

NOTICE
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2012 IL App (4th) 120251-U

Filed 7/19/12

NO. 4-12-0251

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In re: D.S., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	Morgan County
v.)	No. 09JA25
BROOKE JOHNSON,)	
Respondent-Appellant.)	Honorable
)	Jeffrey E. Tobin,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly denied respondent's section 2-1401 petition on the pleadings where the pleadings and record did not show respondent acted with due diligence in pursuing and presenting her claim she did not have notice of the best-interests hearing and could not attend due to her incarceration.

- ¶ 2 Respondent forfeited her challenge to the sufficiency of the State's petition to terminate respondent's parental rights by failing to raise the issue in the trial court.

- ¶ 3 In February 2012, respondent, Brooke Johnson, filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401(West 2010)), asserting she did not receive notice of the hearing on May 12, 2011, at which the trial court terminated her parental rights to D.S. (born in July 2009). The State filed a response, asserting, *inter alia*, respondent failed to demonstrate she acted with due diligence. After a March 2012 hearing, the Morgan County circuit court denied respondent's section 2-1401

petition.

¶ 4 Respondent appeals, asserting (1) the trial court erred by denying her section 2-1401 petition because she did not have notice of the proceedings and was denied her right to be present for the proceedings and (2) the petition for termination of parental rights was fatally defective for failing to request that a guardian of the person be appointed and authorized to consent to the minor's adoption. We affirm.

¶ 5 I. BACKGROUND

¶ 6 In July 2009, the State filed a petition for adjudication of wardship, asserting D.S. was neglected pursuant to section 2-3(1)(b) of the Juvenile Court Act of 1987 (705 ILCS 405/2-3(1)(b) (West 2008)), in that his environment was injurious to his welfare due to his parent's involvement in alleged methamphetamine activity. At an August 2009 adjudicatory hearing, the trial court found D.S. was neglected as alleged in the State's petition. After the September 2009 dispositional hearing, the court found respondent and D.S.'s father were unfit and unable to care for, protect, train, or discipline D.S. The court made D.S. a ward of the court and placed his custody and guardianship with the Department of Children and Family Services (Department).

¶ 7 At a January 2011 permanency review hearing, respondent failed to appear due to being incarcerated in the Sangamon County jail. The court changed the permanency goal to return home to D.S.'s father within 12 months.

¶ 8 In February 2011, the State filed a motion to terminate only respondent's parental rights as to D.S. The petition asserted respondent (1) failed to make reasonable efforts to correct the conditions that were the basis for D.S.'s removal from her, (2) failed to make reasonable

progress toward the return of D.S. within the initial nine months after the neglect adjudication, or (3) failed to make reasonable progress toward the return of D.S. during any nine-month period after the end of the initial nine months following the neglect adjudication. See 750 ILCS 50/1(D)(m) (West 2010) (text of section effective until July 1, 2011)). The record shows respondent received service of the petition to terminate her parental rights and the summons for the hearing on the petition at the Morgan County jail. On March 24, 2011, the trial court held the first appearance on the termination petition. Respondent was present at the hearing and "denie[d] the petition." In respondent's presence, the court set the hearing on the petition to terminate for April 28, 2011.

¶ 9 On Thursday, April 28, 2011, the trial court held the hearing on the fitness portion of the petition to terminate respondent's parental rights. Respondent failed to appear at the hearing. Her attorney had not heard from her since the last time they were in court, at which time she indicated she was going to hire other counsel. A Department caseworker stated she had talked to respondent on Tuesday, and respondent knew she was to be in court at 9 a.m. on Thursday. As to respondent's fitness, the State presented the testimony of Mollie Buchanan, who had been the caseworker in this case until March 2011. The court found respondent was unfit as alleged in the petition and set the best-interests hearing for May 12, 2011.

¶ 10 On Thursday, May 12, 2011, the trial court held the best-interests hearing, and respondent again failed to appear. Respondent was represented by counsel at the hearing. Buchanan again testified on the State's behalf. Buchanan testified she had talked to respondent on both Tuesday and Wednesday of that week and respondent knew of the hearing. Buchanan offered respondent a ride to the hearing, but respondent declined the offer. The court found it

was in D.S.'s best interests to terminate respondent's parental rights.

¶ 11 On November 7, 2011, respondent filed a prisoner correspondence form, notifying the trial court she was incarcerated in the Dwight Correctional Center. On November 17, 2011, respondent filed a letter with the court, wanting visitation with D.S. and noting the progress she had made in prison. She asserted she had tried several times to contact her attorney and Department caseworker. The letter to the court had a postmark of November 3, 2011. A November 17, 2011, docket entry in reply to respondent's letter stated respondent's parental rights were terminated and a copy of the termination order was enclosed.

¶ 12 On February 3, 2012, respondent filed her section 2-1401 petition, asserting she did not have notice of the May 12, 2011, hearing and was unable to attend court that day due to her incarceration. Respondent alleged she had exercised due diligence in filing the petition, in that she had been incarcerated since May 12, 2011, and had filed the petition at the earliest opportunity. She also asserted she had a meritorious defense to the termination petition because she was not unfit and it was not in D.S.'s best interests to terminate her parental rights. The petition noted she learned of the termination of her parental rights on December 23, 2011, from her attorney. The State filed a response, asserting that respondent had notice of the hearing and her failure to appear was her own fault as she did not contact anyone to inform them of her incarceration. The State also asserted she had not exercised due diligence.

¶ 13 On March 8, 2012, the trial court held a hearing on respondent's section 2-1401 petition. The parties only argued the merits of the petition and did not present any evidence. After hearing the parties' arguments, the court denied respondent's petition, noting respondent had proper notice of the hearing and respondent had not made any inquiry of any type about the

termination proceedings from May 2011 to November 2011.

¶ 14 On March 14, 2012, respondent filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). Thus, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 15 II. ANALYSIS

¶ 16 In this appeal, respondent challenges the trial court's denial of her section 2-1401 petition. At the March 2012 hearing, the parties did not present any evidence, and thus the trial court entered judgment on the pleadings, not after an evidentiary hearing. With a section 2-1401 petition, this court reviews the propriety of a trial court's judgment on the pleadings under the *de novo* standard of review. *People v. Vincent*, 226 Ill. 2d 1, 14, 871 N.E.2d 17, 26 (2007).

¶ 17 A. Lack of Notice

¶ 18 To obtain relief under section 2-1401 when the party is not seeking to vacate a judgment as void, the party must show by a preponderance of the evidence the following: (1) the existence of a meritorious claim or defense in the original action, (2) due diligence in pursuing the claim or defense in the trial court, and (3) due diligence in presenting the section 2-1401 petition. *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22. Section 2-1401's due-diligence element requires the movant to provide "a reasonable excuse for failing to act within the appropriate time." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 222, 499 N.E.2d 1381, 1386 (1986). "Due diligence is shown when the 'petitioner show[s] that his/her inaction was the result of an excusable mistake and that petitioner acted reasonabl[y], not negligently, [in failing] to pursue the cause of action.'" *In re Application of the County Treasurer & ex officio County Collector*, 386 Ill. App. 3d 906, 910, 899 N.E.2d 432, 436 (2008) (quoting *Salazar v. Wiley Sanders*

Trucking Co., 216 Ill. App. 3d 863, 871, 576 N.E.2d 552, 557 (1991)). Additionally, a litigant bears the obligation to follow the progress of his or her case, and the inadvertent failure to do so is not a ground for section 2-1401 relief. *Genesis & Sons, Ltd. v. Theodosopoulos*, 223 Ill. App. 3d 276, 279-80, 585 N.E.2d 188, 192 (1991).

¶ 19 In her petition, respondent asserted she exercised due diligence because she had been incarcerated since May 12, 2011, and filed her petition at the earliest opportunity. However, the State notes respondent received service of the State's petition to terminate her parental rights to D.S. and was present in court at the first appearance on the petition in March 2011. At the March 2011 hearing, she "denie[d] the petition" and was informed the hearing on the petition to terminate her parental rights would take place on April 28, 2011. Thus, respondent knew when the litigation of the termination petition would commence. Despite knowing the date of the commencement of the termination proceedings, respondent alleged in her petition she did not learn her parental rights were terminated until December 23, 2011, when she received a letter from her attorney in response to her inquiry of an unknown date. Respondent does not allege how her incarceration prevented her from following the progress of her case by contacting her attorney or the court at an earlier date. The section 2-1401 pleadings and the record indicate respondent waited at least six months to contact her attorney or the court about this case. Accordingly, we find respondent failed to show she exercised due diligence in pursuing and presenting her lack-of-notice claim. Therefore, the trial court properly denied respondent's section 2-1401 petition.

¶ 20 B. Defective Petition

¶ 21 Respondent asserts the termination petition was fatally defective for lacking a

request that a guardian of the person be appointed and authorized to consent to the minor's adoption. The State notes respondent failed to raise this issue in the trial court and thus has forfeited this issue. We agree with the State that respondent has forfeited this issue by raising it for the first time on appeal and decline to address it on the merits. See *People v. Bramlett*, 347 Ill. App. 3d 468, 475, 806 N.E.2d 1251, 1256 (2004) (finding the defendant forfeited his issue on appeal by failing to raise it in his section 2-1401 petition).

¶ 22

III. CONCLUSION

¶ 23

For the reasons stated, we affirm the Morgan County circuit court's judgment.

¶ 24

Affirmed.