



**In the Missouri Court of Appeals
Western District**

S.L.C. and M.S.C.,)
Respondents,) **WD84549**
v.)
M.M.,) **FILED: February 15, 2022**
Appellant.)

**APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY
THE HONORABLE LESLIE M. SCHNEIDER, JUDGE**

**BEFORE DIVISION THREE ANTHONY REX GABBERT, PRESIDING JUDGE,
LISA WHITE HARDWICK AND THOMAS N. CHAPMAN, JUDGES**

M.M. (“Father”) appeals the denial of his Rule 74.06(b) motion for relief from the judgment terminating his parental rights to his son, N.M.J.W. (“Son”), and granting the request of S.L.C. (“Mother”) and M.S.C. (“Stepfather”) to adopt Son. Because the court failed to provide Father notice and an opportunity to be heard on his Rule 74.06(b) motion, we set aside the judgment denying his Rule 74.06(b) motion and remand the case for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL HISTORY

Son was born in December 2008 to Father and Mother. Father has been incarcerated in the federal prison system since November 2008. In January 2019,

Mother and Stepfather filed a petition for stepparent adoption alleging that Father had abandoned Son. They requested that Father's parental rights be terminated and Stepfather be allowed to adopt Son.

The court appointed counsel to represent Father. A hearing on the adoption petition was held on September 5, 2019. Father, who was incarcerated in a federal prison in Oklahoma at the time, did not appear in person. Appointed counsel appeared on Father's behalf. Following the hearing, the court entered its judgment on September 10, 2019, terminating Father's parental rights on the basis of abandonment and granting the adoption.

On February 18, 2020, Father filed a *pro se* motion in this court seeking leave to file a notice of appeal of the adoption judgment out of time.¹ We sustained Father's motion and ordered that he file his notice of appeal on or before March 9, 2020. After Father filed his notice of appeal on March 12, 2020, we dismissed his appeal as untimely filed.

On September 8, 2020, Father filed a *pro se* motion in the circuit court for relief from the adoption judgment under Rule 74.06(b). Father asserted several grounds in his motion, including that his appointed counsel in the adoption proceeding provided ineffective assistance of counsel.² The court set Father's motion for hearing on February 26, 2021. The court's notice of entry and Case.net

¹ All of Father's filings from that point forward were *pro se*.

² "[P]ursuant to § 211.462.2, [RSMo 2016], a natural parent has a statutory right to counsel in a termination of parental rights proceeding and, therefore, an implied right to effective assistance of counsel." *In re J.P.B.*, 509 S.W.3d 84, 97 (Mo. banc 2017).

indicate that the court mailed its notice of this hearing date to Father on February 19, 2021, and provided electronic notice to Father's appointed counsel from the adoption proceeding at the same time. At Mother and Stepfather's request, the hearing was continued and reset for March 2, 2021. The court's notice of entry and Case.net indicate that Father's appointed counsel from the adoption proceeding received electronic notice of the new March 2, 2021 hearing date on February 24, 2021. The record does not indicate that notice of the new hearing date was mailed to Father.

On March 2, 2021, the court held a hearing on Father's Rule 74.06(b) motion. Mother and Stepfather appeared in person and by counsel. Still incarcerated, Father did not appear, and his appointed counsel from the adoption proceeding did not appear. The court denied Father's motion.

On March 10, 2021, the notice of entry that the court had mailed to Father notifying him of the original February 26, 2021 hearing date on his Rule 74.06(b) motion was returned to the court as undeliverable. The envelope indicated that Father was no longer at that address. On March 17, 2021, Father filed a notice of appeal from the denial of his Rule 74.06(b) motion. At the same time, he sent a letter to the court in which he indicated that he had been moved to a federal transfer center in Oklahoma and was "in transit" to a federal prison camp in Texas. He provided the court with the addresses of the transfer center in

Oklahoma and the prison camp in Texas.³ On March 30, 2021, Father filed a motion for reconsideration/rehearing of his Rule 74.06(b) motion in which he alleged, *inter alia*, that his transfer between institutions caused him not to receive proper notice of the hearing on the motion. The next day, the court entered an order stating that it was without jurisdiction to rule on any pending motion.

On April 9, 2021, Father filed a motion in this court seeking leave to file a late notice of appeal from the denial of his Rule 74.06(b) motion. We denied his motion.⁴

On May 11, 2021, Father filed a motion in the circuit court to set aside the denial of his Rule 74.06(b) motion. In this motion, he again asserted, *inter alia*, that he did not receive proper notice of the hearing on his Rule 74.06(b) motion. The court denied the motion. Father filed this appeal. After this court notified Father that he failed to include a copy of the judgment with his notice of appeal, the circuit court entered a judgment on June 15, 2021, stating:

1. Respondent's Motion to set aside judgment denied May 11, 2021.
2. Respondent's Motion to Reconsider/Rehearing filed 3/30/21 denied.
3. Respondent's [Rule 74.06(b)] Motion for relief from judgment denied March 2, 2021.

³ Case.net indicates that the court updated Father's address at that time based on his letter. On March 29, 2021, Father filed a notice of change of address, again stating that his new address was the prison camp in Texas.

⁴ The Case.net record in that case, No. WD84450, indicates that Father did not file a copy of the judgment along with his motion for leave to file a late notice of appeal. This court notified Father that, if a copy of the judgment was not received within five days, his motion for leave might be denied. Father failed to file a copy of the judgment within five days.

The Boone County Circuit Clerk then filed a copy of the judgment with this court.

ANALYSIS

Father raises six points on appeal. Because it is dispositive, we will address only his claim in Point I that the court's denial of his Rule 74.06(b) motion was erroneous because the court violated his right to due process by failing to provide him notice of the hearing date on his motion and an opportunity to be heard. He argues this violation of his right to due process by failing to give him notice of the hearing rendered the judgment denying his Rule 74.06(b) motion void. *See Forsyth Fin. Grp., LLC v. Hayes*, 351 S.W.3d 738, 741 (Mo. App. 2011) (noting that "judgments have been declared void [pursuant to Rule 74.06(b)(4)] for lack of due process when litigants have been denied notice of critical proceedings").⁵

The circuit court "has a duty to send parties notice of their trial setting once ordered." *S.S. by and through T.R.S. v. K.E.J.*, 607 S.W.3d 266, 269 (Mo. App. 2020). Rule 43.01(a)(3) requires that each party be served with "[e]very written notice, appearance, demand, offer of judgment, order, and similar paper that by statute, court rule, or order is required to be served." These provisions for service protect a party's due process rights to notice and an opportunity to be heard. *See*

⁵ "Litigants can request relief from a void judgment pursuant to Rule 74.06(b) at any time." *Forsyth Fin. Grp.*, 351 S.W.3d at 740 (citation omitted). Furthermore, "whether a judgment should be vacated as void is a question of law that we review *de novo*, giving no deference to the trial court's determination." *Id.*

S.S., 607 S.W.3d at 269. Indeed, to satisfy due process requirements, “a party must be informed of any proceeding which is to be accorded finality either by actual notice or by some *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections.” *Am. Econ. Ins. Co. v. Powell*, 134 S.W.3d 743, 746 (Mo. App. 2004) (internal quotation marks and citations omitted).

The record indicates that, after the hearing on Father’s Rule 74.06(b) motion was continued at Mother and Stepfather’s request, the court sent an electronic notice of the new hearing date to Father’s appointed counsel from the adoption proceeding. While service on a party’s counsel of the hearing date on a Rule 74.06(b) motion is proper under Rules 74.06(c) and 43.01(b), *see Tompkins v. Baker*, 997 S.W.2d 84, 88 (Mo. App. 1999), the record is unclear whether Father’s appointed counsel from the adoption proceeding was actually representing Father at that time.

Rule 115.03(c) provides that counsel appointed for parents in juvenile cases “shall serve at all stages of the proceeding . . . , including appeal, unless relieved by the court for good cause shown. If no appeal is taken, services of counsel may be terminated following entry of an order of disposition.” Rule 115.04(c) provides that “[c]ounsel may withdraw from representing a party only with leave of court and only upon compliance with Rule 4 and any applicable local court rules.”

In the adoption judgment, the court did not state that appointed counsel's services were terminated at that time, but the court did order Father's appointed counsel to "submit an invoice for her attorney fees to be awarded by the Court." Moreover, while appointed counsel never filed a motion to withdraw from representing Father, she did not file an appeal from the adoption judgment or any other filings on Father's behalf after the entry of the adoption judgment. Father filed his appeal from the adoption judgment *pro se*. After this appeal was denied as untimely, Father filed several motions and other filings, all *pro se*. Yet, the court continued to send electronic notices to appointed counsel, including the notice of the rescheduled hearing date on Father's Rule 74.06(b) motion, which the court sent *only* to appointed counsel.

The court's statements in the hearing on Father's Rule 74.06(b) motion, however, indicate that the court was uncertain whether appointed counsel was actually representing Father at that time. At the start of the hearing, during which only Mother, Stepfather, and their counsel appeared, the court asked if Father's appointed counsel was "still in this case." Mother and Stepfather's counsel responded, "Well, we're not sure. It's been resolved for quite some time now, so I wasn't sure if she and the Guardian ad Litem . . . were planning to appear or not." The court then stated, "Apparently not." After confirming that Father had filed the Rule 74.06(b) motion *pro se* and that he was not in the courtroom, the court denied the motion.

“Unless the record establishes that the complaining party was provided notice of a trial setting, we may conclude the complaining party did not receive notice.” *S.S.*, 607 S.W.3d at 270 (citation omitted). Given that only appointed counsel received notice of the hearing date, appointed counsel did not appear at the hearing, and the court expressed uncertainty about whether appointed counsel was “still in this case,” the record does not establish that Father was provided notice of the hearing date on his Rule 74.06(b) motion.⁶ We conclude that he did not receive such notice. *Id.* The failure to provide Father notice of the hearing date on his Rule 74.06(b) motion violated his right to due process and rendered the judgment denying the motion void. *See Kerth v. Polestar Entm’t*, 325 S.W.3d 373, 389 (Mo. App. 2010) (setting aside a judgment as void where defendants were not given notice of trial setting).


Father is entitled to notice and an opportunity to be heard on his Rule 74.06(b) motion.⁷ We express no opinion on the merits of any of his claims in his motion.

⁶ The record demonstrates that Father also did not receive notice of the original hearing date, as the notice was returned to the court as undeliverable on March 10, 2021. According to Father’s letter to the court, filed on March 17, 2021, he did not receive the notice of the original hearing date because he had been moved to a federal transfer center in Oklahoma and was “in transit” to a federal prison camp in Texas. Father noted his change of address in that letter and in a subsequent notice of change of address filed on March 29, 2021. It is a “party’s responsibility to keep the court or counsel informed of any address changes,” and if a party neglects that responsibility, “he should have no cause to complain about the court’s action.” *Kerth v. Polestar Entm’t*, 325 S.W.3d 373, 383 (Mo. App. 2010). We need not decide whether Father satisfied his responsibility to keep the court informed of his change of address because the record shows that the court did not attempt to mail the notice of the new hearing date to Father at his prior address.

⁷ This does not mean that Father is entitled to attend the hearing in person. A party has no constitutional or statutory right to appear in person at a civil trial. *J.P.B.*, 509 S.W.3d at 97. “It is well settled that a prisoner is not entitled to perfect access to the courts; an incarcerated person is

CONCLUSION

The judgment denying Father's Rule 74.06(b) motion for relief from the adoption judgment is set aside, and the cause is remanded for further proceedings consistent with this opinion.



LISA WHITE HARDWICK, JUDGE

ALL CONCUR.

entitled to 'meaningful access.'" *In re C.I.G.*, 616 S.W.3d 758, 763 (Mo. App. 2021) (quoting *Call v. Heard*, 925 S.W.2d 840, 846 (Mo. banc 1996)). This "right of access is satisfied by the presence of sufficient alternatives to a personal appearance when the prisoner makes a timely request." *Id.*