COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

TRIAL COURT DEPARTMENT
JUVENILE COURT DEPARTMENT
LAWRENCE DIVISION
DOCKET NO. [redacted]

Care and Protection of [redacted]

FATHER'S RULE 60(b)(4) MOTION FOR RELIEF FROM THE ADJUDICATION AND DECREE DATED SEPTEMBER 24, 2021, MOTION FOR RELIEF FROM THE §29B PERMANENCY ORDER DATED OCTOBER 20, 2021 AND REQUEST FOR A NEW TRIAL

Now comes [redacted] ("Father"), the biological father of [redacted] pursuant to Massachusetts Rule of Civil Procedure and Domestic Relations Procedure 60(b)(4)[1] (collectively "Rule 60(b)(4)"), and maintains that the September 24, 2021 finding that he is currently unfit, the adjudication that his child is in need of care and protection, and decree that terminating his parental rights serves the child's best interest ("Adjudication and Decree"), as well as the October 20, 2021 order approving the Department's proposed plan of adoption (§29B Permanency Order") are void as a matter of law. Father had no advanced notice of the hearing on the merits date, the permanency hearing date, and had no representation at the hearings despite being indigent. Father respectfully requests that this Honorable Court hereby vacate the Adjudication and

[1] "Although those rules do not, strictly speaking, apply to care and protection cases, we look to such rules by analogy." Adoption of Franklin, 99 Mass. App. Ct. 787, 802 (2021) citing Adoption of Yvonne, 99 Mass. App. Ct. 574, 582 (2021).

Decree, vacate the §29B Permanency Order, and thereafter schedule a new hearing on the merits and a new permanency hearing pursuant to G.L. c. 119, §29B ("§29B hearing") within a timeframe that will not deprive Father of his right to the effective assistance of counsel.

Relevant Facts and Procedural History

Father is the biological father of [redacted], born August 23, 2020. [Aff.1][2]. On August 25, 2020, the Department of Children and Families ("the Department") commenced the instant care and protection proceeding and received temporary custody of the child until a hearing on the merits pursuant to G.L. c. 119, § 26. [A.2]. The court also appointed [redacted]., on that day to represent Father. [A.2].

On April 29, 2021, the court via the probation department sent out notices to [redacted] ("Mother") and [redacted] that it scheduled a determination of indigency hearing for June 4, 2021 at 9:00 a.m. [A.5,10,11]. According to Father, [redacted] informed him of the hearing, the nature of the hearing and the hearing date. [Aff.9]. Father attests that he understood that to mean he would be assigned a new attorney, and he was happy about that because he was not happy about her representation to date. [Aff.9]. Father did not attend the June 4, 2021 hearing. [A.5].

At the June 4, 2021 hearing, a probation officer reported that none of the parents completed their indigency intake application [FTR audio], although it is unclear from the

[2] References to Father's affidavit are cited as [Aff.(para. no.)]; references to the Addendum are cited as [A.(page no.)]; and references to the audio recording of the June 4, 2021 hearing between 9:19:43 a.m. and 9:27:08 a.m. in courtroom 7 are cited as [FTR audio].

[3] Upon information and belief, Mother and [redacted] have a son [redacted] was the subject of an open care and protection and guardianship petition. [FTR audio].

record whether he was referring to Father as the notices of the hearing were addressed to Mother and to "[redacted]". [A.10,11]. The court nonetheless struck Attorney [redacted]s appearance solely because Father purportedly had failed to complete his application for an indigency determination with the court's probation department. [FTR audio]. The court also, from the bench, scheduled with the remaining parties a hearing on the merits for September 24, 2021 and rescheduled the §29B hearing from September 15, 2021 to be heard along with the hearing on the merits. No other hearings were scheduled between the June 4, 2021 hearing and the September 24, 2021 hearings, although DCF filed its notice of intent on June 8, 2021 and certified that it served notice "upon all counsel" on June 4, 2021. [A.5,6,9,12,13; FTR audio].

Father attests that he has continuously resided and received his mail at [redacted] since before the commencement of the instant action. [Aff.2]. Father attests that he never received notice from Attorney [redacted], the Department or the court of the hearing on the merits or the §29B hearing. [Aff.9,10]. Father attests he was never served with DCF's notice of intent. [Aff.9]. Father attests he had no communication with Attorney [redacted] about any upcoming court dates after her appearance was struck. [Aff.9]. Father attests that he learned of the hearing on the merits for the first time on September 24, 2021. [Aff.10]. Specifically, Father attests that he heard from Mother that morning, who heard from her mother, who her from her husband, who heard from child's counsel, that a hearing on the merits was scheduled for that day. [Aff.10]. Then, on his way to court, he heard in a similar manner that the hearing was going to be re-scheduled. [Aff.10].

Naturally, neither Father nor Mother, nor counsel on either's behalf, appeared at the September 24, 2021 hearings on the merits/§29B hearing. [A.6]. After the hearings concluded, the court found Father unfit, adjudicated his child in need of care and protection and found termination of his parental rights served the child's best interest.[4] [A.6,7]. The Department's ongoing social worker emailed Mother and Father at 11:45 a.m. to inform them that the court terminated their parental rights. [A.17]. The court mailed Father a notice of his right to appeal that same day. [A.7]. On October 20, 2021, the court entered its §29B Permanency Order. [A.7].

On October 14, 2021, Father went to the courthouse, completed his indigency intake application, and was found by the court to be indigent. [A.7,8]. The court then appointed counsel for Father on October 21, 2021, who timely filed a notice of appeal.[5] [A.8]. On November 22, 2021, CPCS assigned appellate counsel for Father. [A.8].

Argument

In this case, Father's due process rights were deprived because he never received any prior notice of the hearing on the merits, nor advanced notice that the §29B hearing had been re-scheduled and consolidated with the hearing on the merits even though his whereabouts were known to both the Department and the court. [Aff.9,10; A.1,15,16]. "[W]ithout adequate notice of the date of trial, the [parent] did not receive the due process to which [he] was constitutionally entitled." Adoption of Zev, 73 Mass. App. Ct. 905, 906 (2009).

[4] The Adjudication and Decree was docketed on September 29, 2021. [A.7].

[5] Mother and Child also appealed. [A.7,8].

It is vital that "due process rights must be honored whenever a parent is deprived of the right to raise [his] child." Custody of Lori, 444 Mass. 316, 321 (2005). Due process concerns are particularly heightened in child custody proceedings because "[p]arents have a fundamental liberty interest in maintaining custody of their children, which is protected by the due process clause of the Fourteenth Amendment to the United States Constitution". Care and Protection of Erin, 443 Mass. 567, 570 (2005). Of course, the bedrock of due process is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner". Adoption of Zev, 73 Mass. App. Ct. at 905. And not just any notice but notice "reasonably calculated to reach interested parties, under all the circumstance, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". Adoption of Hugh, 35 Mass. App. Ct. 346, 350 (1993). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id.

A judgment rendered in a manner inconsistent with due process of law is void. See Gianareles v. Zegarowski, 467 Mass. 1012, 1014 (2014); see also Harris v. Sannella, 400 Mass. 392, 395 (1987) (a judgment is void if the court from which it issues failed to provide due process of law). "If the judgment is void . . . for failure to conform to the requirements of due process of law, the judge must vacate it." Adoption of Rory, 80 Mass. App. Ct. 454, 457 (2011). Moreover, if a judgment is void, then the party is entitled to relief under rule 60 (b)(4) as a matter of law. see O'Dea v. J.A.L., Inc. 30 Mass. App. Ct. 449, 456 n.13 (1991).

Here, the court scheduled a hearing for June 4, 2021 to determine each parent's indigency status.[6] [A.5]. Father was not present for said hearing. [A.5]. The probation officer reported to the court that none of the parents had completed their indigency intake application. [FTR audio]. The court struck the parents' court-appointed attorneys for no other stated reason than the application for an indigency determination was incomplete [FTR audio], i.e., Father purportedly failed to demonstrate he was indigent.[7] See, e.g., Adoption of Holly, 432 Mass. 680, 688 (2000) (statutory language of G.L. c. 119, § 29 requires a parent to first demonstrate he or she is indigent before counsel is appointed).

Striking court-appointed counsel because Father failed to demonstrate his indigency did not, however, relieve the Department or the court from providing Father personally with notice of any subsequent court proceeding, especially a hearing on the merits. After all, Father's status was now as a pro se litigant. So, when the court scheduled a hearing on the merits and re-scheduled the §29B hearing to September 24, 2021 during a hearing Father did not attend and his court-appointed attorney was struck, Father was thereafter entitled to personal notice of both hearings, yet he received notice of neither. See, e.g., Care and Protection of Yarrick, 96 Mass. App. Ct. 903, 904 n.2 (2019) (whether the father had notice that his attorney withdrew was questionable and no evidence he had actual notice of the trial date).

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[6] It is unclear from the limited record whether the indigency hearing even concerned Father as the notice sent by the court was addressed only to Mother and "[redacted]". [A.10,11]. If Father was not the subject of the indigency hearing, then the court mistakenly striking his counsel opens a Pandora's box of other due process violations.

[7] The court left the door open to reconsider each parent's indigency status and re-appoint counsel if they later demonstrate their indigency. [FTR audio].

In this case, there is no evidence that the Department or the court notified Father personally and directly, whether in hand, by mail, or electronically of either September 24, 2021 hearing even though his whereabouts were known to both institutions.[8] Cf. Adoption of Holly, 438 Mass. at 686. Father attested he has resided at and received his mail at [redacted] since before the commencement of this proceeding. [Aff.1]. It is the address listed on his CARI (Exhibit #18) since his last offense occurring on August 21, 2019. [A.16]. The court sent notice of his right to appeal the Adjudication and Decree to him on the same day as the hearing commenced and concluded. [A6,7]. Similarly, the Department's Exhibit #6 shows it had his address since at least November 2020. [A.14,15]. The Department social worker even e-mailed Father immediately following the hearing on the merits to notify him that the court terminated his parental rights, evidencing the Department could have notified him electronically of the hearing on the merits at any time after the June 4, 2021 hearing. [A.17].

Rather, Father candidly explains that he only learned of the hearing on the merits on the day of the hearing itself, through the grapevine, namely, from Mother, who heard from her mother, who heard from her husband, who heard from child's counsel that morning. [Aff.10]. Then, on his way to court, he heard through the same grapevine that it would be re-scheduled. [Aff.10]. The schoolyard "Telephone Game" on the morning of trial, however, is by no means adequate notice to a party to any court or administrative proceeding, much less notice of a hearing that could result in the permanent severance of

[8] The court did not instruct Attorney [redacted] to perform any post-hearing ministerial tasks after it struck her appearance. [FTR audio]. Father attests that he last heard from Attorney [redacted] on or about June 4, 2021, by text. [Aff.9].

the constitutionally protected parent-child relationship. See, e.g., Juvenile Court Rule 7(E) (even motions that require a hearing must be served at least seven days in advance by either mail or by delivering or electronically). Accordingly, because Father's fundamental due process right to notice and his subsequent opportunity to be heard and rebut the allegations against him were deprived, the underlying Adjudication and Decree is void and must be vacated.

This court must also vacate the §29B Permanency Order approving the Department's proposed plan of adoption as void for lack of proper notice to Father and for denying him the opportunity to file his response or objection. Juvenile Court Standing Order 1-18(4), which governs notice of a §29B hearing, provides:

> No less than forty-five (45) days prior to the [§29B] hearing date, the clerk's office shall send notice of the hearing to the Department, . . . [and] to the parents, by mailing to their last known addresses. . . Such notice shall inform the parties of the date, time, and location of the hearing, of their right to counsel pursuant to G.L. c. 119, § 29 and the right to file objections pursuant to Rule 6.

Father's rights were intact, and he became a pro se litigant after the court struck his counsel and at the time the court rescheduled the §29B hearing from September 15, 2021 to September 24, 2021. Thus, he was entitled to receive notice personally and directly by mail from the clerk's office no later than August 10, 2021 of the date, time and location of the new §29 hearing date. Father attested that he never received such notice and there is no record evidence the court sent such notice. And the court was aware of Father's address because it was listed on, among other documents, his CARI and it sent him notice of his right to appeal the Adjudication and Decree. Accordingly, the §29B Permanency Order approving the Department's proposed permanency plan of adoption is void and must also be vacated.

Lastly, the only adequate remedy is a new trial. The court appointing counsel after the hearing on the merits and §29B hearing does not remedy that initial due process deprivation. Accordingly, simply re-opening the evidence will not suffice. Without Father or legal counsel present at the initial hearing on the merits or §29B hearing, the Department was able to present evidence against Father at will. The Department introduced exhibits without objection and examined its witnesses without fear of objection or cross-examination. "Fundamental fairness, as well as due process concerns requires that a parent be given the opportunity to rebut adverse allegations concerning his or her child rearing capabilities" Adoption of Rory, supra; see also Adoption of Edmund, 50 Mass. App. Ct. 526, 529 (2000) (Due process requires affording the parent the chance to rebut adverse allegations against him). Anything short of a new trial undermines Father's fundamental right to a full and fair trial, especially now that he has the assistance of counsel.

A new hearing on the merits and a new §29B hearing are also the most pragmatic remedies to protect Father's right to a full and fair hearing. If the evidence is only re-opened, in addition to presenting Father's case, Father's counsel would still require the opportunity to rebut DCF's case by filing motions in limine against the Department's exhibits and recalling the Department's witnesses for cross-examination, but only after counsel has had the opportunity to review the testimonial transcripts and file motions to strike inadmissible testimony, such as any hearsay, opinion and the like. This may invite the Department to then re-conduct direct examination. Also, because the legal standard is current parental unfitness, the gap from the initial hearing on the merits to present would also have to be explored by all parties, including the Department. Accordingly, the

Adjudication and Decree as well as §29B Permanency Order are void and a new hearing on the merits and §29B hearing are required.

Wherefore, Father respectfully requests this court:

(1) Vacate the Adjudication and Decree;

(2) Vacate the §29B Permanency Order;

(3) Schedule a new hearing on the merits;

(4) Schedule a new §29B hearing; and

(5) All other just and equitable relief.

Respectfully submitted:
Appellant-Father, [redacted]
By his attorneys

DATED: December 27, 2021

CERTIFICATE OF SERVICE

I, [redacted], hereby certify that on December 27, 2021, I served a copy of Father's within motion by electronic mail to the following:

[redacted]

[redacted]

Addendum