



DUE PROCESS (DP) QUICK GUIDE

April 2022





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I. DUE PROCESS (DP) GENERALLY

Origin: The 5th and 14th Amendments of the United States Constitution guarantee that the government shall not deprive any person of an interest in “life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1. This clause imposes two different constraints on governmental decisions: procedural DP and substantive DP, discussed in further detail below.

Parent’s Rights:	Children’s Rights:
<p>The parental right to raise one’s child is a fundamental liberty interest protected by the DP Clause of the 14th Amendment. [1] A parent has a fundamental liberty interest in the care, custody and control of her child. [2] Thus, a fit parent enjoys a presumption that they act in the best interest of their children, their decisions have special weight, and special factors must justify State intervention. [3] However, adjudication of a child in a dependency and neglect case (D&N), particularly to a fault-based admission, is generally sufficient to overcome the parent’s so-called <i>Troxel</i> presumption. [4] If a parent successfully completes a treatment plan and is awarded primary custody of the child, he or she can regain the <i>Troxel</i> presumption. [5]</p>	<p>Like parents, children have an interest “in a continuing family relationship,” as well as interest “in a permanent, secure, stable, and loving environment.” [6] Although the US Supreme Court has not specifically recognized children’s rights to DP in D&N actions, it is well-established that children are entitled to DP protections when their liberty interests are at stake. [7] Regardless, the US Supreme Court has made clear that both “the child and his parents share a vital interest in preventing erroneous termination of their natural relationship” and that even at the termination of parental rights (“TPR”) proceeding, when a child has already been adjudicated, “the interests of the child and his natural parents coincide to favor use of error-reducing procedures.” [8]</p>

In D&Ns: DP requires the state to provide fundamentally fair process in a dependency and neglect proceeding. [9] A parent may not be deprived of parental rights absent DP protections. [10] Because parental rights are fundamental, certain DP requirements must be met before such rights may be fully extinguished through a TPR proceeding. [11] When a parent retains his or her parental rights despite the D&N case, such as when guardianship or custody is granted to a non-parent, the DP considerations are still relevant but not as substantial as in a termination hearing. [12]

Flexibility: Applying the DP Clause is an “uncertain enterprise” which involves determining what fundamental fairness requires in a particular situation. [13] Thus, DP is necessary flexible and calls for such procedural protections as the particular situation demands. [14]

Harm Required: Absent a showing of harm or prejudice, a parent's DP claim cannot stand. [15]



II. PROCEDURAL DUE PROCESS

Procedural DP requires notice and an opportunity to be heard. [16]

Notice: In dependency and neglect proceedings, procedural DP requires that a parent be given notice of the hearing. [17]. Thus, a parent is entitled to know the day and time a particular matter is to be heard by the court as well as what the court will be deciding. [18]

Hearing: In a dependency and neglect proceeding, DP requires parents be given an opportunity to protect his or her rights. [19]. The opportunity to be heard must be provided at a meaningful time and in a meaningful manner. [20]. The right to be heard includes affording the parent the right to cross-examine adverse parties and call his or her own witnesses. [21]

DP does not require the State to transport or assure the presence of an incarcerated parent who is represented by counsel at a termination hearing. [22] The CO Court of Appeals has also determined that a parent's DP rights were not violated by holding a TPR hearing by video. [23] However, the Court of Appeals found that the trial court's failure to grant a continuance for a parent who was not able to attend the video termination hearing due to lack of internet access, violated the parent's DP rights. [24]

Counsel: A parent does not have a DP right to appointed counsel in a TPR proceeding. [25]. A parent's right to appointed counsel in TPR proceedings is secured by statute and not constitutional mandate. [26]



III. SUBSTANTIVE DUE PROCESS

Fundamental Fairness: The primary question when faced with a challenge to substantive DP is whether the State's process is fundamentally fair. [27]

Test: The method to assess fundamental fairness is the three-factor balancing test described in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

1. the nature of the private interest affected by the proceeding;
2. the risk of an erroneous deprivation of the private interests as a result of the state's chosen process; and
3. the countervailing governmental interest supporting the use of the challenged process.

Factors as Applied to TPR:

- 1) In a parental rights termination proceeding, the private interest affected, i.e. parental rights, is significant. [28]
- 2) A determination of whether an erroneous deprivation of rights is likely to occur with the state's process depends on an analysis of the underlying statutory structure at play and whether the risk of error is likely. [29]
- 3) In D&N cases, the governmental interest is a combination of the *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. [30]

Interest Required: DP requirements only apply when there is a deprivation of interests encompassed by the 14th Amendment's protection of liberty and property. [31]. Therefore, a person must first establish that he or she possesses a protected interest before raising a DP challenge. [32]. Parents undoubtedly have an interest in maintaining the parent-child legal relationship sufficient to create substantive DP rights. [33] Additionally, children have a liberty interest in continuing the family relationship and, when placed in foster care, have an interest in being free from harm. [34] In contrast, foster parents do not have a constitutionally protected liberty interest in the outcome of a D&N case giving rise to substantive DP rights. [35] Relatives also do not have a substantive DP rights, at least not sufficient to appeal the outcome of a TPR hearing. [36]

Substantive DP Applied

1. DP required a clear and convincing standard of proof at a termination of parental rights hearing. [37]
2. Parents facing TPR do not necessarily have a constitutional right to court-appointed counsel. [38]
3. Preponderance of the evidence standard was sufficient at the adjudication hearing. [39]
4. Parent's DP rights were not violated by the foster parents' participation in TPR hearing. [40]



IV. DUE PROCESS ANALYSIS

Questions to Guide Your Analysis

Is the party raising a DP challenge a parent, or otherwise would have a liberty interest protected by the 14th Amendment? *If not, argue that DP is not applicable*

If a parent, is the parent actually harmed or prejudiced by the action/inaction in which counsel is complaining about. *For example, a DP challenge when the parent is absent or not participating in the case should carry little weight.*

To determine what type of DP challenge is being lodged, assess whether the challenge is to the procedure being utilized for a particular hearing (procedural DP) or whether the challenge is to a major legal issue that goes to the fundamental fairness of the case, such as burden of proof or party participation in the case (substantive DP).

If the parent's objection is to the procedure involved in a particular hearing (procedural DP), ask yourself whether the parent received adequate notice and/or an opportunity to be heard in a meaningful way. *If not, consider joining in the request for a continuance so that these DP issue may be rectified.*

Assess the stage of the proceeding.

Does this stage involve an emergency proceeding, where there is an imminent threat to the child's health or safety? If so, will the parent be provided notice and the opportunity for a contested hearing in the near future?

If the case is pre-adjudication, is the child still in the parent's custody? *In which case, the parent's Troxel rights are at their strongest, and the parent arguably has a significant say in the care, custody, and control over the child.*

In contract, is the case post-adjudication, the child placed out-of-home, and the parent out of compliance with his or her treatment plan? *In which case, the parent likely does not have the benefit of the Troxel presumption that his/her decisions are in the child's best interest.* Consider these factors when determining your position on the objection.

- *If the objection relates to a custody or guardianship hearing, the parent's due process concerns are significant but not as high as at a termination of parental rights hearing.*
- *If the objection relates to a termination hearing, where the potential for infringement on parental rights is at its most significant, the level of DP provided to a parent needs to be at its highest.*
- *In contrast, if the objection does not relate to a hearing at all, but rather to something relatively minor the department is or is not doing, DP concerns are very minimal, and the parent should be relying on statutory authority instead.*

If a parent is raising a substantive challenge to DP (i.e. attacking a significant, fundamental part of the case), is the risk of error likely if the parent's concerns are not taken seriously? Also, how strong is the governmental interest in protecting the health and safety of the child compared to the parent's objection? *Consider raising the child's DP rights as a response to the parent's challenge.*



V. GENERAL SCRIPTS FOR RESPONDING TO A DUE PROCESS CHALLENGE FROM A PARENT

Allegation #1: “THIS PROCESS IS UNFAIR TO MY CLIENT”

Possible Responses:

- “Your honor, I am not clear as to Counsel’s argument. Is counsel making an argument based upon procedural due process or substantive due process? And can counsel describe the specific harm to the client that is being alleged?”
- “Your honor, the process involved here is, in fact, ‘fundamentally fair’ because_____:

“Counsel has not alleged that the parent is actually harmed by the process; this parent is not engaged in the case whatsoever.”

“Due Process is necessarily flexible depending on the situation and, in this situation, the parent has received more than adequate due process given the facts before you.”

“This proceeding also involves a child, Your Honor, and this child also has due process rights to a fair process and procedure. What the parent is proposing here would infringe on the child’s due process rights.”

Allegation #2: “THIS PROCESS VIOLATES MY CLIENT’S PROCEDURAL DUE PROCESS RIGHTS”

Possible Responses:

- *“Counsel fails to allege which, if any, procedural violations of the client’s due process rights have occurred. Your honor, I need more specificity to even be able to effectively respond.”*
- *“Counsel’s client has received an abundance of procedural due process protections including, but not limited to: notice of the proceeding and the right to be heard and defend his/her claims”*

Allegation #3: “THIS PROCESS VIOLATES MY CLIENT’S SUBSTANTIVE DUE PROCESS RIGHTS”

Possible Responses:

- *“Counsel fails to demonstrate how this situation impacts the overall fairness of the process as a whole, particularly considering the parent has and will continue to have the opportunity to present his/her side at contested hearings at every important stage of this case, all with the assistance of counsel.”*



V. GENERAL SCRIPTS FOR RESPONDING TO A DUE PROCESS CHALLENGE FROM A PARENT, CONT.

- “Counsel fails to allege any case law which has found a violation of substantive due process in this type of situation. Additionally, Counsel has not described how, under the three-part test described in *Eldridge*, the client’s due process rights are being violated here.” (cite *Mathews v. Eldridge*, 424 U.S. 310, 335 (1976))
- [Non-TPR]: “Applying the three-part test in *Eldridge*, first, the matter before you today does not involve a termination hearing and, therefore, the parent’s interest is not nearly as high as if parental rights were at stake. Second, the risk of improperly eliminating the parent’s rights, based upon the issue before you, is negligible. Third, and most importantly, the court’s interest in protecting the child’s safety and well-being is most significant issue before you today.”
- [TPR] “I acknowledge that the parent has a significant interest in the proceeding before you today, since parental rights are at stake; however, applying the second factor of the three-part test in *Eldridge*, the risk of an erroneous decision based upon the parent’s concerns is minimal because the parent has received all of the due process protections throughout this case, and will continue to receive these protections throughout this hearing. Finally, the Children’s Code makes clear that the controlling issue here today is the child’s physical and emotional health and safety. While parents are entitled to a high standard of procedural protections, the overriding issue is the best interest of the child and not the parent’s desired outcome.”



ENDNOTES

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- [1] See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re D.I.S.*, 249 P.3d 775, 780 (Colo. 2011).
- [2] *Troxel v. Granville*, 530 U.S. 57, 66 (2000).
- [3] *Id.* at 2061-62.
- [4] *People in Interest of J.G.*, 370 P.3d 1151, 1159-60 (Colo. 2016).
- [5] *People in Interest of N.G.G.*, 459 P.3d 664, 668 (Colo. App. 2019).
- [6] *People in Interest of C.A.K.*, 652 P.2d 603, 607 (Colo. 1982) (citations omitted).
- [7] See *In re Gault*, 387 U.S. 1, 30-31 (1967) (children in delinquency proceedings entitled to DP protections); *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (lack of adequate procedures used by school in suspending students violated DP); *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (children not beyond constitutional protections based upon status as minors); *Youngberg v. Romero*, 457 U.S. 307, 315, 319 (1982) (individual with intellectual disability, involuntarily committed to state institution, had constitutionally protected liberty interests under DP clause of 14th Amendment). Lower court have relied on these cases to find that children who are in state custody are entitled to DP protections in a variety of circumstances. See e.g., *Taylor v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987); *Aristotle v. Johnson*, 721 F.Supp. 1002, 1005-07 (N.D. Ill. 1989); *Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1359-60 (N.D. Ga. 2005); *In re Jaimie T.T.*, 599 N.Y.S.2d 892, 893-95 (N.Y. App. Div. 1993); *In re Dependency of M.S.R. & T.S.R.*, 271 P.3d 234, 244-45 (Wash. 2012)
- [8] *Santosky v. Kramer*, 455 U.S. 745, 760-61 (1982).
- [9] *Id.* at 754-55; *People ex rel. J.A.S.*, 160 P.3d 257, 262 (Colo. App. 2007) (citations omitted); *People in Interest of A.M.D.*, 648 P.2d 625, 636 (Colo. 1982).
- [10] See *People in Interest of A.M.D.*, 648 P.2d 625, 631 (Colo. 1982).
- [11] *L.L. v. People*, 10 P.3d 1271, 1276 (Colo. 2000).
- [12] *Id.* at 1277-78.
- [13] *A.M. v. A.C.*, 296 P.3d 1026, 1035 (Colo. 2013) (citation omitted).
- [14] *Id.* at 1034-35.
- [15] *People ex rel. J.A.S.*, 160 P.3d 257, 262 (Colo. App. 2007).
- [16] *People in Interest of D.G.*, 733 P.2d 1199, 1202 (Colo. 1987).
- [17] See *People in Interest of M.M.*, 726 P.2d 1108, 1115 (Colo. 1986). Thus
- [18] See *id.* at 1115.
- [19] See *People in Interest of M.M.*, 726 P.2d 1108, 1115 (Colo. 1986); *People ex rel. M.B.*, 70 P.3d 618, 624 (Colo. 2003).
- [20] *People in Interest of R.J.B.*, 482 P.3d 519, 524 (Colo. App. 2021) (citations omitted).
- [21] *People in Interest of K.N.B.E.*, 457 P.3d 140, 142 (Colo. App. 2019).
- [22] *People in Interest of C.G.*, 885 P.2d 355, 357 (Colo. App. 1994).
- [23] *People in Interest of R.J.B.*, 482 P.3d 519, 525 (Colo. App. 2021).
- [24] *People in Interest of E.G.*, 2022COA9 (Jan. 6, 2022).
- [25] *C.S. v. People*, 83 P.3d 627 (Colo. 2004).
- [26] *A.R. v. D.R.*, 456 P.3d 1266 (Colo. 2020).
- [27] *People in Interest of A.M.D.*, 648 P.2d 625, 636 (Colo. 1982).
- [28] *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982).
- [29] See *People in Interest of A.M.D.*, 648 P.2d 625, 637-38 (Colo. 1982).
- [30] See *id.* at 639-40.
- [31] *M.S. v. People*, 303 P.3d 102, 105 (Colo. 2013) (citations omitted).
- [32] *Id.* at 105.
- [33] *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982).
- [34] See e.g. *id.* at 760-61; *DeShaney v. Winnebago Dep't of Social Servs.*, 489 U.S. 189, 201 (1989); see also *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2001); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 891 (10th Cir. 1992); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1981).
- [35] See *M.S. v. People*, 303 P.3d 102, 105-106 (Colo. 2013); *C.W.B., Jr. v. A.S.*, 410 P.3d 438, 445-46 (Colo. 2018).
- [36] *People in Interest of C.N.*, 431 P.3d 1219, 1222 (Colo. App. 2018).
- [37] *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).
- [38] *Lassiter v. Dept. of Social Servs. of Durham Cnty*, 452 U.S. 18, 33 (1981).
- [39] *People in Interest of A.M.D.*, 648 P.2d 625, 635 (Colo. 1982).
- [40] *A.M. v. A.C.*, 296 P.3d 1026, 1035-36 (Colo. 2013).