



Evidence and Due Process Considerations in Child Welfare Cases

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“Due process, not benevolent intentions, produces justice.”

Justice Abe Fortas, *In re Gault*

Rules of Evidence

- In abuse and neglect cases, the Rules of Evidence do not apply in Custody Hearings, Dispositional Hearings, Judicial Reviews, and Permanency Hearings.¹
- This means that typically the Rules of Evidence apply only to Adjudications and Terminations of Parental Rights.
- Rules about privilege always apply.²

When the Rules of Evidence do not apply, how should courts make decisions about what evidence gets admitted?

Due Process Requirements. In abuse and neglect cases, due process requires:

- timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding;
- a reasonable opportunity to refute or defend against a charge or accusation;
- a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation;
- representation by counsel,
- a hearing before an impartial decisionmaker.³

Due process applies throughout the abuse or neglect case: “The statutory scheme which our legislature enacted to protect children and adjudicate parental rights represents a continuum of proceedings which begins with the filing of a petition for neglect or abuse and culminates in the termination of parental rights. [Citation omitted.] Because due process is a flexible right, the amount of process due at each stage of the proceedings is

¹ See, NMRA 11-1101 (D) and various sections of NMSA 32A-4-1 et. seq.

² NMRA 11-1101(D).

³ *In re Pamela A.G.*, 2006 -NMSC- 019, ¶ 12 (2006), citing *State ex. rel. CYFD v. Lorena R.*, 1999–NMCA–035, ¶ 26 (1999) (quoting *In re L.V.*, 240 Neb. 404, 482 N.W.2d 250, 257 (1992)).

reflective of the nature of the proceeding and the interests involved, as well as the nature of the subsequent proceedings. “⁴

- Accordingly, due process applies at judicial reviews⁵ and permanency hearings.⁶ What process is due in individual reviews and permanency hearings will vary from case to case.
- The Court must ensure that the parties’ due process rights will not be violated by the admission of evidence.⁷

Balancing Tests. To assess due process in abuse and neglect cases, Courts should apply the balancing test in *Matthews v. Eldridge*⁸ and weigh three factors:

- the private interest at stake, that is the parent’s interest in parenting his or her child,
- the government's interest in the welfare of the child, and
- whether the procedures used increased the risk of erroneous deprivation of the private interest.⁹

Potential Considerations in Balancing. When balancing, consider, for example, the standard of proof for the particular hearing, the purpose of the hearing, and the impact that a particular piece of evidence may have on the permanency plan or a future TPR.

- The standard that applies at the custody hearing, probable cause, is a lower standard than applies at a permanency hearing *but* the outcome of the custody hearing impacts custody and where the children will live pending adjudication, which is important.
- A permanency hearing may be particularly significant because the Court will make a determination at this point as to what the permanency plan will be. The permanency hearing is a “critical stage” of the case—and therefore requires due process, including fair notice and opportunity to be heard—because the outcome threatens “substantial prejudice to parental rights,” and “bears a direct relation to the TPR hearing. . . [T]he factual basis for termination is largely established at the permanency hearing, even though a formal TPR hearing follows.”¹⁰
- When the Department seeks a futility finding at any hearing, it may be necessary to more carefully scrutinize the evidence presented.
- A judicial review report may contain a statement which is very negative about the parent, which could lay the groundwork for a change in permanency plan in the future.

⁴ *State ex rel. CYFD v. Maria C.*, 2004-NMCA-083.

⁵ *State ex rel. CYFD v. Vanessa C.*, 2000-NMCA-025, ¶ 21.

⁶ *Maria C.*, ¶¶ 28-29.

⁷ See e.g., *In re Termination of Boespflug*, 1992-NMCA-138.

⁸ *Pamela A.G.*, 2006 -NMSC- 019, ¶ 13.

⁹ *Id.*

¹⁰ *Maria C.*, ¶¶ 28-29.

Confrontation and Hearsay

- Due process requires that parties have a meaningful opportunity to confront witnesses and defend against allegations in abuse and neglect cases.¹¹
- *Confrontation rights are not the same as in criminal cases*: New Mexico case law is clear that due process in abuse and neglect cases does not mean that there are the same confrontation rights as in criminal cases.¹²
- Courts must use the balancing test in *Mathews v. Eldridge* to determine whether procedures to test reliability of evidence are appropriate and whether cross examination of the declarant is necessary.¹³
- *Permanency Hearings*: The Abuse and Neglect Act provides that the parties must be able to present evidence and cross-examine witnesses at permanency hearings even though the Rules of Evidence do not apply.¹⁴
- *Judicial Reviews*: The Act also requires that parties have an opportunity to present evidence and cross-examine witnesses at judicial reviews.¹⁵
- *Hearsay*: Due process may mean that hearsay evidence is not appropriate in some circumstances even if the Rules of Evidence do not apply.

¹¹ *Lorena R.*, 1999–NMCA–035, ¶ 26.

¹² See *State ex rel. CYFD, In re Esperanza M.*, 1998 -NMCA- 039 ¶ 15; *Pamela A.G.*, 2006 -NMSC- 019, ¶ 13.

¹³ *Pamela A.G.*, 2006 -NMSC- 019, ¶ 13.

¹⁴ NMSA §32A-4-25.1(I).

¹⁵ NMSA §32A-4-25(D).