Court, objected to any modification of

[11] We note that this decision was handed down after the language in the concealment-tolling provision had changed from "conceals the fact that the offense has been committed," Ind. Code § 35-1-3-5 (1976), to "conceals evidence of the offense." Ind. Code § 35-41-4-2(h)(2) (2014).

> Natalia's age, and presented certain evidence and testimony on his behalf.

However, none of these actions served to prevent the State from discovering that the Barnetts allegedly committed the offense of neglect of a dependent.

[65] Specifically, beginning in 2012, the Barnetts were investigated by the HCDCS for possible abuse or neglect of Natalia, and the Barnetts subsequently informed HCDCS staff that they were seeking to have Natalia's age changed. In 2013, HCDCS filed a request for authority to file a CHINS petition, based on its belief that Natalia was a child who had been abandoned and was in need of services, and the trial court dismissed the petition, finding that it lacked jurisdiction because Natalia had been judicially determined to be an adult by the Marion Probate Court. Later in 2013, Tippecanoe County Adult Protective Services conducted an investigation into whether Natalia was an endangered adult. Investigators interviewed Natalia and the Barnetts and became aware of the probate court's 2012 order that changed Natalia's birthyear. In 2014, the Tippecanoe County Sheriff's Department received a complaint that questioned Natalia's age classification as an adult; an investigation ensued that included meetings with the TCPO.

[66] In 2016, the Manses filed a petition in the Tippecanoe County Circuit Court seeking guardianship of Natalia, and Michael filed an objection with the court. The Manses then filed in the Marion County Probate Court a combined motion to vacate the probate court's 2012 age-change order and motion for relief from judgment. A hearing on the matter was held in March 2017, at which the

Manses and Michael appeared, and Natalia was present and represented by a GAL. At the hearing, a detective with the Tippecanoe County Sheriff's Department testified that the TCPO wanted to help stabilize Natalia's situation; at least two meetings regarding the matter were held in the prosecutor's office; and the prosecutor's office attempted to enlist local attorneys to assist in the matter pro bono.

[67] The State did not file charges against the Barnetts until September 2019. However, the State's ability to investigate the crimes and develop a case was not thwarted. Moreover, the Barnetts "did not engage in any positive act calculated to conceal the fact" that they allegedly committed neglect of a dependent; thus, the statute of limitations was not tolled and Counts I, III, and V should have been dismissed. *See Study*, 24 N.E.3d at 957-58. We, therefore, conclude that the trial court properly granted, in part, the Barnetts' motions to dismiss and did not abuse its discretion in so doing.

[68] In conclusion, we find that the trial court did not abuse its discretion by giving preclusive effect to the Marion County Probate Court's 2012 age-change order and the March 7, 2017 order reaffirming same, thus preventing the State from relitigating Natalia's age; and the trial court did not err in dismissing Counts I, III, and V against the Barnetts because the charges were filed outside of the five-year statute of limitations period, and the State failed to allege sufficient facts to constitute an exception to the statute. The judgment of the trial court is affirmed.

[69] Affirmed.

Robb, J., and Crone, J., concur.