***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**MEMORANDUM**

TO: CAFL Appellate Panel Support Unit

FROM: Law Student Intern [JF]

RE: Denial of Parent’s Due Process Right to Participate when Parent Misses or is Late to Court for Reasons Beyond Parent’s Control

DATE: June 2020

1. **Question Presented**

A parent may be unexpectedly late to, or miss, a care and protection or termination of parental rights trial for reasons beyond their control. For example, on the morning of trial, a parent may be ill or have transportation problems or have some other good faith difficulty preventing arrival. What are the due process considerations of holding a trial when a parent is late or absent through no fault of their own?

1. **Brief Answer**

A court may violate a parent’s due process right to participate in trial if it commences trial when the parent is delayed or absent for reasons beyond their control. Whether starting the trial without the parent violates due process depends on how long a delay is required, the interests of the child in question, and the parent’s prompt communication of the situation to their attorney and/or the court. Starting without the parent may not violate due process, however, if the court makes accommodations to safeguard the parent’s interests.

1. **Analysis**

**A. Starting trial when a parent is unexpectedly delayed may violate due process**

Parents have a fundamental liberty interest in the care of their children. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982); Care & Protection of Erin, 443 Mass. 567, 570 (2005). Due process applies when the state seeks to terminate parental rights. Erin at 571. Due Process requires that a parent has an opportunity to be heard “at a meaningful time and in a meaningful manner.” Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *see also* Adoption of Mary, 414 Mass. 705, 710 (1993) (noting that due process and fundamental fairness require “an opportunity effectively to rebut adverse allegations”). However, due process is flexible, and must take into consideration the child’s interest in prompt resolution of the proceedings, the reasonableness of the parent’s delay in arriving at court, and the parent’s communication of the issue to the court and the attorneys. Commonwealth v. Durling, 407 Mass. 108, 113 (1990).

The court may violate due process when it commences while a parent is briefly delayed or absent for reasons outside of their control.[[1]](#footnote-1) For example, in Adoption of Eartha, the mother notified her lawyer that she would be late to the termination proceedings. Adoption of Eartha, 74 Mass. App. Ct. 1108 \*4 (2009) (Mass. App. Ct. Rule 1:28). The mother took the wrong exit while driving to court. *Id.* She was also bringing her own mother, who planned to testify. *Id.* the Appeals Court held that the mother lacked the opportunity to meaningfully participate in the litigation when the court proceeded in her absence. *Id.* The court denied the mother the opportunity to call witnesses and rebut evidence presented against her. *Id.* The trial, in the mother’s absence, failed to satisfy the requirements of due process requirements. *Id.*

Likewise, in Adoption of Titus, neither parent was present because of confusion about the scheduled time for trial. Adoption of Titus, 73 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28). The judge wanted the trial to begin at 9 A.M. *Id.* The attorneys communicated their beliefs that the parents would arrive at 11 A.M., the time that the parents expected the trial to begin. *Id.* Still, the court commenced with trial and terminated the parents’ rights in their absence. In doing so, the court denied the parents an opportunity to present evidence or cross-examine witnesses. *Id.* The Appeals Court held that the trial was a “mere gesture” that denied due process, and remanded the case for a new trial. *Id.* at \*1.

This analysis is not limited to Massachusetts courts. In In re A.B., a trial court in Indiana violated due process when a mother was denied entry into the courtroom when she arrived twenty minutes late. In re A.B., 922 N.E.2d 740, 746 (Ind. Ct. App. 2010). The mother failed to contact her attorney prior to trial and the attorney was allowed to withdraw from representation. *Id.* at 743. On appeal, the court held that the mother’s interests and the risk of substantial error outweighed “the small, additional cost and even any incremental emotional strain upon the child that may have resulted from permitting Mother to participate in the remainder of the evidentiary hearing.” *Id.* at 746.

A Florida District Court of Appeals held that a trial court violated due process when terminating a father’s rights by default when the father was en route to the proceedings. R.P. v. Dep’t of Children and Families, 835 So.2d 1212, 1214 (Fla. Dist. Ct. App. 2003). The father was unaware that he needed to be present at the hearing until the preceding evening and lived approximately 200 miles from the court. *Id.*  at 1213. The judge continued the case until an afternoon session, but the father was still traveling when the trial began. *Id.* The Court of Appeals determined that the trial court abused its discretion and disregarded due process when it knew that the father was on his way. *Id.* at 1213-14. The Court noted that previous trial delays were not attributable to the father. *Id.* at 1213. The father only required a short continuance and the record did not indicate that a delay would harm the children involved. *Id.* at 1214. Furthermore, even though the case had been pending for two years, the child’s interest was not determinative when the father only required a short continuance. *Id.* at 1213-14.

A parent’s absence without notice based on illness may not justify a delay of trial if the parent has already caused other delays, the case has lasted for a long time, and the parent does not prove the illness or seek to reopen the evidence after trial. In Adoption of Katie, the father informed the court and his attorney on the morning of trial that he had the flu and could not be present. Adoption of Katie, 87 Mass. App. Ct. 1110 (2015) (Mass. App. Ct. Rule 1:28). He requested a short continuance so that he could attend on a later date, but the court proceeded without him. *Id.* at \*1. However, the Appeals Court noted that the case was pending for nearly two years and that the court had already postponed the trial “many times” to accommodate the father. *Id.* The father also failed to provide an affidavit or any proof that the father was actually ill. *Id.* Furthermore, the court recognized that the father’s attorney could sufficiently “present facts on the merits of the case” on the father’s behalf. *Id.* at \*1 (quoting Adoption of Hugh, 35 Mass App. Ct. 346, 347 (1993)).

Likewise, the Appeals Court may evaluate due process concerns less favorably to the parent if the parent did not make a strong effort to notify the attorney or court of the delay or absence. For example, in Adoption of Tanya, the mother lacked transportation to attend the hearing. Adoption of Tanya, 81 Mass. App. Ct. 1141 (2020) (Mass. App. Ct. Rule 1:28). The trial court denied her request for a continuance and terminated the mother’s rights. *Id.* at \*1-2. The Appeals Court determined that the trial judge did not abuse his discretion or violate the mother’s due process rights. *Id.* at \*2. The mother did not make an effort to find transportation or request assistance from the Department of Children and Families (DCF). *Id.* The mother did not even communicate with DCF to provide contact information. *Id.* The panel’s analysis suggests that the mother’s lack of effort to get to court, participate in the proceedings, or communicate with DCF weighed against any due process concerns. *See id.*

In contrast, courts may consider a parent’s prompt communication a compelling reason to wait for the parent. *See, e.g.,* State ex rel. Dep’t of Human Serv’s v. G.R., 224 Or. App. 133, 143 (2008). In G.R., the father incorrectly believed that the trial began at 11 A.M., not 9 AM. *Id.* at 137. The trial court terminated his parental rights in his absence. *Id*. The Court of Appeals reviewed the case to determine if the trial judge abused his discretion[[2]](#footnote-2) and if the father’s delay was excusable neglect. *Id.* at 142. The Court set forth four consideration, including the nature and magnitude of the interests, the father’s promptness in trying to rectify the absence, the prejudice involved, and any colorable defenses on the merits. *Id.* at 143. Here, the father immediately acted when he realized his mistake and arrived at the courtroom only thirteen minutes after the trial ended. *Id.* at 142-43. The father actively prepared for trial with his attorney and intended to be present. *Id.* at 142. The Court determined that the factors all weighed in the father’s favor, and the trial court erred in failing to wait for him. *Id.* at 143-44.

Similarly, in the absence of communication from the defendant-party, a court may deny a continuance without violating the defendant’s right to due process. In Commonwealth v. Carey, a defendant left the courtroom during a recess and did not return. Commonwealth v. Carey, 55 Mass. App. Ct. 908 (2002). The judge waited an hour, but Carey did not return. *Id.* at 908.While the Massachusetts Court of Appeals criticized this judicial decision for lack of procedure, they ultimately upheld the conviction as the defendant did not explain his absence, move for a new trial, or provide any evidence that extra effort to find him would have been successful. *Id.* Additionally, the Court of Appeals found that Carey did not provide any evidence contrary to the assumption that his absence from court was voluntary. *Id.* The Court of Appeals determined that the judge’s decision to continue the hearing without the defendant was not a violation of the defendant’s due process rights because Carey did not notify the court or his attorney of delay or absence, nor was there evidence that additional procedure would have changed the outcome of the hearing. *Id.*

**B. If the trial court insists on starting trial without a parent, it can alleviate due process concerns by making accommodations for parents**

If a parent is unexpectedly delayed or misses trial for reasons outside of her control, the court may nevertheless satisfy due process making accommodations to protect the parent’s rights. For example, in In re Matthew P., 153 Conn. App. 667, 677-78 (2014), the mother was hospitalized on the first day of the trial with a recurring infection. The court permitted the trial to begin in her absence, but it allowed her to review the trial transcripts and recall witnesses from the first day. *Id.* at 673. The Connecticut Appeals Court determined that this accommodation satisfied due process and lowered the risk of an erroneous deprivation of the mother’s rights. *Id*. at 676-77. Similarly, in In re Sean P.H., 122 A.D.3d 850, 995 N.Y.S.2d 744 (2014), a mother in a termination proceeding was late to her hearing, and did not contact her attorney or the court about her absence. *Id*. Her attorney requested a delayed start for the proceeding, but was denied, and the hearing started without her. *Id.* However, the court did not allow cross examination of the witness until the mother was present in the courtroom. *Id.* The New York Appeals Court determined that this accommodation was enough to justify starting the hearing without the mother present, and the mother’s due process rights were not violated. *Id.*

Massachusetts already recognizes that trial courts can accommodate parents who are incarcerated and cannot be summoned into court by writ of habeas corpus. *See* Adoption of Edmund, 50 Mass. App. Ct. 526, 527 (2000) (imprisoned father allowed to teleconference into hearing). Massachusetts may permit similar accommodations to allow an absent-but-not-incarcerated parent to participate. *See, eg,.* B.H., Sr. v. Dep’t of Children and Families, 882 So.2d 1099 (Fla. Dist. Ct. App. 2004) (holding that the father’s appearance by telephone was sufficient); S.C. v. Dep’t of Children and Families, 877 So.2d 831 (Fla. Dist. Ct. App. 2004) (affirming default judgment when mother failed to appear by telephone).

For example, in a recent unpublished decision, the Appeals Court noted that the absent father failed to file a motion to reopen evidence or take similar action. Adoption of Katie, 87 Mass. App. Ct. 1110 (2015) (Mass. App. Ct. Rule 1:28). That the panel faulted the father for failing to take this step, rather than faulting the court for proceeding without him, suggests that the trial courts may be able to start trial without a parent provided that they permit the parent to reopen the evidence to address issues raised in the parent’s absence. *See also* In re Sean P.H., *supra* (allowing mother to cross examine witnesses/a witness after late arrival).

1. **Conclusion**

A trial court may violate a parent’s due process right to participation if the court starts a trial when a parent is a few minutes late, unexpectedly delayed, or unable to attend. When evaluating whether a trial court denied the parent due process, the Appeals Court will look to the reasonableness of the absence, whether the parent promptly communicated the situation to her counsel or the court, whether there were prior delays of trial at the request of the parent, and the need for a prompt decision in that case. Under certain circumstances, a court may proceed – or, at least, begin a trial – without the parent if it makes accommodations to ensure the parent is able to protect their rights by reopening the evidence to address issues the parent missed at trial.

1. In Care and Protection of Oona, 02-P-216 (Mass. App. Ct., July 10, 2002), the court held that the trial court should have granted the mother’s request for continuance. The mother was nine months pregnant and due to deliver and could not attend the trial. The trial court found the mother unfit. The Appeals Court determined that the trial court violated the mother’s right to contest the allegations and evidence against her. The court noted several factors in its decision, including that both parties requested continuances and that the case did not require an especially quick resolution. (Note: Oona is an unpublished decision dated too early to be cited per Rule 1:28. If you choose to cite it, proceed carefully and with a detailed explanation of why you should be permitted to violate the Rule.) [↑](#footnote-ref-1)
2. A parent can raise this issue on appeal not only as a violation of the parent’s due process right to participate, but also as an abuse of discretion for failing to grant a continuance. For example, in In re L.A., 857 So.2d 310, 311 (Fla. Dist. Ct. App. 2003), a father was in the restroom when the court called the case. *Id.* The father’s attorney asked for a continuance, but the court refused. The court entered a default judgment against the father as he walked into the courtroom. *Id.* The District Court of Appeals of Florida determined that the trial court abused its discretion when finding that the father consented to the dependency under these circumstances. *Id.* at 312. The trial court was informed that the father was in the restroom, and the Court of Appeal noted that there was no reason to believe that the father was elsewhere or would not arrive momentarily. *Id.* [↑](#footnote-ref-2)