***[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

DATE: June, 2020

RE: Due Process - Meaningful Participation, Parent in Another State or Country

**QUESTIONS PRESENTED**

Due process requires that parents have an opportunity to meaningfully participate in trials terminating parental rights. Ideally, participation occurs at court and via face-to-face consultation with counsel. What does due process require on behalf of out-of-state parents who cannot attend court in person? What about for parents who are out of the country and cannot attend? What does due process require for a parent facing a long-term illness?

**BRIEF ANSWERS**

1. Due process requires that a parent residing in another state be provided with an opportunity to meaningfully participate in proceedings. However, courts prefer in-person participation because poverty alone is not a settled reason for use of alternative means of participation.
2. A parent with visa complications is in a situation like that faced by a detained or incarcerated parent; if in-person participation is essentially impossible, due process most likely requires allowing alternative means of participation.
3. The availability of alternative means of meaningful participation for a parent facing a long-term illness depends on the court’s evaluation of the specific facts of the case.

**DISCUSSION**

Parents have the due process right to meaningfully participate in child welfare proceedings. See *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). “A fundamental requirement of due process is ‘the opportunity to be heard.’ It is an opportunity which must be granted at a meaningful time and in a meaningful manner.” *Id.*, quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). But what does the right to “meaningful participation” mean in each case? How is the parent’s interest in participation weighed against the other interests at stake?

*Mathews v. Eldridge* clarifies that an individual’s procedural due process rights will demand different protections based on case-specific circumstances. 424 U.S. 319, 335 (1976). Courts apply the *Mathews* balancing test when assessing whether due process has been afforded where alternative means of participation are used or denied. *Adoption of Edmund*, 50 Mass. App. Ct. 526, 529 (2000). In termination proceedings, as well as care and protection cases, the balancing test is as follows: the “court must weigh the private interest that will be affected, the risk to the parent of an erroneous deprivation [of the right to due process], and the government's interest in making the determination.” *Id.*, citing *Mathews,* 424 U.S. at 334-35. The right to participate meaningfully is a due process right where “[p]arents have a fundamental liberty interest in maintaining a familial relationship with their children.” *Id.* If a State seeks to terminate parental rights, which would completely end a parent’s constitutional right to raise the child/children involved, it must do so “in a manner that meets the requirements of the due process clause.” *Edmund*, 50 Mass. App. Ct. at 529 (citing *Santosky v. Kramer*, 455 U.S. 745, 752-754 (1982) and *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); and quoting *Care and Protection of Robert*, 408 Mass. 52, 58 (1990)).

The government interest in allowing parents to participate via video conference is supported in Massachusetts by juvenile court procedures, which indicate that if a party makes a timely motion to allow use of videoconferencing for witness testimony, the judge may allow it—and may, in fact, “recommend the use of videoconferencing to the parties to further judicial efficiency.” Uniform Practice 01-10, Procedures for the Use of Juvenile Court Videoconferencing Equipment, Selected Court Rules and Standards, 365, 365 (outlining factors[[1]](#footnote-1) to be assessed in approving a motion seeking videoconferencing).

1. **NO CASE HAS HELD THAT A PARENT WHO CANNOT AFFORD TO PARTICIPATE HAS A DUE PROCESS RIGHT TO ALTERNATIVE MEANS BECAUSE OF POVERTY, BUT WHEN PROVIDED, ALTERNATIVE MEANS OF PARTICIPATION MUST GIVE THE PARENT A SUFFICIENTLY MEANINGFUL OPPORTUNITY TO PARTICIPATE.**

If an out-of-state parent cannot reach a Massachusetts courtroom to participate in care and protection proceedings, he or she still has options for meaningful participation. No case has held that a parent who cannot afford to participate has a due process right to alternative means because of poverty. However, on the principle that parents should be heard in court, counsel must still assert the parent’s interests where the means are inadequate or are not made available. “Except in unusual cases, both parents should be present at these hearings, to the end that the trial judge might better evaluate the character and fitness of each parent.” *Hamlin v. Hamlin*, 276 S.E.2d 381, 385 (N.C. 1981). The following cases involve parents in a variety of circumstances. Generally, the principles of the due process right to meaningfully participate while in another state *are* applicable to a parent who seeks to participate in a termination case in Massachusetts. There has been no clear determination of whether a parent who cannot afford to participate has a due process right to alternative means because of poverty; however, *Santosky v. Kramer* (1982)lends some guidance. The Court provided that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'” *Santosky,* 455 U.S. 745, 758 (1982) quoting Goldberg v. Kelly, [397 U.S. 254](https://www.law.cornell.edu/supremecourt/text/397/254), [262](https://www.law.cornell.edu/supremecourt/text/455/745)-263 (1970). This is bolstered by the fact that termination orders especially are final and irrevocable in most states. *Santosky,* 455 U.S. at 759. The Court went on to state that “[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups…such proceedings are often vulnerable to judgements based on cultural or class bias.” *Santosky,* 455 U.S. at 763. Because termination proceedings in particular involve an interest that is “far more precious than any property” it can be argued that courts should do everything in their power to prevent due process violations on the basis of poverty from affecting participating parents.

* 1. **Due process in Massachusetts courts requires that means of participation be adequate, and requests for alternative participation are timely and proper.**

In Massachusetts care and protection cases, meaningful participation means that "a parent [has] the opportunity effectively to rebut adverse allegations concerning child rearing capabilities," but does not require that a parent actually be *present* in the courtroom; that is where alternative means of participation enter the picture. *Edmund*, 50 Mass. App. Ct. at 529, quoting *Adoption of Mary*, 414 Mass. 705, 710, (1993).

An incarcerated father’s right to due process was not served where “[1] the father had made timely and persistent requests of the courts for leave to appear which were denied, [2] he specifically sought to participate through the court-sanctioned mechanism of telephone conferencing, and [3] no other procedure to respond was afforded to him.” *Edmund,* 50 Mass. App. Ct. at 530.

As a rule, “the precise method of participation should generally be left to the discretion of the trial judge,” who may “be given some flexibility, consistent with the facts of each case, in determining among several of the currently available options, including but not limited to video or telephonic conferencing during the proceedings” as would best “assure that a parent has a meaningful opportunity to respond to the evidence presented at trial.” *Id.* In Massachusetts courts, the adequacy of the means which a parent may or may not be afforded meaningful participation is most frequently assessed in the context of incarcerated parents challenging the sufficiency of those means. *Edmund,* 50 Mass. App. Ct. at 530-31. [[2]](#footnote-2) There is no right in Massachusetts to “in-person” participation by incarcerated parents. The specific alternative means by which an incarcerated parent may participate are not clearly defined.

In Massachusetts, for a parent to assert his or her due process right to participate by alternative means, a motion outlining those means must be made in a timely and proper manner. Otherwise, the judge’s exercise of discretion in assuring timely proceedings trumps a parent’s right to meaningfully participate. *Calderwood v. Dyer*, 68 Mass. App. Ct. 1114 (2007) (Mass. App. Ct. Rule 1:28).[[3]](#footnote-3) The Appeals Court in *Calderwood*, an unpublished modification of child support case, found that a lower court properly refused to hear an Arizona mother’s telephoned testimony. *Id.* The mother's counsel made an oral request for the mother to participate by phone “and submitted the mother's affidavit on the morning of trial,” which “stated that coming to trial from Arizona would ‘impact [her] financial situation.’” *Calderwood,* 68 Mass. App. Ct. 1114 at \*2. The court found that the motion “was neither timely nor proper,” and that the motion cited “no case law for the proposition that a party to an action can choose to participate in a trial by telephone to avoid the expense of coming to trial.” *Id.*

* 1. **Other states’ allowable alternative means of participation for out-of-state parents in termination proceedings may apply to Massachusetts cases.**

Other states’ courts have come to varied conclusions about which means of appearing at termination proceedings afford meaningful participation. These cases reinforce the idea that the “respondent in a [termination of parental rights] case has the right to ‘meaningfully participate’ in the hearing.” *Interest of Christopher D.,* 530 N.W.2d 34, 42 (Wis. Ct. App. 1995), quoting *In re A.A.L*., 448 N.W.2d 239, 243 (Wis. Ct. App.1989).

Where a father was denied his due process right to participate in New Mexico in 1999, the court reviewed the history of the right to participate in termination proceedings, finding that “due process requirements necessitate more than simply providing for a parent's appearance by deposition. *State ex rel. Children, Youth & Families Dep't v. Ruth Anne E*., 974 P.2d 164, 169-70 (N.M. 1999). The case required that the parent be given an *opportunity to revie*w the evidence presented by the state, to consult with his or her attorney, and then to present evidence by deposition or by telephone.” *Ruth Anne E*., 974 P.2d at 169-70 (emphasis on means of participation added). The court stated that “a parent who is incarcerated and is unable to attend the hearing on the state's petition to terminate parental rights is entitled to *more than* simply the right to cross-examine witnesses or to present argument through his attorney, or to present deposition testimony.” *Ruth Anne E*., 974 P.2d at 171. The right to meaningful participation for an incarcerated parent “includes the right to review the evidence presented against him or her, present evidence on his or her behalf, and an opportunity to challenge the evidence presented.” *Id.* The case specified that (a) testimony by telephone; (b) the opportunity to consult with counsel; and (c) the “opportunity to reopen [the] record after the deposition” strengthens the claim that participation was meaningful at the trial level. *Id.* As balanced with the economic interests of the State, the court held “[w]e do not believe that utilization of any of these procedures utilized in other states would greatly burden the Department.” *Ruth Anne E*., 974 P.2d at 172.

A Wisconsin court found that ideally, “a person whose parental rights the State seeks to terminate should be present at the proceedings, so he or she can not only see and hear what is going on and assess the witnesses' demeanor, but also assist his or her lawyer without any undue difficulties.” *In re Termination of Parental Rights to Idella W.,* 708 N.W.2d 698, 700 (Wis. App. 2005). If the parent cannot attend termination proceedings in person, alternative means of participation “*must*, unless either the parent knowingly waives this right or the ministerial nature of the proceedings make personal-presence unnecessary, *be functionally equivalent to personal presence*: the parent must be able to assess the witnesses, confer with his or her lawyer, and, of course, hear everything that is going on.” *Id.* The *Idella W.* court found that the parent was not able to meaningfully participate in termination proceedings when the alternative means provided (telephone) were inadequate. *Id.* The technology on the parent’s end “faded in and out” and was “temporarily interrupted by static.” *Idella W.,* 708 N.W.2d at 702-703. This alternative did not allow meaningful participation “because periodic or sporadic inaudibility… significantly truncates a party's ability to fully comprehend what is going on, and thus hinders the ability to get a feel for the proceedings—a mix of spoken words and body language—and, therefore, meaningfully consult with his or her lawyer concerning not only the testimony but also what everyone else may be doing in court.” *Id.*

Some states codify the circumstances under which a party may be compelled to testify by alternative means, though Massachusetts does not. For example, Vermont law says that:

“(1) The court may require any witness or party to testify or participate in a hearing by telephone if the court finds (A) that the testimony or participation of the witness or party is necessary to the fair determination of the issues, and (B) that the witness or party is either physically unable to be present or cannot be produced without imposing substantial administrative burdens or costs on the state.(2) Upon motion of a party granted in advance of hearing, or upon the court's own motion, the court may permit any witness or party to testify or participate in a hearing by telephone.” VT R. FAM. P. Rule 17 (2009).

Other states set up different schemes to ensure due process. For example, a Wisconsin court found “that a trial court may order the petitioning parent to pay for the transportation of the respondent [parent] to the termination hearing; but … did not decide whether the respondent has a right to be physically present or whether there are alternatives to physical presence that afford meaningful participation.” *Christopher*, 530 N.W.2d at 42, citing *In re A.A.L.,* 448 N.W.2d at 243. That court clarified that “whether a respondent in a TPR proceeding can meaningfully participate without being physically present depends on the circumstances of each case.” *Id.*

The poverty element of an out-of-state parent’s inability to attend is largely unexplored in Massachusetts courts. However, a federal court has held that where a mother who sought custody from the father chose not to attend proceedings and the mother had then “willfully and voluntarily absented herself despite the earlier orders” to appear, she had sufficient due process. *Morton v.* *Morton*, 982 F. Supp. 675, 688 (D. Neb. 1997). Because the mother did not attend custody proceedings but (a) was “granted a formal evidentiary hearing … (which she refused to attend),” (b) “provided with an in-chambers hearing,” and (c) “given an opportunity to submit formal written objections to the … order” it was found that the mother received adequate due process. *Id.*

Where a father had been incarcerated in several states, ultimately ending up in Texas, the court found that he had meaningful opportunity to participate through his counsel in Rhode Island custody proceedings because “an effort was made to ensure respondent's presence at the termination hearing through the issuance of a writ of habeas corpus,” *In re Brandon A*., 769 A.2d 586, 590 (R.I. 2001). The *Brandon* court acknowledged that when a party requests alternative means of participation be made available, “the Family Court justice should ascertain whether—in light of due-process considerations—alternative means of participation in the proceedings can be afforded” to the party, and then “direct an attorney … to inform the client of the possibility to participate by deposition, telephone, or with the help of transcripts and communication with counsel.” *In re Brandon A.,* 769 A.2d at 591.

For an indigent out-of-state parent, counsel must make a timely and proper motion to ensure that the parent will be allowed to participate in termination proceedings. Whether poverty alone allows the parent to seek alternative means of participation is an unsettled question, but the compelling interest in meaningful participation by parents supports any argument that alternative means should be made available. A stable and clear telephonic or web camera connection during proceedings will allow the parent to participate meaningfully in all, or most, aspects of a hearing. Where that connection breaks down or private consultation with counsel is unavailable, questions of adequacy may arise. If the parent chooses to participate by affidavit or deposition instead, before and/or after the trial, the parent will likely have been afforded due process rights.

1. **IF IN-PERSON PARTICIPATION BY A PARENT WITH VISA COMPLICATIONS IS IMPOSSIBLE, DUE PROCESS LIKELY REQUIRES ALTERNATIVE MEANS.**

A parent who lives in another country and is experiencing visa issues prior to care and protection proceedings in Massachusetts, may be able to assert a due process right to meaningfully participate through alternative means. Massachusetts care and protection cases do not address this scenario, so it is necessary to go outside the state to find similar cases.

In the case of *In re Interest of Mainor T.,* the court found that the mother’s children “were inappropriately removed from the home,” and the initiation of termination proceedings “‘led to a “domino effect,’ in which [the mother] had been deported and could not now reenter the United States without fear of a lengthy jail sentence.” 674 N.W.2d 442, 451 (Neb. 2004). Recognizing that the mother attempted to participate as much as she could via an affidavit, the court refused to allow the mother’s “failure to appeal from the adjudication [or] the disposition order” to preclude the court “from reviewing those proceedings for deprivations of due process.” *In re Interest of Mainor T,* 674 N.W.2dat 456.The court reasoned refusal would “abdicate this court's responsibility to ensure that proceedings which lead to the termination of a familial relationship are fundamentally fair.” *Id.* It was found that (a) the mother here was not afforded due process, and (b) the lower court did not establish termination was in the best interest of the child by clear and convincing evidence. *In re Interest of Mainor T,* 674 N.W.2dat 463. To avoid terminating parental rights based on a plan “designed for failure,” this court vacated the termination order and remanded. *Id.*

Unlike incarcerated parents, detained parents who are non-citizens do not enjoy the same level of due process protections if they are unavailable to appear. ICE does not grant detained parents rights that other parents would hold. According to an ICE directive, prior to deportation, a parent being detained by ICE does not retain “any right or benefit, substantive or procedural” that is “enforceable at law by any party in any administrative, civil or criminal matter.” ICE Parental Interests Directive: Overview of the Parental Interests Directive, https://www.ice.gov/about/offices/ enforcement-removal-operations/parental-directive.htm (as of June 17, 2014).

The ICE directive asserts that parents have a fundamental right to “make decisions concerning the care, custody, and control of their minor children.” Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities, U.S. ICE directive, pages 4-5, effective August 23, 2013, https://www.ice.gov/doclib/detention-reform/pdf/parental\_interest\_directive\_signed.pdf. The ICE directive states that detained parents should be allowed to attend parental rights proceedings “if practicable.” *Id.* If in-person appearance is not practicable due to administrative costs, time, “distance or safety concerns,” then “video or standard teleconferencing from the detention facility or the Field Office” *may* be facilitated by ICE, though such participation is not guaranteed. *Id.* This 2013 directive has not been cited in any court cases and is not binding or “enforceable at law,” but it implies that ICE has considered the parental participation of detained parents. *Id.* The directive could also affect hundreds of thousands of cases nationally: “DHS's Inspector General reported that between 1998 and 2007, the government deported 108,434 alien parents of U.S. citizen children.” 44 Conn. L. Rev. 99, 160, citing Office of the Inspector Gen., Dep't of Homeland Sec., Removals Involving Illegal Alien Parents of United States Citizen Children 4 (2009), http://www.dhs.gov/xoig/assets/mgmtrpts/OIG 09-15 Jan09.pdf.

Incarcerated, detained, and deported parents, as well as parents who otherwise are legally prevented from entering the United States, share an obstacle if confronted by government roadblocks to in-person participation. Thus, in asserting the participation rights of such parents, we can look to cases addressing the rights of incarcerated parents. *In re Dean L*., 109 A.D.2d 87, 88 (N.Y.S. 1985) (“Analogous cases…have upheld the right of the State to proceed with the hearing in the absence of a parent unable to attend because of imprisonment.”).

In *Bonaparte v. Devoti*, the Massachusetts Appeals Court articulated the breadth of the due process right to participate in trial. 93 Mass. App. Ct. 603 (2018). The case lays out the procedural flexibility that trial courts should give parties in proceedings involving children. *Id.* Nine days before trial, the wife moved for permission to testify by telephone or video, noting that difficulties with her green-card status would prevent her from re-entering the United States prior to trial. *Bonaparte,* 93 Mass. App. Ct. at 604. The pre-trial judge denied the motion without explanation. *Id.* At the start of the trial, the wife’s counsel renewed “the wife's request to testify by telephone or video,” but the new judge found the motion untimely, and denied it. *Id.* The trial judge ultimately entered a divorce judgment that “closely resembled the husband’s proposed judgment.” *Id.* The wife’s motion for a new trial was denied. *Bonaparte,* 93 Mass. App. Ct. at 605. The wife’s subsequent appeal claimed that the denial of her motion to participate through video or telephonic testimony was an abuse of discretion and deprived her of due process. *Id.*

The Appeals Court held that the denial of the wife’s motion to testify by video or telephone was an abuse of discretion, for several reasons. *Bonaparte,* 93 Mass. App. Ct. at 608. First, timeliness was not an issue warranting the denial of due process. The trial judge denied the wife’s motion based solely on the “untimel[iness]” of her request despite the fact that “there is no specific time frame for filing such a motion.” *Bonaparte,* 93 Mass. App. Ct. at 606. Mass. Dom. Rel. P. 30(A)(k)(1) requires notice and an opportunity to be heard but has no specific filing deadline. *Bonaparte,* 93 Mass. App. Ct. at 607. The rule *must* not supersede the needs of justice and the best interests of the child. *Id.* Second, the Appeals Court stated that the trial judge failed to “consider other relevant factors.” *Bonaparte,* 93 Mass. App. Ct. at 606. The trial judge failed to consider the wife’s interest in being able to testify, the prejudice resulting from her inability to testify, and the impact on the child’s interests. *Id.* The Court stated “[g]iven that the husband had only visited with the child a “few times” since 2011, and that the wife is responsible for the overwhelming majority of the child’s care, it is inconceivable that the wife’s testimony on these matters would have had no effect on the judge’s findings. *Id.* Finally, the best interest of the child was addressed in the trial judge’s consideration: “[i]n cases involving children, a judge’s action to ameliorate the harsh effects of a procedural rule may be necessary to protect the child’s best interests and to prevent manifest injustice.” *Bonaparte,* 93 Mass. App. Ct. at 607. The risk of a child “receiving less support than necessary” because of this abuse is “too great to ignore.” *Id.*

In *Adoption of Posy,* a father living in Guatemala sought custody of his two daughters, who were placed in foster case after their mother died. 94 Mass. App. Ct. 748. The Probate and Family Court terminated the father’s parental rights; the father won on appeal, and the termination was vacated. *Id.* The appeals court found that along with a lack of clear and convincing evidence, the Department rushed in changing its goal from reunification to adoption, violating the father’s right to due process. *Adoption of Posy,* 94 Mass. App. Ct. at 752. The judge stated that the goal changed because of the father’s “lack of progress” on his service plan. *Id.* However, in contrast, Department expressed that the goal changed because of the father’s immigration status and because “the children are United States citizens.” *Id.* On appeal, the court acknowledged special challenges, but stated that such challenges “must be met…consistent with due process.” *Id.* The service plan was issued for less than a month before the goal changed from reunification to adoption here. *Adoption of Posy,* 94 Mass. App. Ct. at 750. A desire for permanency in the lives of children is important but does not excuse bypassing due process for parents.

An out-of-country parent must assert his or her due process rights and make clear the difficulties in any attempt to meaningfully participate. He or she will have the same options for participation means as a father in the country (phone, videoconference, affidavit, deposition, or counsel representation). The parent should attempt to participate at all stages of the proceedings, through whatever means are available. Where means are not made available, the parent should present a timely challenge. Difficulties in obtaining a visa are analogous to the difficulties faced by detained or deported parents, who still have some rights despite interactions with ICE and law enforcement. Ultimately, the parent has a right to meaningfully participate in court proceedings around the termination of his parental rights. Procedural mishaps should not supersede a parent’s right to due process or the best interest of the child.

1. **EVALUATION OF WHETHER A PARENT’S ONGOING MEDICAL FRAGILITY SHOULD PERMIT THE PARENT TO PARTICIPATE BY ALTERNATIVE MEANS REQUIRES THE COURT TO WEIGH THE INTERESTS OF ALL PARTIES INVOLVED.**

A medically fragile parent who is in the hospital at the time of proceedings may request participation via a motion for alternative means. However, it is within the judge’s discretion to allow or deny such a motion. Cases like this involve weighing the conflicting interests of the parent, the child, and the State, and frequently come out in favor of interests other than those of the parent.

A New York father unable to attend custody proceedings because of multiple heart attacks had his due process rights violated. *Dean L.,* 109 A.D.2d at 90-91. While the court in *Dean* did reverse the decision of the lower court, which conducted a hearing without the father, it acknowledged that the right of a child to “prompt determination of their status” superseded the father’s right to testify. *Id.* That court recognized the availability and importance of alternative means of participation: “The risk that [the father’s] absence will lead to an erroneous decision can be reduced or eliminated by permitting him to give testimony by deposition, if possible, and by his representation at trial by his attorney.” *Dean L.,* 109 A.D.2d at 88. Though the term “alternative means” is not used in discussing these approaches to participation by a medically fragile parent, note that the absence of any participation by the father is not a suggested alternative. *Dean L.,* 109 A.D.2d at 91.

In contrast, *In re Samara R.* addresses a mentally ill mother who had “phony” medical emergencies (among multiple recorded emergency room visits during the period) on the dates of various termination proceedings. 795 N.W.2d 64 (Wis. App. 2011) (unpublished decision). The court found that the mother did *not* have her due process right to meaningfully participate violated where a doctor testified that the mother was “a known abuser of emergency services and on [the date of a scheduled deposition,] … presented herself to the emergency room with no medical or psychiatric problems.” *In re Samara R.,* 795 N.W.2d at \*6.

 Often, parents with long-term obstacles to participation seek continuances, rather than attempting to participate by alternative means. Thus, counsel must differentiate between parents capable of participating in some meaningful alternative fashion *now* from those unable to participate in the foreseeable future. See *State in Interest of S.A.D*., 481 So. 2d 191, 194 (La. Ct. App. 1985); *Cecilia A. v. Arizona Dep't of Econ. Sec.,* 274 P.3d 1220, 1225 (Ariz. Ct. App. 2012); *In re T.E.B.,* 24 P.3d 900, 904 (OK CIV APP 2001).

A father’s ability to participate in termination proceedings was limited because he was “profoundly deaf,” and hearing aids only minimally improved his hearing. *State in Interest of T.S.B*., 532 So. 2d 866, 868 (La. Ct. App. 1988) (writ denied sub nom). *In Interest of T.S.B.*, 536 So. 2d 1239 (La. 1989). The court found that the father was allowed to meaningfully participate where “the appointment of competent counsel, the limited use of hearing aids and [the father’s] ability to communicate in writing … reduced the risk of error to a minimum.” *Id.* (finding father’s imprisonment and the fact that his “hearing impairment will not improve” weighed in favor of “permitting the state to proceed with its efforts to terminate”).

The Juvenile Court videoconferencing guidance specifically asks judges to weigh “whether transporting the person proposed to appear by videoconferencing to the courtroom presents a significant health or security risk, … the convenience of the parties and the proposed witness,” and other relevant factors. Uniform Practice 01-10 at 365. This speaks directly to the circumstances of a parent whose removal from a hospital and appearance in a courtroom could indeed present a health risk to her (or others, if contagious). The transportation of a medically fragile person and accommodation of their medical needs in a courtroom is almost certainly inconvenient. A timely and proper motion stating these compelling reasons and the mother’s desire to testify by videoconference should be presented at least 30 days before the hearing. *Id.*

**CONCLUSION**

 Parents who want to participate in Massachusetts termination proceedings have a due process right to meaningful participation that must be asserted timely and properly. Parents, despite their inability to appear in court, should be afforded the best available means of participation in the proceedings to terminate their parental rights.

Alternative means of participation are available, but counsel is likely to get accommodations for parents only where it seeks to take advantage of those means through a timely motion.

“Meaningful participation” in termination proceedings requires different accommodations depending on the interests being balanced and the parent’s needs, their reasons for seeking alternative means and their choice of means. Where alternative means fall short, such as fuzzy reception or inadequate ability to interact with counsel, parents may have grounds to contest whether their participation was “meaningful” at all.

The right to meaningfully participate is not dependent on the parent’s location; nor will the parent’s indigent status or noncitizen status negate his right to participate. The case law in Massachusetts, supported by case law from other jurisdictions, indicates that the right of the parent to be involved in his child’s life is an important one. The state has an interest in ensuring fair proceedings, and in ensuring that all parents have a right to participate. The use of alternative means of participation furthers these state goals.

1. Factors and conditions to be considered by the judge are: “(1) whether the party filing the motion is unable, after a diligent effort, to procure the physical presence of a party or witness in the courtroom (2) whether full and effective cross-examination can occur, especially when the cross-examination may involve documents or exhibits, (3) whether there is sufficient control of the proceedings at the remote site so as to effectively extend the courtroom to the remote site, (4) whether transporting the person proposed to appear by videoconferencing to the courtroom presents a significant health or security risk, (5) whether security would be required and available at the remote site to commit to videoconferencing on the date(s) and time requested in the motion, (6) the cost of producing a witness in person in relation to the importance of the offered testimony, (7) the convenience of the parties and the proposed witness, and (8) *any other factors that the court my determine to be relevant.* Any order issued pursuant to this procedure is subject to (a) the ability to compatibly utilize the videoconferencing equipment between the court and the remote site, (b) the operational needs of the remote site, and (c) the cost to the court to utilize said equipment.” Uniform Practice 01-10 at 365 (emphasis added). [↑](#footnote-ref-1)
2. *Edmund* cites to the following states’ approaches in its assessment of modes of meaningful participation, largely in the context of incarcerated parents: *In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982) “(no due process violation where father was represented by *counsel*, was given *trial transcript* in order to rebut testimony, and was able to testify via *telephone*)”; *In re Adoption/Guardianship No. 6Z980001,* 748 A.2d 1020 (Md. 2000) “(parent submitted *deposition* testimony *prior to trial*, was provided with *transcript* from the State's case, and was given *opportunity* to submit an *affidavit* in response)”; *State ex rel. Juvenile Dept. v. Stevens,* 786 P.2d 1296 (Or. App 1990) “(incarcerated father not deprived of due process rights where he was represented by *counsel* and was able to testify via *telephone* after adverse witnesses); *In re Randy Scott B.,* 511 A.2d 450, 453–454 (Me. 1986) (incarcerated father's constitutional rights held adequately protected where his *deposition* was admitted in evidence and his *counsel* declined the opportunity to open the record *after the trial*).” *In re Baby K.,* 722 A.2d 470 (N.H. 1998) “(where incarcerated father participated via *telephone* and his *attorney* had the dual responsibility of representing his client and acting as a conduit for information from and to the parent, the court held that the father could not have received adequate representation because his attorney was required to perform two roles at once; vacated and remanded to the trial court to devise a mechanism for meaningful participation)”; *State ex rel. Children, Youth & Families Dept. v. Ruth Anne E.,* 974 P.2d 164 (N.M. 1999) “(due process rights were violated because parent was not given an opportunity to respond to allegations, e.g., a *posttrial* [sic] *deposition* after reviewing the evidence).” *Edmund,* 50 Mass. App. Ct. at 529 (emphases on allowable or rejected means added). [↑](#footnote-ref-2)
3. Generally, unpublished cases before 2008 cannot be cited. *Calderwood* serves as support for the published cases cited here. [↑](#footnote-ref-3)