



DUE PROCESS IN STATE COURTS SUMMARY SHEET

Christopher Curry, DV LEAP, George Washington University Law Student, December 2007

- I. Within the past 15 years, there have been ninety published state supreme court and appellate court opinions addressing due process in family courts.
 - A. This represents 44 states and the District of Columbia. It also represents thirty state supreme court opinions and sixty state appellate court opinions.
 - B. Six states lack published opinions dealing with due process in family court within the last 15 years: AZ, AK, HA, ID, NV, NJ
 - C. Most frequent – Alaska and Florida with 7 cases each, followed by Texas with 6. Most states have less than four.
- II. Of the cases, approximately half (46) have found due process violations in cases addressing notice, right to a hearing, ex parte communications, in camera interviews, and dealings with GALs
 - A. Example: Ex parte R.D.N., 918 So. 2d 100 (Ala. 2005)(trial court's ex parte communications with a child's guardian ad litem, and reliance upon her ex parte recommendation, that a mother retain custody violated father's due process rights)
 - B. These cases were roughly equal on finding violations for mothers and fathers.
- III. Cases finding no due process violations deal only with notice and hearing issues. None deal with ex-parte communications, in camera interviews, or GALs.
 - A. Example: Carroll v. Law, 2005 WY 44 (Wyo. 2005) (mother's claims that she was denied due process rejected because she did not provide a transcript for review).
 - B. Two-thirds of these cases denied that mothers had their due process rights violated.
- IV. Courts differ on how they deal with due process issues. In finding insufficient notice, one court gave a lengthy analysis of the interests at stake in due process. Keisling v. Keisling, 92 S.W.3d 374, 377 (Tenn. 2002). In finding sufficient notice, one court did not even mention due process and instead based its decision on "lack of surprise" with no legal analysis, only factual analysis. Reimche v. Reimche, 1997 ND 138, P48 (N.D. 1997).

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MEMORANDUM

TO: DV LEAP DECEMBER 2007 SYMPOSIUM ATTENDEES

FROM: CHRIS CURRY, DV LEAP INTERN

SUBJECT: DUE PROCESS AND CHILD CUSTODY IN STATE COURTS

The Due Process clauses of the Fifth and the Fourteenth Amendments state that the government cannot deprive people of life, liberty, or property without due process of law. U.S. CONST. amend. V, XIV. These amendments ensure that the government respects the essential rights of its citizens while exercising its authority. At their heart is the concern for fundamental fairness. In state family courts, the due process rights of parents involved in child custody disputes involve several procedural rights including adequate notice and adequate hearing. Additionally, the manner in which courts deal with guardians ad litem, ex parte communications with a party, and in camera interviews with children frequently raise issues of fundamental fairness. In many instances, these issues result in due process violations. Below is a brief summary of how state appellate and state supreme courts have treated these due process violations. Of ninety cases dealing with due process in family courts within the past fifteen years, forty-six state courts, including sixteen state supreme court cases and thirty appellate court cases, found due processes violations of varying types.

Insufficient Notice

First, eighteen state courts across the country, including five state supreme court cases and thirteen appellate court cases, have found that a party to a child custody dispute has had insufficient notice of a proceeding or issues to be heard at the proceeding. In these cases, the insufficient notice constituted a violation of due process. Of these eighteen courts, eight ruled that modifying visitation or custody decree without giving notice violated due process rights.

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(See Appendix A, 1.) Three courts found that due process was violated when inadequate notice was given that a finding of contempt could be made at a particular hearing. (See Appendix A, 2.) Three courts ruled that there was a due process violation when there was no notice to one party of the other's ex parte communications with the court. (See Appendix A, 3.) One court ruled that a trial court could not impose joint custody when a hearing only discussed issues related to sole custody and neither party had requested joint custody. (See Appendix A, 4.) Furthermore, one court ruled that the parties to a custody dispute must receive sufficient notice of the possibility that a non-party will receive custody at a hearing. (See Appendix A, 5.) Additionally, one court found inadequate notice to a mother of the type of sanctions sought by a father against her. (See Appendix A, 6.) Finally, one court ruled that giving res judicata effect to a civil protection order's custody provisions during a divorce hearing violates due process. (See Appendix A, 7.)

Insufficient Hearing

Twenty-two state courts across the country, including nine state supreme court cases and fourteen appellate cases, have found violations of due process through inadequate hearings. Of these twenty-two courts, ten ruled that failure to allow testimony at a hearing made that hearing inadequate and thus violated due process. (See Appendix A, 8.) Nine ruled that modifying a visitation or custody decree without holding an evidentiary hearing violated due process rights. (See Appendix A, 9.) One court ruled that a show cause hearing was not an adequate forum to decide custody and thus violated the father's procedural due process rights. (See Appendix A, 10.) Furthermore, one court found that the standard used at a hearing to determine custody constituted a violation of due process because it improperly devalued the rights of a natural parent over a non-parent. (See Appendix A, 11.) Finally, one court found that due process was

violated when a father's trial counsel withdrew a day before the trial and no continuance was granted to allow the father to find another lawyer. (See Appendix A, 12.)

Ex Parte

Three courts across the country, including one state supreme court case and two appellate cases, have found further due process violations in the handling of ex parte communications. These courts have found that a trial court can't rely on ex parte communications or reports to determine custody because to do so violates the other party's due process rights. (See Appendix A, 13.)

In Camera Interviews

One court found a due process violation when the trial court interviewed a child in camera without the consent of all parties. In Barret v. Wright, a mother challenged judgments made against her after the trial court conducted an in camera interview with her child without her consent. 897 So. 2d 398, 398 (Ala. Civ. App. 2004). The appellate court found that this constituted a due process violation because "to sanction such a procedure would fly squarely in the face of the constitutional right of litigants to a public trial." Id. at 401 (internal citation omitted).

Guardian Ad Litem (GAL)

Finally, two courts have found bias or a potential for bias from guardians ad litem and thus violated due process. In Patel v. Patel, the court found that the GAL did not conduct an objective or balanced investigation and heavily favored the father. 347 S.C. 281, 286-287 (S.C. 2001). The appellate court therefore discounted the GAL's opinion and remanded the case for a new custody hearing. Id. at 289. Furthermore, in People v. Delores W. (In re Mark W.), the court ruled that a bar attorney who spoke to a mother about acting as her attorney in a

termination of parental rights case could not later use the information gained from this conversation to take a position adverse to her when acting as her GAL. 371 Ill. App. 3d 81, 102 (Ill. App. Ct. 2006).

Appendix A

1. Potter v. Potter, 55 P.3d 726 (Alaska, 2002) (modifying visitation decree without giving notice violated former husband's due process rights).
Keisling v. Keisling, 92 S.W.3d 374 (Tenn. 2002) (not providing sufficient notice to mother that custody was to be addressed at hearing was due process violation).
Cervieri v. Cervieri, 814 So. 2d 528 (Fla. 4th DCA 2002) (denied the husband due process by changing custody of the child without the husband having received fair notice of the wife's request for modification).
Ryan v. Ryan 784 So.2d 1215 (Fla.App. 2 Dist. 2001) (due process violated when custody and visitation rights were terminated based upon father's petition that did not request such relief or give mother notice that the trial court could take such action).
Roque v. Paskow, 693 So.2d 999 (Fla.App. 4 Dist. 1997) (order modifying temporary custody violated the mother's due process rights to notice and an opportunity to be heard).
Van Schaik v. Van Schaik, 90 Md.App. 725 (Md.App. 1992) (trial court failed to afford the parties due process of the custody hearing because of lack of notice).
Vincent v. Griffin, 872 So. 2d 676 (Miss. 2004) (chancellor should have required service of an additional Rule 81 summons on the father before holding the hearing and assessing him with attorney fees).
In re Campbell, 1998 Tenn. App. LEXIS 634 (Tenn. Ct. App. 1998) (biological father not given adequate notice that hearing would deal with custody issues).
2. Sims v. Williams, 2006 Tenn. App. LEXIS 58 (Tenn. Ct. App. 2006) (appellant father had no notice that he was facing criminal contempt when he failed to appear at custody hearing);
Everett v. Parker, 2005 PA Super 404 (Pa. Super. Ct. 2005) (Because notice of contempt hearing was deficient, ex parte contempt and custody transfer orders violated mother's due process rights)
Khan v. Khan, 921 P.2d 466 (Utah Ct. App. 1996) (husband found in contempt for interfering in wife's visitation did not have reasonable notice that any issue of contempt would be before the court).
3. Evans v. Evans, 2007 Ala. Civ. App. LEXIS 496 (Ala. Civ. App. 2007) (order awarding the father custody was entered improperly after an ex parte hearing of which the mother had no notice).
Loudermilk v. Loudermilk, 693 So.2d 666 (Fla App. 2 Dist. 1997) (entry of emergency order without notice to father deprived father of procedural due process right).
Dep't of Children's Servs. v. K.G. (In re: K.L.H.), 2003 Tenn. App. LEXIS 863 (Tenn. Ct. App. 2003) (court violated the mother's due process rights by accepting uncontested testimony at an ex parte hearing without notice).

4. Zahl v. Zahl, 273 Neb. 1043 (Neb. 2007)
5. Elton H. v. Naomi R., 119 P.3d 969 (Alaska 2005).
6. In re Marriage of Reese & Guy, 73 Cal.App.4th 1214 (Cal.App.4 Dist. 1999).
7. In re Marriage of Jackson, 315 Ill.App.3d 741 (Ill.App. 3 Dist 2000).
8. State ex rel. Milner v. Carlton, 223 S.W.3d 896 (Mo. Ct. App. 2007) (temporary custody order should not have been entered in favor of father without a hearing).
Grew v. Knox, 265 Mich. App. 333 (Mich. Ct. App. 2005) (temporary custody should not have been awarded to father without evidentiary hearing);
Walker v. Walker, 960 P.2d 620 (Alaska 1998) (because appellant squarely contested appellee's allegations, appellant was entitled to an evidentiary hearing)
Berglass v. Berglass, 804 A.2d 889 (Conn.App. 2002) (court improperly made modifications without hearing).
In the Interest of N.H. v. T.H., 41 S.W.3d 607 (Mo. Ct. App. 2001) (trial court erred in entering an amended judgment without notice and without giving the parties an opportunity to be heard).
Mock v. Mock, 2004 ND 14 (N.D. 2004) (district court erred when it did not grant an evidentiary hearing because the father's allegations established a prima facie case for change of custody)
A.H. v. P.B., 2 P.3d 627 (Alaska 2000) (without conducting a hearing, trial court granted mother's request to reduce father's telephonic contact).
Pryweller v. Pryweller 218 Ill.App.3d 619 (Ill.App. 1 Dist.1991) (mother improperly held in contempt without full hearing).
Matter of Marriage of Glenn, 18 Kan.App.2d 603 (Kan.App.1993) (without any apparent justification, the trial court denied the father the opportunity of a full and complete hearing).
9. In re Hoffman, 97 Ohio St. 3d 92 (Ohio 2002) (parties not given opportunity to properly cross-examine guardian ad litem at hearing).
Pope v. Pope, 901 So. 2d 352 (Fla. 1st DCA 2005) (husband was improperly denied evidentiary hearing when court extended protection order).
Davis v. Schmidt, 210 S.W.3d 494 (Mo. Ct. App. 2007) (trial court abused its discretion by allocating to the father majority of guardian ad litem fees without hearing from guardian regarding investigation of father's allegations).
In re Marriage of Kinnan, 131 Wn. App. 738 (Wash. Ct. App. 2006) restriction had been imposed because the husband, then the mother's boyfriend, had pleaded guilty to communication with a minor for immoral purposes. On appeal, the court reversed the trial court's order that removed the restriction and remanded for an appropriate hearing.
In re Parentage of Jannot, 110 Wn. App. 16 (Wash. Ct. App. 2002) (trial judge simply checked off on a form which said that there had not been an adequate showing to warrant a hearing, but appellate court found hearing necessary).
Wright v. Wright, 181 S.W.3d 49 (Ky. Ct. App. 2005) (inadequate hearing where the lower court asked no questions of either party and impermissibly relied upon extrajudicial evidence in entering the DVO)
Henry v. Johnson, 192 W. Va. 82 (W. Va. 1994) (the special master did not hear enough evidence to adequately resolve the issues).

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Tyree v. Evans, 728 A.2d 101 (D.C. 1999) (appellate court concluded that although the trial judge could place reasonable limits on cross-examination, she erred by precluding cross-examination altogether).

Lashbrook v. Lashbrook 957 P.2d 326 (Alaska 1998) (right to a hearing on former wife's petition to modify custody was not satisfied by an earlier hearing in a domestic violence proceeding that the trial court subsequently consolidated with the divorce proceeding).

Jackson v. Jackson, 961 P.2d 393 (Wyo. 1998) (unreported hearing did not provide the parties with a meaningful opportunity to have been heard or to have developed the evidentiary record.).

10. VinZant v. Elam 977 P.2d 84 (Alaska 1999)

11. Wilson & Wilson, 199 Ore. App. 242 (Or. Ct. App. 2005) (holding that the best interests of the child standard was improperly considered over the rights of a natural parent).

12. Sims v. Day, 2004 WY 124 (Wyo. 2004).

13. Ex parte R.D.N., 918 So. 2d 100 (Ala. 2005) (trial court's ex parte communications with a child's guardian ad litem, and reliance upon her ex parte recommendation, that a mother retain custody violated the father's fundamental right to procedural due process)

Pierce v. Tello, 868 So. 2d 1253 (Fla. 4th DCA 2004) (judge violated father's due process rights when she based her order suspending father's contact with child on ex-parte communication in form of faxed lab report showing he tested positive for illegal drugs)

Van Schaik v. Van Schaik, 90 Md.App. 725 (Md.App.,1992) (termination of father's joint custody rights based on reports to which father had been denied access constituted due process violation).



MEMORANDUM

TO: DV LEAP DECEMBER 2007 SYMPOSIUM ATTENDEES

FROM: CHRIS CURRY, DV LEAP INTERN, GEORGE WASHINGTON LAW STUDENT

SUBJECT: DUE PROCESS AND CHILD CUSTODY IN STATE COURTS – PART II

Of ninety cases dealing with due process in family courts within the past fifteen years, forty-four state courts, including fourteen state supreme court cases and thirty appellate court cases, did not find due process violations.

Sufficient Notice

First, twenty-five state courts across the country, including nine state supreme court cases and seventeen appellate court cases, have found that a party to a child custody dispute has had sufficient notice of a proceeding or issues to be heard at the proceeding. Of these twenty-five courts, nineteen ruled that modifying visitation or custody decree without giving notice violated due process rights. (See Appendix A, 1.) Three courts found that there was adequate notice of a contempt hearing and that therefore there was no due process violation. (See Appendix A, 2.) One court found that there was no due process violation when a trial court awarded a father sole custody of a minor child even though the father's custody petition only sought joint legal custody. (See Appendix A, 3.) Furthermore, one court found that in general, a respondent is put on notice that acts of alleged past abuse can be introduced at a protective order hearing when a petitioner files an *ex parte* petition for protection. (See Appendix A, 4.) Finally, one court ruled that a mother had sufficient notice that a letter written by her daughter to her much older

boyfriend would be introduced as evidence to impeach her parenting skills at a custody hearing. (See Appendix A, 5.)

Adequate Hearing/No Hearing Warranted

Nineteen state courts across the country, including five state supreme court cases and fourteen appellate cases, have found adequate evidentiary hearings or no need to hold such a hearing. Of these nineteen courts, ten ruled testimony presented at a hearing was sufficient and that the litigant had a full and fair opportunity to be heard, thus comporting with due process. (See Appendix A, 6.) Six ruled that modifying a visitation or custody decree without holding an evidentiary hearing did not violate due process rights because no hearing was warranted. (See Appendix A, 7.) One court found that a trial court's imposition of sanctions for direct contempt on a party's children without holding a hearing on the issue did not violate due process. (See Appendix A, 8.) Furthermore, one court ruled that a custody statute dealing with stepparents is valid and did not violate the natural parent's due process rights and therefore no hearing was required. (See Appendix A, 9.) Finally, one court found that a trial court did not deny a mother due process when it rejected the sole custody recommendation of the Domestic Relations Commissioner (DRC) without first reviewing the videotape of the DRC's hearing. (See Appendix A, 10.)

Appendix A

1. Siekawitch v. Siekawitch 956 P.2d 447 (Alaska 1998) (father had adequate notice, for procedural due process purposes, that mother, by her motion to modify visitation, sought equal time with parties' two children).
- Anderson v. Lackey, 163 N.C. App. 246 (N.C. Ct. App. 2004) (court found mother had sufficient notice that court would discuss visitation issues based on father's Motion For Contempt And Motion For Judicial Assistance).
- In the Interest of Macalik, 13 S.W.3d 43 (Tex. App. 1999) (court concluded that both parties had fair notice of the issues to be decided, and pleadings were sufficient to support the modifications).
- Ruth v. Ruth, 32 Kan.App.2d 416, (Kan.App. 2004) (divorced mother who moved to another state after divorce received adequate notice of father's motion to modify child custody).
- Anderson v. Anderson, 718 So.2d 582 (La.App. 4 Cir.,1998) (in custody modification proceeding, service upon mother's court appointed representative constituted sufficient notice to mother).
- Trivette v. Trivette, 162 N.C. App. 55 (N.C. Ct. App. 2004) (trial court's judgment placing sole custody of the parties' children with their mother was affirmed because the father had adequate notice of the modification hearing).
- Reimche v. Reimche, 1997 ND 138 (N.D. 1997) (mother failed to show she was surprised by father's decision to seek full custody of their minor child at trial as she did not request a continuance or express her surprise to trial court).
- In re Ratliff, 2007 Ohio 1770 (Ohio Ct. App. 2007) (court found mother had sufficient notice that legal custody would be at issue in hearing).
- Hall v. Hall, 1997 Ohio App. LEXIS 2481 (Ohio Ct. App. 1997) (wife was given sufficient notice that the husband was seeking sole custody of the child).
- Wilker v. Wilker 630 N.W.2d 590 (Iowa 2001) (wife had sufficient notice, under rules of civil procedure and due process clause, of husband's claim of domestic abuse).
- Smith v. State, 2006 Tex. App. LEXIS 8740 (Tex. App. 2006) (defendant not entitled to a continuance where she did not receive notice of the date of her trial for interference with child custody).
- In the Interest of B.A.B., 124 S.W.3d 417 (Tex. App. 2004) (court found wording of Rule 11 agreement gave notice to mother that father would seek to modify custody).
- Lohmann v. Lohmann, 62 S.W.3d 875 (Tex. App. 2001) (court found that by requesting attorneys' fees in her response to his request for writ of attachment, mother sufficiently put father on notice that she would seek them).
- In re Cummings, 13 S.W.3d 472 (Tex. App. 2000) (even assuming appellant wife did not have notice, appellant failed to show how she was harmed by the error).
- Gabriel v. Pritchard, 173 Vt. 452 (Vt. 2001) (father's refusal of service by certified mail did not permit him to claim denial of due process where the clerk used the alternative means of service of ordinary first class mail).
- Prodromidis v. Burman, 2004 Del. LEXIS 71 (Del. 2004) (visitation was manifestly an issue of hearing and of which father had notice).
- Davis v. Hunt, 167 Vt. 263 (Vt. 1997) (no denial of due process where mother made virtually no showing that she was prejudiced by the consolidation of which she claims she had no notice).

Scott M.H. v. Kathleen M.H., 218 Wis. 2d 605 (Wis. Ct. App. 1998) (court held that appellant had notice that her custodial or placement rights were at issue in the divorce proceedings in the trial court).

BB v. RSR, 2007 WY 4 (Wyo. 2007) (father's general allegation of a change in circumstances was sufficient to apprise the mother of the nature of the claim).

2. Meade v. Levett, 671 N.E.2d 1172 (Ind.App. 1996) (mother received adequate notice of contempt hearing regarding her failure to abide by trial court's order that child be returned to father's custody).

Suazo v. Suazo, 2007 La. App. LEXIS 1646 (La. Ct. App. 2007) (trial court had properly found a mother in contempt for failing to comply with a custody order where she had received sufficient notice).

Wyatt v. Decsi, 2002 Ohio 6993 (Ohio Ct. App. 2002) (court held that the father was denied due process because he did not receive adequate notice of the contempt hearing).

3. Kidwell v. Calderon, 98 Conn.App. 754 (Conn.App. 2006).

4. Coburn v. Coburn, 342 Md. 244 (Md. 1996).

5. Jenkins v. Handel, 10 P.3d 586 (Alaska 2000).

6. Jones v. Walker, 29 Kan. App. 2d 932 (Kan. Ct. App. 2001) (district judge had discretion to determine responsibility for cost of custody evaluation and was permitted to allocate whole cost of to father, especially as he was contesting custody).

Goodwin v. Goodwin 618 So.2d 579 (La.App. 2 Cir 1993) (time limit imposed on wife to present evidence did not violate her due process rights).

Pike v. Maguire, 47 Mass.App.Ct. 929 (Mass.App.Ct. 1999) (Former husband received fair hearing on whether restraining order obtained by former wife should be extended or made permanent).

McNeill v. Ressel, 258 A.D.2d 64 (N.Y. App. Div. 1999) (no prejudice where mother was forced to proceed without counsel when attorney was permitted to review the transcript, make objections, and cross-examine).

Molitor v. Molitor, 2006 ND 163 (N.D. 2006) (father didn't preserve issue of fair hearing for appeal where judge's remarks were noted to be derogatory).

In re Forster, 1999 Ohio App. LEXIS 3813 (Ohio Ct. App. 1999) (in child custody hearing where father sexually abused child, court's order prohibiting father's presence in court during child's testimony was proper).

Way v. Prosch, 163 Ore. App. 437 (Or. Ct. App. 1999) (award of child custody and support to father affirmed because mother did not demonstrate an irregularity preventing fair trial though judge had pre-trial contact with respondent).

Garr v. Peters, 2001 PA Super 110 (Pa. Super. Ct. 2001) (court concluded that appellant had ample opportunity to present her evidence regarding modification of the custody agreement and trial court did not err by transforming the custody hearing into a contempt hearing).

Carroll v. Law, 2005 WY 44 (Wyo. 2005) (mother's claims that she was denied due process rejected because she did not provide a transcript for review).

Bliss v. Bliss, 733 A.2d 954 (D.C. 1999) (court held that evidence presented during the hearing was sufficient to support the trial court's finding that appellant was given an adequate opportunity to be heard by Russian court, but chose not to take it).

7. Brockman v. Craig, 205 S.W.3d 244 (Ky. Ct. App. 2006) (wife not entitled to a hearing to modify the custody agreement).

Szarzynski v. Szarzynski, 732 N.W.2d 285 (Minn. Ct. App. 2007) (orders denying the father's motion to modify custody and finding him in contempt affirmed).

Khan v. Saminni 446 Mass. 88, 842 N.E.2d 453 (Mass. 2006) (trial court's refusal to hold evidentiary hearing to afford mother opportunity to demonstrate that hearing in family court in Trinidad was not a fair proceeding did not violate mother's right to due process).

Hendrix v. Hendrix, 183 S.W.3d 582 (Mo. 2006) (trial court judgment modifying a custody order was affirmed even though it was done so on stipulated facts rather than hearing).

Esterle v. Dellay, 281 A.D.2d 722 (N.Y. App. Div. 2001) (order which granted custody of child to father was affirmed even though Mother had argued that the psychologist had prejudged her case and that court's acceptance of his testimony without a hearing denied her due process).

Skidelsky v. Skidelsky, 279 A.D.2d 356 (N.Y. App. Div. 2001) (court affirmed denial of defendant's motion for a hearing on modification of custody).

8. In re Marriage of Marshall 278 Ill.App.3d 1071 (Ill.App. 3 Dist. 1996).

9. Tailor v. Becker, 708 A.2d 626 (Del.Supr. 1998).

10. Squires v. Squires, 854 S.W.2d 765, 770 (Ky. 1993).