Illinois Official Reports

Appellate Court

***Department of Healthcare & Family Services ex rel. Hodges v. Delaney*,**
2021 IL App (1st) 201186

Appellate Court Caption	THE DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES *ex rel.* JACQUELINE HODGES, Petitioner-Appellee, v. TERRANCE DELANEY, Respondent-Appellant
District & No.	First District, Fourth Division No. 1-20-1186
Filed	August 31, 2021
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 03-D-90319; the Hon. Robert W. Johnson, Judge, presiding.
Judgment	Reversed.
Counsel on Appeal	Ben J. Mahon and Laura SB Vallejo, of Greater Chicago Legal Clinic, of Chicago, for appellant. Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and Benjamin F. Jacobson, Assistant Attorney General, of counsel), for appellee.
Panel	PRESIDING JUSTICE GORDON delivered the judgment of the court, with opinion. Justices Lampkin and Reyes concurred in the judgment and opinion.

OPINION

¶ 1 In 2003, the Department of Healthcare and Family Services (Department) filed a petition under the Uniform Interstate Family Support Act (Support Act) (750 ILCS 22/100 *et seq.* (West 2002)) on behalf of Jacqueline Hodges to determine the existence of a parental relationship between respondent Terrance Delaney and Hodges's daughter Terriana[1] and to establish respondent's support obligations (support petition). Respondent was allegedly served through substitute service, and a default judgment was entered against him in early 2004.

¶ 2 In 2012, respondent filed a petition claiming that he had never been served with the support petition and sought to vacate the default judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). In 2013, the trial court struck the section 2-1401 petition, with leave to refile it, when respondent did not appear in court to argue it.

¶ 3 In 2019, respondent filed a second section 2-1401 petition challenging the support petition, again claiming that he had never been served with process. However, the trial court ultimately denied respondent's section 2-1401 petition, finding that respondent had not demonstrated due diligence in raising the defect in service, due to the several-year gap between his first and second section 2-1401 petitions. Respondent appeals, and for the reasons that follow, we reverse.

¶ 4 BACKGROUND

¶ 5 On February 20, 2003, the Department, on behalf of Hodges, filed a uniform support petition against respondent pursuant to the Support Act, seeking a finding of paternity and establishment of an order of support with respect to Hodges's daughter Terriana, who was 22 months old at the time.

¶ 6 The sheriff's office allegedly served respondent via substitute service. The return of service form provided that respondent was served at an address on Chase Avenue on April 2, 2003, when a copy of the summons and complaint were left with an individual named "William Delaney," who was listed as respondent's "brother"; the summons and complaint were also allegedly mailed to respondent at that address.

¶ 7 On July 16, 2003, the trial court entered a default order of parentage, finding that respondent was the father of Terriana; respondent was not present at the court hearing. The court reserved the issue of support, continuing the matter for a later hearing on September 16, 2003. The case was continued several more times until the Department withdrew the support petition on January 21, 2004, due to Hodges's failure to supply an affidavit as to her expenses and financial needs. On February 18, 2004, the Department filed a motion to vacate the January 21, 2004, order after Hodges supplied the requested affidavit, which was granted on April 22, 2004. On May 24, 2004, the trial court entered a support order, ordering respondent to pay $200 per month in child support as well as $25 per month for retroactive child support; respondent's child support obligation was to terminate on April 2, 2019, when Terriana turned 18. Again, respondent was not present in court.

[1]While Terriana was 22 months old at the time of the filing of the petition, she is now 20 years old.

¶ 8 On October 23, 2012, respondent filed a *pro se* appearance and a *pro se* motion, claiming that he had never been contacted about the support petition. Respondent claimed that he had never resided at the Chase Avenue address at which he had been allegedly served, nor did he know anyone by the name of "William Delaney." Respondent sought to reopen the case to challenge the paternity and support orders.

¶ 9 On November 15, 2012, counsel entered an appearance on behalf of respondent, and the trial court granted counsel leave to amend respondent's motion, which it characterized as a petition filed pursuant to section 2-1401 of the Code.

¶ 10 On January 15, 2013, through counsel, respondent filed an amended petition, which sought to vacate the trial court's parentage and support orders pursuant to section 2-1401 of the Code and to quash service pursuant to section 2-301 of the Code (735 ILCS 5/2-301 (West 2010)). Respondent claimed that he did not reside at the Chase Avenue address, nor had he resided there at the time of the alleged substitute service. Instead, respondent had lived at an address on Touhy Avenue from 2002 to 2003 and had been living at an address on Ridge Boulevard since 2004. In support, respondent attached (1) his affidavit; (2) a September 18, 2002, letter from the circuit court of Cook County adult probation department, which showed his address as the Touhy Avenue address; (3) an April 18, 2003, letter from the Social Security Administration, which showed his address as the Touhy Avenue address; and (4) the title to his Honda Accord, issued October 19, 2004, which showed his address as the Ridge Boulevard address.

¶ 11 Respondent also claimed that he had a meritorious defense to the judgments against him, and he alleged in his affidavit that he was never lawfully served. Respondent additionally claimed that he had acted with due diligence because he had no knowledge of the proceedings against him until October 2012, when he was informed of the proceedings. In his affidavit, respondent averred that he was incarcerated with the Cook County Department of Corrections in 2009 and was sentenced to three years with the Illinois Department of Corrections on June 11, 2010. He was released on December 13, 2011, and in October 2012 discovered his driver's license was suspended. When respondent contacted the Secretary of State's office, he was informed that his license had been suspended due to past-due child support. Shortly thereafter, respondent filed his *pro se* motion seeking to vacate the orders.

¶ 12 Before respondent's petition was ruled on, respondent's counsel filed a motion to withdraw, claiming that irreconcilable differences had made counsel's continued representation impossible. On August 7, 2013, the trial court granted counsel's motion to withdraw and gave respondent 21 days to obtain new counsel.

¶ 13 Also on August 7, 2013, the trial court struck respondent's section 2-1401 petition with leave to refile because respondent was not present in court.

¶ 14 On October 3, 2019, respondent filed another *pro se* motion to vacate the support order. Respondent again claimed that he had never been served with process and that he had been incarcerated for the past 10 years and had no steady income or employment. The matter was continued several times, and on January 27, 2020, respondent filed another *pro se* petition pursuant to section 2-1401 of the Code, seeking to vacate the order of parentage and the support order as void for lack of personal jurisdiction. Again, respondent claimed that he never lived at the Chase Avenue address and that "William Delaney" was not a family member. Attached to the petition were (1) the affidavit of respondent's brother, who averred that respondent resided with him at the Touhy Avenue address at the time of the alleged service and that they

did not have a family member named "William Delaney"; (2) the affidavit of respondent, who averred that he resided at the Touhy Avenue address with his brother at the time of the alleged service and did not have a family member named "William Delaney"; (3) the September 18, 2002, letter from the circuit court of Cook County adult probation department, addressed to respondent at the Touhy Avenue address; and (4) the April 18, 2003, letter from the Social Security Administration, addressed to respondent at the Touhy Avenue address.

¶ 15 In its response, filed on February 19, 2020, the Department addressed only respondent's October 3, 2019, motion and did not address his January 27, 2020, petition. In its response, the Department argued that respondent's motion should be denied because "his claim is self-serving and is not credible." The Department further argued that respondent's motion should be denied because he first raised the claims as to the adequacy of service in 2012 but failed to appear in court on that petition and waited six years before filing a new motion, demonstrating a lack of diligence. Additionally, the Department claimed that respondent's delay in refiling after his initial petition meant that his claims should now be barred by *laches*. Finally, the Department claimed that respondent's motion should be denied because respondent failed to name Terriana, who was now an adult, as a necessary party.

¶ 16 On February 26, 2020, the trial court entered an order, finding that on October 3, 2019, respondent filed a motion, which was heard on January 22, 2020. After arguments were presented, the court continued the motion and set a briefing schedule. However, respondent then filed another petition on January 27, 2020. The court found that "[t]he current Petition is regarding the same issue as the motion filed on 10/3/19. The current petition is untimely." Consequently, the court struck the January 27, 2020, petition.

¶ 17 In his reply, respondent attached and incorporated the January 27, 2020, petition and its exhibits. Respondent further claimed that his allegations were supported by affidavits, as well as by the letters he submitted, and that the Department did not provide any counteraffidavits. Respondent also argued that his previous filings were never substantively decided and that jurisdictional defects did not require a showing of due diligence. Similarly, respondent contended that he was able to attack personal jurisdiction at any time and that *laches* was not applicable where the court's jurisdiction was in question. Finally, respondent argued that Terriana was not a necessary party to the proceedings.

¶ 18 On March 6, 2020, counsel filed an appearance on behalf of respondent for the limited purpose of litigating the issue of service. On March 11, 2020, the parties came before the court, and the Department argued that respondent's reply should be stricken for incorporating a stricken petition. The court declined to strike the reply in its entirety and struck only the petition that was incorporated into the reply, but the court considered the reply and the evidentiary matter attached to it (the affidavits and documents that respondent had attached to the stricken petition).

¶ 19 On May 19, 2020, the court entered an order denying respondent's petition, finding that "[t]he Respondent has failed to demonstrate he exercised due diligence in presenting his defense or claim to the trial court in the original action and in the filing for relief."

¶ 20 On June 16, 2020, respondent, through counsel, filed a motion to reconsider, arguing that the trial court had applied the incorrect legal standard when finding that respondent had failed to demonstrate due diligence, because a defendant contesting a default judgment based on a lack of personal jurisdiction is not required to show either due diligence or a meritorious defense. Respondent further claimed that he had provided evidence as to his address, including

affidavits and documentary evidence, and the Department provided no counteraffidavits to rebut respondent's evidence.

¶ 21 On September 29, 2020, the trial court denied respondent's motion to reconsider, finding that "[r]espondent failed to meet his burden." Respondent timely filed a notice of appeal, and this appeal follows.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant contends that the trial court erred in dismissing his section 2-1401 petition due to a lack of diligence. Section 2-1401 "provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be vacated 'after 30 days from the entry thereof.' " *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220 (1986) (quoting Ill. Rev. Stat. 1983, ch. 110, ¶ 2-1401(a)). A section 2-1401 petition can present either a factual or legal challenge to a final judgment or order. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. "Although a section 2-1401 petition is ordinarily used to bring facts to the attention of the trial court which, if known at the time of judgment, would have precluded its entry [citation], a section 2-1401 petition may also be used to challenge a purportedly defective judgment for legal reasons [citation]." *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). The nature of the challenge presented in a section 2-1401 petition is "critical" because it dictates the proper standard of review on appeal. *Warren County*, 2015 IL 117783, ¶ 31.

¶ 24 Where the petition raises a factual challenge,

> "[t]o be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Airoom*, 114 Ill. 2d at 220-21.

"The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence." *Airoom*, 114 Ill. 2d at 221. "Whether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court, depending upon the facts and equities presented." *Airoom*, 114 Ill. 2d at 221.

¶ 25 By contrast, where a section 2-1401 petition raises a purely legal challenge to a judgment by alleging that it is void, review of the petition is *de novo*. *Warren County*, 2015 IL 117783, ¶ 47. Moreover, "the general rules pertaining to section 2-1401 petitions—that they must be filed within two years of the order or judgment, that the petitioner must allege a meritorious defense to the original action, and that the petitioner must show that the petition was brought with due diligence—do not apply." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Instead, our supreme court has explained that "[p]etitions brought on voidness grounds need not be brought within the two-year time limitation. Further, the allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian*, 201 Ill. 2d at 104; see also *Warren County*, 2015 IL 117783, ¶ 48.

¶ 26 In the case at bar, respondent's petition is based on his claim that the judgment against him was void because the trial court lacked personal jurisdiction over him due to improper service

of process.[2] Our supreme court has found that this type of section 2-1401 petition represents a purely legal challenge, and neither party contends otherwise on appeal. See *Sarkissian*, 201 Ill. 2d at 105 (where the petition alleged that the default judgment was void because the trial court lacked personal jurisdiction due to defective service of process, there was no need to establish due diligence or allege a meritorious defense). Accordingly, we review the denial of respondent's petition *de novo*. *De novo* consideration means we perform the same analysis that a trial judge would perform. *XL Specialty Insurance Co. v. Performance Aircraft Leasing, Inc.*, 2019 IL App (1st) 181031, ¶ 62.

¶ 27 In its May 19, 2020, order denying respondent's section 2-1401 petition, the trial court found "[t]he Respondent has failed to demonstrate he exercised due diligence in presenting his defense or claim to the trial court in the original action and in the filing for relief." Thus, it appears that the trial court applied the standard for a fact-based section 2-1401 petition, rather than the appropriate standard for a voidness-based section 2-1401 petition, which does not require a showing of diligence or a meritorious defense. On appeal, the Department does not contend otherwise.

¶ 28 Indeed, the Department does not argue the merits of respondent's petition at all on appeal. While we address the Department's arguments below, we first discuss the sufficiency of respondent's petition because we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774, ¶ 23. Thus, if respondent's petition was deficient, we may affirm the trial court despite its application of the incorrect standard.

¶ 29 In order to have a valid judgment, the court must have both jurisdiction over the subject matter of the litigation and jurisdiction over the parties. *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). "Serving a copy of a summons and complaint on a party-defendant is an essential part of the litigation process and allows a court to obtain personal jurisdiction over that defendant." *Urban Partnership Bank v. Ragsdale*, 2017 IL App (1st) 160773, ¶ 18. "If a party is not properly served with summons, the trial court does not obtain personal jurisdiction over that party." *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 367 (2001). Where the trial court does not have personal jurisdiction over a party, any order against him is void *ab initio*. *In re Marriage of Schmitt*, 321 Ill. App. 3d at 367; see also *Sarkissian*, 201 Ill. 2d at 103 (a judgment entered by a court that lacks jurisdiction over the parties is void).

¶ 30 Section 2-203 of the Code allows for service of process "by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards," and also mailing the summons to the same address. 735 ILCS 5/2-203(a)(2) (West 2002). In the case at bar, the sheriff's office allegedly served respondent via substitute service on April 2, 2003, when a copy of the summons and complaint were left at the Chase Avenue address with an individual named "William Delaney," who was listed as respondent's "brother"; the summons and complaint were also allegedly mailed to respondent at that address. However, in his section 2-1401 petition, respondent disputed that service, alleging that he never lived at the Chase Avenue address and was not related to any individual named "William Delaney."

[2]We note that a party may also object to the trial court's jurisdiction on the ground of insufficiency of process by filing a motion pursuant to section 2-301(a) of the Code prior to filing any other pleading or motion in the case (735 ILCS 5/2-301(a) (West 2018)).

¶ 31 The return of service is *prima facie* evidence of service, which can be set aside only by "clear and satisfactory evidence." *Nibco, Inc. v. Johnson*, 98 Ill. 2d 166, 172 (1983). However, our supreme court has cautioned that this rule applies only to matters within the knowledge of the officer making the return, "such as the facts that service was made, that it was made upon a person who gave his name as [a particular name], and that service was made at a particular place." *Nibco, Inc.*, 98 Ill. 2d at 172. Our supreme court has further explained:

> "The fact that service was made upon a person who said his name was Joe Johnson and the place where it was made are within the personal knowledge of the officer and cannot be contradicted by the uncorroborated affidavit of the defendant. However, the recital in the return that Joe Johnson was a member of defendant's household was presumptively not within the personal knowledge of the officer. This recital could be denied by the affidavit of the defendant, as it was. If the affidavit were not contradicted, or if it were unrebutted, that part of the affidavit attacking those recitals in the return which are beyond the personal knowledge of the officer would be taken as true." *Nibco, Inc.*, 98 Ill. 2d at 172-73.

¶ 32 In the case at bar, similarly, the facts that the officer served an individual named "William Delaney" at the Chase Avenue address on April 2, 2003, are matters within the personal knowledge of the officer. However, respondent has denied the recitals in the affidavit that the Chase Avenue address was his usual place of abode and that William Delaney was a member of his household, supporting his claim with (1) his affidavit, (2) his brother's affidavit, and (3) several documents with his address on them.[3] In response, the Department provided no evidence to rebut respondent's claims, including the testimony of the officer making the return. See *Nibco, Inc.*, 98 Ill. 2d at 173 (the officer who made the service testified in support of his conclusion that the individual was a proper person upon whom substitute service could be made). Accordingly, respondent's claims must be taken as true. A return of service based on substitute service "must show strict compliance with every requirement of the statute authorizing such substituted service, since the same presumption of validity that attaches to a return reciting personal service does not apply to substituted service." *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 309 (1986). In the case at bar, respondent was not served according to the requirements of section 2-203(a)(2), and consequently, his section 2-1401 petition should have been granted for lack of service of process.

¶ 33 As noted, the Department does not challenge the merits of respondent's petition on appeal. Instead, the Department urges us to affirm the trial court on another basis: *laches*. While this was not the basis of the trial court's order, as explained above, we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ocwen Loan Servicing, LLC*, 2020 IL App (2d) 190774, ¶ 23. *Laches* "is an equitable doctrine to be invoked in the discretion of the court to bar equitable claims." *Eckberg v. Benso*, 182 Ill. App. 3d 126, 131 (1989). It is premised on "the reluctance to aid one who has knowingly slept upon his rights and acquiesced for a great length of time." *Pyle v. Ferrell*, 12 Ill. 2d 547, 552 (1958). To assert a claim of *laches*, "a party must show both that there was unreasonable delay in bringing the action and that the delay materially prejudiced him." *Eckberg*, 182 Ill. App. 3d at 132. "No absolute right governs when *laches* should apply, and

[3]While these documents were attached to respondent's stricken petition, the trial court stated that it would nevertheless consider this evidence, and we do the same.

what facts will combine to constitute *laches* depends upon the circumstances of each case." *Eckberg*, 182 Ill. App. 3d at 132.

¶ 34 *Laches* has been called a "curious argument" in the context of challenging a void judgment, "as the principle that a void judgment may be attacked at any time is firmly entrenched in Illinois law." *West Suburban Bank v. Advantage Financial Partners, LLC*, 2014 IL App (2d) 131146, ¶ 26. However, as the Department notes, there have been situations in which *laches* has been found applicable, even in challenging a void judgment. Based on our research, cases applying *laches* to void judgments appear to have occurred in three general types of cases. First, our supreme court has applied *laches* with respect to allegedly void judgments in the context of oil and mineral rights. See, *e.g.*, *James v. Frantz*, 21 Ill. 2d 377, 382 (1961) (noting that " 'there is no class of property in which *laches* is more relentlessly enforced' than with respect to oil and mining property" (quoting *Pyle*, 12 Ill. 2d at 553)). Second, *laches* has been applied to allegedly void judgments in the context of adoption or child custody cases. See, *e.g.*, *In re Jamari R.*, 2017 IL App (1st) 160850, ¶ 63 (noting that, in adoption cases, the potential of prejudice is greater because the delay affects not only the parties but also the child (citing *In re Adoption of Miller*, 106 Ill. App. 3d 1025, 1033 (1982))). Third, the Second District has recently applied *laches* to allegedly void judgments in the context of mortgage foreclosure cases. See, *e.g.*, *Federal National Mortgage Ass'n v. Altamirano*, 2020 IL App (2d) 190198, ¶ 16.[4]

¶ 35 In the case at bar, however, we have no need to consider whether *laches* applies in the context of a case such as the one presented here, because we cannot find that the Department has established the necessary elements for the application of *laches*. See *West Suburban Bank*, 2014 IL App (2d) 131146, ¶ 26 (noting that there was no need to determine whether *laches* was applicable in a nonadoption setting because the elements necessary for the application of the doctrine had not been satisfied). As noted, to assert a claim of *laches*, "a party must show both that there was unreasonable delay in bringing the action and that the delay materially prejudiced him." *Eckberg*, 182 Ill. App. 3d at 132. On appeal, the Department makes arguments concerning both of these elements. However, before the trial court, the Department made no arguments, and presented no evidence, showing that the delay materially prejudiced anyone—not the Department, Hodges, or Terriana. Instead, the Department merely asserted that "[t]he Respondent has failed to timely assert his lack of service claim to the prejudice of the Petitioner and the child in this case." Such a conclusory assertion cannot support a finding of *laches*. See *West Suburban Bank*, 2014 IL App (2d) 131146, ¶ 27 (where the plaintiff merely asserted that its prejudice was evident from the record, the appellate court found that "[t]his bald assertion is insufficient"); *Harper v. City Mutual Insurance Co.*, 67 Ill. App. 3d 694, 699 (1978) (where the defendant's motion to dismiss based on *laches* merely set forth arguments concerning the timing of the action, the appellate court found that the element of prejudice was missing). Accordingly, even if *laches* was applicable, the Department's failure to establish its elements means that it does not provide for an alternate basis for affirming the trial court's denial of respondent's petition.

[4]We note that the Second District issued several opinions in 2020 applying the doctrine in this context. The Illinois Supreme Court has granted a petition for leave to appeal in one of these cases and will presumably address the issue in its disposition of that appeal. See *PNC Bank, National Ass'n v. Kusmierz*, 2020 IL App (2d) 190521, *appeal allowed*, No. 126606 (Ill. Jan. 27, 2021).

¶ 36 We note that the Department suggests that we should remand the case to the trial court so that it can address the issue of whether *laches* applies under the facts of this case. However, the cases the Department cites in support of its argument are entirely distinguishable from the situation present in the case at bar because none of those cases involve remanding a case solely so that a party receives a second chance to raise an argument that was not properly presented in the first instance. Instead, nearly all[5] of the Department's cited cases involve cases that were reversed for other reasons, with the defendant being permitted to raise *laches* as a defense upon remand. See, *e.g.*, *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 52 (reversing dismissal of complaint based on *res judicata* and the statute of limitations but noting that, on remand, the defendant was "free to assert a *laches* defense"); *Tillman v. Pritzker*, 2020 IL App (4th) 190611, ¶ 33 (reversing denial of the plaintiff's petition for leave to file a taxpayer's suit, finding that the plaintiff should be permitted to file the complaint, but noting that the defendants' alternative arguments, including the defense of *laches*, could be raised on remand); *Harper*, 67 Ill. App. 3d at 699 (reversing dismissal based on an insurance policy's exclusionary clause but noting that the trial court should hold an evidentiary hearing on the alternative defense of *laches* on remand).[6]

¶ 37 In fact, *Tillman* highlights the insufficiency of the Department's assertion of *laches* in the case at bar: the supreme court actually recently reversed the appellate court in *Tillman* and did so on the alternative basis of *laches*. See *Tillman v. Pritzker*, 2021 IL 126387, ¶ 31. However, there, the issue of *laches* was fully raised and argued below,[7] and the supreme court found that the relevant facts to determine both elements of *laches* were "readily apparent from the record." *Tillman*, 2021 IL 126387, ¶¶ 26-29. This is a far cry from the case at bar, in which the issue of prejudice is barely mentioned at all. In the case at bar, as discussed above, the Department's assertion of *laches* in response to respondent's section 2-1401 petition was insufficient. Remanding the case to the trial court to address the issue would simply be providing the Department with a second opportunity to develop an argument that it had the burden to present in the first instance. See *La Salle National Bank v. Dubin Residential Communities Corp.*, 337 Ill. App. 3d 345, 351 (2003) (the party asserting *laches* has the burden of establishing its applicability). Accordingly, we do not find such a remand appropriate and do not find the Department's argument on that point to be persuasive.

¶ 38 Finally, the Department claims that the trial court could have properly denied respondent's petition because respondent did not join Terriana as a necessary party. The filing of a section 2-1401 petition is considered a new proceeding, not a continuation of the old one. 735 ILCS 5/2-1401 (West 2018); *Sarkissian*, 201 Ill. 2d at 102. However, the section 2-1401 petition

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[5]The sole exception is *Chriswell v. Rosewell*, 70 Ill. App. 3d 320 (1979). However, that case involved the trial court's incorrect application of the *laches* doctrine and a remand to permit the trial court to properly consider the issue. See *Chriswell*, 70 Ill. App. 3d at 326. As with the Department's other cited cases, this case bears no similarity to the issues presented in the case at bar.

[6]We note that it appears that the *laches* defense in *Harper* may not have been properly developed, as the appellate court opinion indicates that it contained no discussion of prejudice. *Harper*, 67 Ill. App. 3d at 699. However, the court nevertheless was reversing on a different issue, not remanding solely to permit the defendant to have a second chance in presenting an undeveloped argument, as in the case at bar.

[7]Indeed, the appellate court opinion noted that the trial court conducted a hearing at which it heard "extensive arguments" from the parties. *Tillman*, 2020 IL App (4th) 190611, ¶ 18.

does not represent an entirely clean slate—courts have observed that "a section 2-1401 proceeding will always involve the same parties as the underlying case and will always relate back to the original judgment in the underlying case. [Citation.] It is filed in the same case in which the judgment was entered, and the pleading bears the same docket number." *Niemerg v. Bonelli*, 344 Ill. App. 3d 459, 466 (2003); *Excalibur Energy Co. v. Rochman*, 2014 IL App (5th) 130524, ¶ 26. Thus, for instance, a party is not entitled to a substitution of judge as of right, even though the party would normally have such a right in civil litigation. See *Niemerg*, 344 Ill. App. 3d at 465 ("[a]lthough a section 2-1401 proceeding may be a 'new action' for some purposes, such as pleading sufficiency and service of process, it is not a new case for purposes of section 2-1001(a)(2) [(735 ILCS 5/2-1001(a)(2) (West 2000))]"). Similarly, we cannot find that a defendant bringing a section 2-1401 petition is required to join parties who were not parties to the original action.

¶ 39 In the case at bar, the Department has cited no cases supporting its claim that someone who was not a party to the initial action must nevertheless be joined as a necessary party to a petition seeking to vacate a judgment entered in that action. We note that a child is not a necessary party to a proceeding to adjudicate parentage. 750 ILCS 46/613(a) (West 2018) ("A minor child is a permissible party, but is not a necessary party to a proceeding under this Article.").[8] Moreover, a minor is not in privity with her mother in a paternity action and is not barred from bringing her own paternity action. *In re M.M.*, 401 Ill. App. 3d 416, 422 (2010); see also 750 ILCS 46/602 (West 2018) (under the Illinois Parentage Act of 2015, a paternity action may be maintained by the child); 750 ILCS 45/7(a) (West 2002) (same, under the Illinois Parentage Act of 1984). Thus, Terriana was not a necessary party to the original action. In the absence of any authority suggesting otherwise, we therefore cannot find that she was a necessary party to respondent's section 2-1401 petition seeking to vacate the judgment in that action. Accordingly, respondent's failure to join her as a party does not provide an alternative basis for affirming the trial court's denial of his petition.

¶ 40 CONCLUSION

¶ 41 For the reasons set forth above, we reverse the trial court's denial of respondent's section 2-1401 petition. The trial court applied the incorrect standard in denying the petition, and application of the correct standard establishes that the petition should have been granted. The Department's arguments concerning alternate bases for affirming the denial are unpersuasive, where the Department did not make any arguments or present any evidence to the trial court concerning the prejudice requirement for *laches* and where there is no authority for its suggestion that respondent was required to join Terriana as a necessary party to his petition.

¶ 42 Reversed.

[8]We note that this provision appears in the Illinois Parentage Act of 2015 (750 ILCS 46/101 *et seq.* (West 2018)), which took effect on January 1, 2016. At the time of the filing of the support petition in the case at bar, the applicable law was the Illinois Parentage Act of 1984 (750 ILCS 45/1 *et seq.* (West 2002)), which does not contain an express provision concerning necessary parties.