THIRD DIVISION
August 7, 2019

No. 1-17-2680

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	
	)	Appeal from the
BENEQUENDE OUSMANE NACANABO[1],	)	Circuit Court
	)	Cook County
Petitioner-Appellee,	)	
	)	14 D3 30378
and	)	
	)	Honorable
AISSATA DJIRE,	)	Alfred Levinson,
	)	Judge Presiding
Respondent-Appellant.	)	

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Trial court properly denied respondent's section 2-1401 petition.

¶ 2 Respondent Aissata Djire argues that the circuit court erred by denying her section 2-1401 petition to vacate an order allowing her ex-husband, petitioner Benequende Ousmane Nacanabo, to relocate the couple's two children to Africa. For the following reasons, we affirm.

¶ 3 BACKGROUND

[1] The record in this case uses multiple different spellings for petitioner's name. For the purposes of this Order, we have chosen the spelling of his name that appeared on the parties' petitions for dissolution of marriage.

¶ 4 Djire and Nacanabo are both African immigrants who were officially married in a civil ceremony in 2013. Prior to their marriage, the couple had two children. In 2014, Nacanabo filed a petition for dissolution of marriage; Djire counter-petitioned. Ultimately, they entered into a marital settlement agreement, and the court granted a judgment of dissolution in February 2015.

¶ 5 As part of the settlement, the parties agreed to joint custody and financial responsibility of their two children. But "the primary residential custody of the children" was awarded to the father, Nacanabo. That decision was based, at least in part, "upon the fact that [Djire] is or has relocated to the State of North Carolina."

¶ 6 Relocation Order

¶ 7 Later, in July 2016, Nacanabo filed a petition to relocate their children to his native country of Burkina Faso in Africa. Djire objected. After a hearing, the court made oral findings of fact—which were later incorporated into a written memorandum order—and allowed Nacanabo to relocate the children, albeit with certain conditions to protect Djire's visitation rights.

¶ 8 Aside from the relocation itself, three other aspects of that order are worth mentioning. First, the court required Nacanabo to post a $15,000 bond to ensure that the children would be able to travel to the United States. Second, the court required Nacanabo to assume the cost of Djire's travel to Burkina Faso to visit the children. And third, given the children's move to Africa, the order modified Djire's parenting time, giving her two weeks of visitation in Burkina Faso annually (all at once or two weeklong periods) as well as allowing her, three times a week, to speak with the children via some form of electronic video conferencing. She was also provided parenting time during the summer, between the children's school years. In a subsequent order, and for reasons not pertinent to this appeal, the court changed many of these provisions.

¶ 9 The written memorandum order was entered on October 4, 2016. Djire, through counsel, filed two motions to reconsider, which were denied in January 2017. Djire did not appeal either the relocation order or the denial of the motions to reconsider.

¶ 10 Section 2-1401 Petition

¶ 11 Instead, in April 2017, pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)), Djire filed a petition to vacate the court's decision to allow the relocation. In the petition, she alleged that the court made grave errors in its judgment by barring evidence of Nacanabo's alleged abuse and failing to appoint a guardian *ad litem*. The court allowed Nacanabo to respond to the petition, but he failed to do so within the time allowed. Nearly five months after the initial response date, Nacanabo filed his response to Djire's 2-1401 petition. Djire objected, and Nacanabo filed a motion to allow the late response. On October 4, 2017, the court denied Nacanabo's motion to file a late response and simultaneously denied Djire's 2-1401 petition. The order does not explain the court's reasoning.

¶ 12 Djire appeals the denial of her 2-1401 petition.

¶ 13 ANALYSIS

¶ 14 Initially, we dismissed this appeal on jurisdictional grounds, due to a defect in the notice of appeal. We expressly noted that only the supreme court, under its supervisory authority, could permit this appeal to go forward. On Djire's motion, the supreme court did just that, granting Djire's motion for supervisory order and directing us "to treat the notice of appeal, filed on October 31, 2017, as an appeal from the circuit court's October 4, 2017, judgment denying movant's section 2-1401 petition."

¶ 15 We must be very clear about the posture of this case. The circuit court entered its written order granting Nacanabo's petition for relocation in October 2016 and denied the motion to

reconsider that order in January 2017. We are not reviewing the propriety of the court's decision to allow the relocation. Djire did not appeal those orders. Instead, we are only tasked with considering whether the court erred in denying Djire's section 2-1401 petition. It's a crucial distinction, because a section 2-1401 petition, though filed in the same court where the original proceeding took place, is itself a separate proceeding—a collateral attack on the original proceeding—and *not* a continuation of the original proceeding. *Stolfo v. KinderCare Learning Centers, Inc.*, 2016 IL App (1st) 142396, ¶ 25.

¶ 16 "The purpose of a petition under section 2–1401 is to bring before the court matters of fact not appearing in the record, which if known to the court at the time the judgment was entered, would have prevented its rendition." *Universal Outdoors, Inc. v. City of Des Plaines*, 236 Ill. App. 3d 75, 80 (1992). This information can present either a factual or legal challenge to a final judgment or order. *Warren County Soil and Water Conversation Dist. v. Walters*, 2015 IL 117783, ¶¶ 31, 41.

¶ 17 The type of challenge dictates the standard of review on appeal. *Id*. ¶ 31. When there is a "purely legal challenge" to the underlying judgment, we apply a *de novo* standard of review. *Id*. ¶ 47; see also *People v. Vincent*, 226 Ill. 2d 1, 5 (petition raised purely legal question by alleging that underlying judgment was void). But if, as here, the challenge to the final judgment is dependent on factual issues, the challenge "must be resolved by considering the particular facts, circumstances, and equities of the underlying case." *Id*. ¶ 50. In that instance, we follow the standards set forth in *Smith v. Airoom*, 114 Ill. 2d 209 (1986); see *Walters*, 2015 IL 117783, ¶¶ 51.

¶ 18 Namely, "the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense; (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 221. The circuit court's denial or grant of a section 2-1401 petition in those instances is reviewed for an abuse of discretion. *Walters*, 2015 IL 117783, ¶ 51; *Airoom*, 114 Ill. 2d at 221.

¶ 19 Because, as we noted above, a section 2-1401 petition is a separate proceeding collaterally attacking the judgment in the original proceeding, as opposed to being a continuation of the original proceeding, a section 2-1401 petition may not be used to obtain relief on a basis that has already been raised or could have been raised in the trial court. *People v. Kane*, 2013 IL App (2d) 110594, ¶ 17; *People v. Haynes*, 192 Ill. 2d 437, 460–61 (2000) ("Points previously raised at trial and other collateral proceedings cannot form the basis of a section 2–1401 petition for relief."). That is to say, apart from jurisdictional issues not present here, a section 2-1401 petition allows a party only to raise an " 'error of fact or the existence of a valid defense *[that] was not made to appear in the trial court'* " through no fault of the petitioner. (Emphasis added.) *Airoom*, 114 Ill. 2d at 222 (quoting *Brockmeyer v. Duncan*, 18 Ill. 2d 502, 505 (1960)).

¶ 20 Thus, we have consistently held that, if the factual or legal issue was already raised in the original trial proceedings or could have been raised there, a party may not invoke section 2-1401 to re-litigate that same question as a substitute for an appeal, or a second appeal, of that original judgment. See *Stolfo*, 2016 IL App (1st) 142396, ¶¶ 26-27 (plaintiff's claims in section 2-1401 petition "either were, or could have been, asserted in his direct appeal," and thus were "*res judicata* and may not be relitigated in [a] section 2-1401 proceeding, which is a separate action and not a continuation of the earlier action."); *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 756 (2006) (plaintiff's section 2–1401 petition "must fail because its grounds, namely, his relative indigence compared to his wife and her alleged misrepresentations as to her income and

obligations, were fully argued before the circuit court and, as such, could have been raised in a direct appeal which was not forthcoming. Accordingly, they cannot now be invoked through a collateral attack under section 2–1401."); *Niemerg v. Bonelli*, 344 Ill. App. 3d 459, 466 (2003) ("a section 2-1401 petition is not intended to provide for the review of an order from which a party could have taken a timely appeal, and such a petition is not to be invoked as a substitute for a party's right to appeal."); *Stacke v. Bates*, 225 Ill. App. 3d 1050, 1053 (1992) (acknowledging "well-established rule" that "it is 'not within the purpose of a [section 2–1401] proceeding * * * to [consider claims] which could have been presented in the trial court and on direct review * * *. Such claims which might have been raised, but were not, are waived.").

¶ 21 I. Exclusion of Evidence of Abuse

¶ 22 In her section 2-1401 petition, Djire first argues that the trial court erroneously excluded evidence of spousal and child abuse at the relocation hearing. She cites various documents to support her claim of domestic abuse. She alleges that "none of this evidence was submitted at the Court's hearing on Petitioner's request for removal. Upon information and belief, Respondent's prior counsel, Sidney Axelrod, made several attempts at the hearing to submit such evidence."

¶ 23 The petition is supported by the affidavit of Mr. Axelrod, in which he states:

> "During the course of the hearing, I attempted to question [Djire] and to submit documentation with regard to Respondent's allegation that she was a victim of domestic violence. Upon objection to such testimony and documents, the Court ruled that since there was a Martial Settlement Agreement that was part of and included any [*sic*] Judgment for Dissolution of Marriage entered February 9, 2015, that evidence of alleged prior abuse was not admissible."

¶ 24 Finally, her 2-1401 petition specifically alleges that she "demonstrated due diligence in presenting the above-mentioned claims in that her prior counsel attempted to present evidence of domestic violence and child abuse at the hearing on relocation of the minor children."

¶ 25 First, we are unable to verify that Djire's counsel attempted to question her about this evidence or the extent to which the court allowed or disallowed it. We do not have a transcript of the hearing on the relocation petition. We only have the transcript of the court's oral ruling and arguments on the motions to reconsider. But from this information alone, we can be sure of this much: Djire presented at least *some* evidence of domestic abuse in the original hearing on Nacanabo's petition to relocate. We know this because the court specifically discussed the evidence and found that it wasn't credible, and because Nacanabo called a rebuttal witness for the purpose of contesting the abuse allegations.

¶ 26 Though again we have no transcript of the relocation proceedings, we know from the court's ruling that it did not believe the claims of abuse. The court placed significant weight on the testimony of the rebuttal witness, a neighbor, whose testimony cast significant doubt, in the court's eyes, on Djire's abuse allegations. The court also believed that Djire was motivated to raise claims of abuse as a means of enhancing her residency status in the United States. The court also generally took issue with Djire's credibility on a number of grounds. (We are not saying whether we concur with these views—we have no transcript, and thus no ability to agree or disagree—only that these were the court's stated reasons.)

¶ 27 Simply put, the court did not say that Djire's evidence of domestic abuse was excluded or inadmissible; it said it didn't believe it.

¶ 28 That alone is a fatal problem. It is the appellant's burden on appeal to establish error, and absent a transcript of proceedings establishing the foundational facts and the trial court's

reasoning, we must presume that the trial court's order was correct on the law and facts. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984) (absent transcript of hearing on motion to vacate, no basis for holding trial court abused discretion); *Wells Fargo Bank, N.A. v. Hansen*, 2016 IL App (1st) 143720, ¶ 15 (court unable to review judgment for abuse of discretion without transcript of proceedings); *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56 (appellate court unable to "divine the trial court's reasoning" behind its decision in absence of report of proceedings and thus could not determine whether decision constituted abuse of discretion).

¶ 29 Here, Djire can cite to nothing in the record to support her claim that the trial court failed to consider this evidence, and what little information we have from the record reveals the opposite. In any event, absent a transcript of the relocation hearing at which the court supposedly excluded certain evidence, it would be impossible for us to find an abuse of discretion without knowing (1) that this exclusion of evidence did, in fact, occur and (2) the trial court's reasoning for it. See *Foutch*, 99 Ill. 2d at 391–92.

¶ 30 We recognize that Djire submitted an attorney's affidavit in the petition, in which counsel claimed that the court did, in fact, exclude the evidence. But we don't know what the trial court had to say about that affidavit—whether the trial court agreed with it, disputed it wholesale, or had a different take on matters. We don't know that because we likewise don't have a transcript of the hearing on the section 2-1401 petition itself. So we could not possibly find that the trial court erred without knowing its reasoning for its ruling. See *id.*

¶ 31 A separate and independent problem for Djire is that, excluded or otherwise, the issue of domestic abuse was litigated in the trial court, as evidenced by the trial court's discussion of it and as Djire herself (and her attorney) claim. Djire could have challenged the trial court's

judgment and reasoning on direct appeal but did not, instead asserting this error for the first time in a collateral attack under section 2-1401. We reiterate that section 2-1401 is not a second bite at the apple; it is not to be used as a substitute for direct appeal of the underlying judgment under attack; and thus issues that could have been raised on direct appeal may not serve as a basis for a section 2-1401 petition. *Stolfo*, 2016 IL App (1st) 142396, ¶¶ 26-27; *Smolinski*, 363 Ill. App. 3d at 756; *Niemerg*, 344 Ill. App. 3d at 466; *Stacke*, 225 Ill. App. 3d at 1053. The trial court's supposed exclusion of abuse evidence was front and center in the original relocation proceedings. It was incumbent on Djire to challenge that ruling on direct appeal. A section 2-1401 petition was an improper vehicle to raise that challenge.

¶ 32 If we permitted parties to skip timely motions to reconsider and direct appeals, with their strict 30-day deadlines, and let them raise factual and legal issues (jurisdictional ones aside) long after the running of the 30-day clock, even though they were before the court in the original trial proceedings, our system could not operate effectively and efficiently. Prevailing parties would be left in a state of purgatory, without the benefit of finality of judgments, wondering whether the losing party might reappear months later to raise arguments that properly belonged on direct appeal. The law does not and cannot permit that.

¶ 33 We recognize that around the time of the trial court's relocation judgment, Djire switched attorneys. That does not change the fact, however, that Djire did not appeal the relocation order on the basis on which she now challenges it. Nor does it allow us to excuse that failure by allowing an after-the-fact collateral challenge by way of section 2-1401. And as we noted earlier, even if we could do so and considered her claim on the merits, the absence of a sufficient record of the relocation hearing prevents us from determining whether any error occurred at all, much less an abuse of discretion.

¶ 34 For these reasons, we respectfully find no basis to overturn the trial court's decision on the first ground raised by Djire.

¶ 35 II. Failure to Appoint a Guardian *Ad Litem*

¶ 36 As for the second claimed error, the failure to appoint a guardian *ad litem*, we again find insurmountable obstacles to our review, as well as other problems.

¶ 37 The guardian issue is intrinsically linked to the issue of domestic abuse, though not exclusively based on that claim. The petition alleges that a guardian *ad litem* was needed to be the neutral party to investigate Djire's claims of abuse. But the petition also alleges that "[t]he highly unusual nature of such a removal request alone was cause for a GAL appointment."

¶ 38 In proceedings involving visitation and allocation of parental responsibilities, "the court may, on its own motion or that of any party," appoint a guardian *ad litem*. See 750 ILCS 5/506(a) (West 2016). Though Djire notes the "highly unusual nature" of a relocation request, we would note that the relocation statute does not speak in any way to the appointment of a guardian *ad litem*. See 750 ILCS 5/609.2 (West 2016). So it remains a discretionary decision by the trial court under section 506(a) of the Act. See 750 ILCS 5/506(a) (West 2016). As such, we typically review the decision to appoint a guardian *ad litem* for an abuse of discretion. *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 19.

¶ 39 Djire says the appointment of a guardian *ad litem* was mandatory. There are instances in which the court has a duty to appoint a guardian *ad litem*, most notably "when a minor is without proper representation." *Roth v. Roth*, 52 Ill. App. 3d 220, 226 (1977). Djire's argument is that a guardian's appointment was mandatory due to the abuse allegations, the disparity between an uneducated, French-speaking wife and a highly educated, English-speaking husband, and the fact that the children were moving to a different continent.

¶ 40 We have no basis to hold that the appointment of a guardian was mandatory. We know some of these circumstances to be true, but we don't know nearly enough, with the record as undeveloped as it is.

¶ 41 For one thing, it's unclear from the record whether either party requested the appointment of a guardian. And we have nothing definitive on whether the court considered, on its own motion, appointing one. As far as we can discern, the only reference to the issue of appointing a guardian comes from Nacanabo's response to the 2-1401 petition below. In it, Nacanabo states: "the Court discussed whether a child's representative/guardian ad litem and the possible reappointment of the previous child's representative was appropriate and or necessary and the conclusion by all was that it was not."

¶ 42 That doesn't make the statement true, but it's the most we have in terms of a record, which isn't much. We likewise know, as stated above, that the trial court found Djire's abuse allegations—the centerpiece of her claim for the appointment of a guardian—to be contrived, and we have no record on which to review whether the trial court's ruling in that regard was erroneous. Without a developed record, we could not possibly hold that the court was under a mandatory obligation to appoint a guardian *ad litem*. We can only review the failure to appoint a guardian for an abuse of discretion. See 750 ILCS 5/506(a) (West 2016); *Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 19.

¶ 43 And unfortunately, for that same reason—the absence of a record—we have no basis to find an abuse of discretion. We have no transcript of the relocation hearing, so we could not possibly find error without knowing whether any party requested a guardian or whether the trial court considered it at all.

¶ 44 And absent a transcript of the hearing on the section 2-1401 petition, we have no insight into the judge's reasons for why it denied that petition. For all we know, in response to the petition's argument about the appointment of a guardian, the trial court might have pointed out that this issue was thoroughly discussed at the relocation hearing, and the decision not to appoint a guardian was by agreement of the parties (as Nacanabo claimed in his written response). The court might have stated other reasons for disagreeing with this contention. We have no way of knowing, and thus no way to review the circuit court's exercise of discretion. As such, we must presume the decision was in accordance with the law and supported by the facts. *Foutch*, 99 Ill. 2d at 391–92; *Hansen*, 2016 IL App (1st) 143720, ¶ 15; *Williams*, 2015 IL App (1st) 122481, ¶ 56.

¶ 45 Once again, we would also note that this issue could have been the subject of a direct appeal by Djire from the relocation order. If she felt that it was error not to appoint a guardian, she could have raised that issue on direct appeal; she has given no sound reason why she was prevented from doing so. Yet again we repeat that we have never allowed section 2-1401 petitions to serve as substitutes for direct appeal, at least in contexts like this, concerning facts that were before the parties and the court at the time of trial. See *Stolfo*, 2016 IL App (1st) 142396, ¶¶ 26-27; *Smolinski*, 363 Ill. App. 3d at 756; *Niemerg*, 344 Ill. App. 3d at 466; *Stacke*, 225 Ill. App. 3d at 1053.

¶ 46 For either one of these reasons or both, we have no basis to find error with the trial court's judgment regarding the appointment of a guardian *ad litem*.

¶ 47 III. Other Issues Raised on Appeal

¶ 48 In her appellate brief, Djire also argues that the circuit court improperly weighed the factors in determining whether to allow the relocation. First, similar to what we've held above,

those issues could have been raised on direct appeal from that order. They do not belong in a collateral proceeding under section 2-1401.

¶ 49 Secondly, and equally as fatally, these claims were not pled in her 2-1401 petition. Her 2-1401 petition is limited to the issues of domestic abuse and the failure to appoint a guardian *ad litem*. As such, any other arguments are forfeited on appeal. See *U.S Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 24 ("defendant's section 2-1401 petition and her reply to U.S. Bank's response make no mention of the issue ***. Arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal."); *People v. Bramlett*, 347 Ill. App. 3d 468, 475 (2004) ("defendant did not raise this issue in his petition, and thus he has forfeited it.").

¶ 50 CONCLUSION

¶ 51 Proceedings involving the relocation of children are gut-wrenching for the parties. And allegations of abuse must always be taken seriously. We are not unsympathetic to the stakes or the emotions in this case. But without a developed record of any kind, and given the limited constraints of a section 2-1401 proceeding, we have no basis to overturn the trial court's ruling. We thus affirm the trial court's denial of the section 2-1401 petition.

¶ 52 Affirmed.