

The Fundamental Right to a Fair Trial By Joel R. Brandes

The Fifth Amendment to the U.S. Constitution provides, in part, that no person shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment contains the same words. It prohibits the states from depriving any person of life, liberty, or property, without due process of law. A fundamental requirement of due process of law is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections. The notice must reasonably convey the required information and must afford a reasonable time for those interested to make their appearance. (*Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950)).

The United States Supreme Court has deemed the due process guarantees of the Fifth and Fourteenth Amendments to protect certain substantive rights that are not enumerated in the Constitution but are so important that they cannot be infringed without a compelling reason no matter how much process is given. These rights to substantive due process are referred to as fundamental rights. (See https://www.law.cornell.edu/wex/fundamental_right; https://www.law.cornell.edu/wex/Due_Process)

A fundamental right under the due process clause is one that is "deeply rooted in this Nation's history and tradition." (*Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)). The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. History and tradition guide and discipline the inquiry but do not set its outer boundaries. Long ago the Supreme Court held that the right to marry is protected by the Constitution. For example, *Loving v. Virginia*, (388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010), invalidated bans on interracial unions, and *Turner v. Safley*, (482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64) held that prisoners could not be denied the right to marry. (See *Obergefell v. Hodges*, 576 U.S. 644, 645–46, 135 S.Ct. 2584, 2589 (2015)).

In *Dobbs v. Jackson Woman's Health Organization*, (597 U.S. ____ (2022)) Justice Alito's plurality opinion pointed out that the Court's decisions have held that the Due Process Clause protects two categories of substantive rights. The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, but the Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and makes them equally applicable to the States. The second category comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty."

In *Matter of Coates*, (9 N.Y.2d 242, 213 N.Y.S.2d 74 (1961)), the New York Court of Appeals observed that the exact meaning and scope of the phrase “due process of law” cannot be defined with precision. It noted that in *Stuart v. Palmer* (74 N. Y. 183, 191 (1878)), it stated what it considers to be the very least which would satisfy due process: “...due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this.”

Due process does not, however, “guarantee to the citizen of a state any particular form or method of state procedure.” (*Dohany v. Rogers*, 281 U. S. 362, 369 (1930)). “Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard.” There must be an opportunity to litigate fully the questions involved and the propriety of the proceedings. Otherwise, it would unquestionably be violative of due process. (*Matter of Coates*, *supra*.)

Regardless of the merits of their case, all litigants are entitled to a fair trial (*Salzano v. City of New York*, 22 A.D.2d 656, 253 N.Y.S.2d 138 (1st Dept, 1964)). The right to a fair trial is a fundamental right, and the denial of a fair trial will result in a reversal.

In *Nicole B. v Franklin A*, 210 A.D.3d 1351, 178 N.Y.S.3d 286 (3d Dept.,2022) the Appellate Division observed that the Family Court demonstrated an inability to be fair at various stages of the proceeding, starting with the first appearance, where the court indicated that it was inclined to dismiss the mother’s custody modification petition without a hearing, and the order on the appeal made it clear that the court had, *sua sponte*, previously dismissed several modification petitions filed by the mother. At the next appearance, the court again indicated that it was disinclined to modify the custody order and later, referring to the mother, stated that “the boy who cried wolf is very large and in charge of this case.” At the opening of the fact-finding hearing, after noting that it had already held several hearings regarding this child, the court stated that if it “g[o]t the feeling as we go through that the burden of that change [in circumstances] is not going to happen ... [the court is] going to cut things off.” At the close of the mother’s proof, Family Court prompted the father to make a motion to dismiss the mother’s petition, which the court granted. Based on Family Court’s comments regarding its predispositions and its inappropriate comment regarding the mother’s credibility, the Appellate Division found that Family Court appeared to have prejudged the case. It reversed the order appealed from and remitted the matter for a new hearing before a different judge.

Evidentiary errors or rulings

When a trial court makes evidentiary errors or rulings that operate to deny an individual his fundamental right to a fair trial, an appellate court must reverse the judgment and grant a new trial without regard to any evaluation as to whether the errors contributed to the result, and even in the absence of an objection. (*Rodriguez v. Cato*, 63

A.D.2d 922, 406 N.Y.S.2d 100 (1st Dept. 1978); *Habenicht v R.K.O. Theatres* (23 A.D.2d 378, 381, 260 N.Y.S.2d 890 (1 Dept., 1965))

In *Pringle v. Pringle*, (296 A.D.2d 828, 744 N.Y.S.2d 784 (4th Dept. 2002)), an application for modification of a support order, reversal was required because the hearing conducted by the Hearing Examiner limited to the colloquy among counsel and the Hearing Examiner, was not a substitute for testimony and failed to comply with the rudiments of due process. The Appellate Division observed that the rules of evidence govern a hearing to determine an application for modification of a support order. Unsworn testimony is inadmissible and unverified financial data cannot serve as a basis for a Family Court order for support.

Denial of a full and fair opportunity to present evidence

A party may be deprived of a fair trial where the court impermissibly and repeatedly precludes him from eliciting relevant testimony. In *Shagoury v. Shagoury* (39 A.D.3d 527, 835 N.Y.S.2d 215 (2 Dept. 2007)), a divorce action, the husband was deprived of a fair trial requiring a new trial before a different Justice, even though the wife presented evidence which, if believed, would support trial court's finding of cruel and inhuman treatment. The Appellate Division found that the court impermissibly and repeatedly precluded the husband from eliciting relevant testimony in his defense, as well as in support of the factual allegations contained in his counterclaim.

The denial of the right to testify and to present witnesses constitutes a denial of a fundamental right. In *Matter of Liska J v. Benjamin K* (174 A.D.3d 966, 107 N.Y.S.3d 156 (3d Dept. 2019)), a custody proceeding, the father was deprived of procedural due process when Family Court excluded testimony as to his fitness as a parent. As a result, the father was prevented from addressing all of the relevant factors, including who should be the child's primary custodian and what he did to foster a relationship between the child and the mother. The father's stepfather was precluded from testifying about his observations of the father as a parent. The Appellate Division held the court's failure to allow the father a full and fair opportunity to present evidence, coupled with the court's own limitations on its decision, constituted a fundamental due process error requiring reversal of the Family Court's order.

The denial of the right to cross-examine witnesses and the right to confer with counsel are fundamental errors requiring reversal. In *Matter of Dominic B.* (138 A.D.3d 1395, 30 N.Y.S.3d 769 (4th Dept. 2016)), the court's failure to allow the mother to cross-examine a key witness, a caseworker for the petitioner, constituted a denial of her fundamental right to due process. In *Matter of Turner v. Valdespino* (140 A.D.3d 974, 34 N.Y.S.3d 124 (2d Dept. 2016)) Family Court violated the mother's fundamental due process rights when it instructed her not to consult with her attorney during recesses, which resulted in her being unable to speak to her attorney over extended periods of time. Family Court's conduct deprived the mother of due process.

Cumulative effect of errors

In *Arbital v Allstate Ins. Co.*, (282 A.D.2d 560, 723 N.Y.S.2d 386 (2 Dept., 2001)) an action to recover damages for breach of an insurance policy, the judgment was reversed, on the law and a new trial granted where the cumulative effect of the trial errors, including the improper restriction of cross-examination, deprived the defendant of a fair trial.

Denial of Counsel

The denial of the right to assistance of counsel is a fundamental error. It takes many forms.

In *Moloney v. Moloney* (19 A.D.3d 496, 798 N.Y.S.2d 455 (2d Dept. 2005)), the court held that the deprivation of an unrepresented party's fundamental right to counsel in a custody or visitation proceeding required reversal, without regard to the merits of the unrepresented party's position. In *DiBella v. DiBella* (161 A.D.3d 1239, 75 NYS3d 371 (3d Dept. 2018)), the Appellate Division held that In the absence of the requisite statutory advisement of her right to counsel or a valid waiver of that right, the mother was deprived of her fundamental right to counsel, which required reversal, without regard to the merits of her position.

In *Scott v. Scott*, 62 A.D.3d 714, 879 N.Y.S.2d 488 (2d Dep't 2009), the Appellate Division held that the denial of adjournment in a child support proceeding to allow the father's newly-assigned counsel to confer with his client before he testified, investigate service of the judgment of divorce, and secure medical evidence in support of the father's defense that he was disabled and unable to pay support violated the father's statutory right to counsel.

The failure of a court to advise a respondent of his right to remain silent before the respondent partially admitted the allegations in a PINS petition has been held to be reversible error as a denial of due process. (*Matter of Mark S.*, 144 A.D.2d 1010, 534 N.Y.S.2d 53 (4 Dept., 1988); *Matter of Damian C.*, 161 A.D.2d 1206, 556 N.Y.S.2d 429 (4th Dept. 1990)).

Ineffective Assistance of Counsel

The fundamental right to counsel includes the right to the effective assistance of counsel. The denial of that right requires reversal without regard to the merits of a party's position. In a support proceeding, the appropriate standard to apply in evaluating a claim of ineffective assistance is the meaningful representation standard. In *Miller v. DiPalma*, (179 A.D.3d 696, 117 N.Y.S.3d 698 (2d Dep't 2020)), the Appellate Division held that the father was deprived of the effective assistance of counsel at a hearing on the mother's petition for violation of an order of child support. The father's defense at the hearing was

that because of a back injury, he could not continue working as a mail carrier beginning in January 2018 and that, prior to obtaining a new position at the post office in March 2019, he searched for different work. Despite being advised on multiple occasions that the father was required to provide a financial disclosure affidavit, tax forms, proof that he was diligently searching for employment, and certified medical records, his attorney failed to procure the father's medical records or provide the court with any relevant financial documentation. He also failed to call any witnesses to testify about the effects of the father's back injury, subpoena his treating physician, or obtain a medical affidavit. Counsel's failure to obtain relevant medical information or to procure financial and job search records that may have supported the father's contention constituted a failure to meaningfully represent the father, and he was entitled to a new hearing on the violation petition.

Lack of Notice

Notice is a fundamental component of due process. The failure to give notice is a denial of fundamental due process rights. In *Matter of King v. King* (167 A.D.3d 1272, 91 N.Y.S.3d 283 (3d Dept. 2018)), a custody proceeding, the court held that although a movant seeking to vacate a default is generally required to demonstrate both that there was a reasonable excuse for his failure to appear and a meritorious defense, no showing is required where a party's fundamental due process rights have been denied. In the absence of notice to the wife, the Family Court's sua sponte consideration of extraneous allegations violated the wife's due process rights.

Conclusion

A party is denied a fair trial when she is denied due process of law, the right to legal counsel, and the right to confront and call witnesses. Due process requires that she be afforded reasonable notice of the proceeding and a reasonable opportunity to be heard. An opportunity to be heard includes the right to testify, present witnesses, and cross-examine witnesses. The right to counsel includes the right to be advised of the right to counsel in those cases where there is a right to counsel and the right to competent representation. Although individual errors might be deemed harmless when considered separately, a new trial will be ordered when these errors, considered collectively, cause substantial prejudice to a party (See, for example, *McGloin v. Golbi*, 49 A.D.3d 610, 853 N.Y.S.2d 378 (2d Dept. 2008)).

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of the twelve-volume treatise, Law and the Family New York, 2022- 2023 Edition, and Law and the Family New York Forms, 2022 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.