***[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 (EdC)

DATE: June, 2020

RE: Due Process—Right to Testify, Present Evidence, and Cross-Examine Witnesses

**QUESTIONS PRESENTED**

 What are the due process rights of parents involved in child welfare proceedings to testify, present evidence, and cross-examine witnesses? Which of these rights is subject to the judge’s discretion and by what determination? This three-part question will be explored by analyzing three cases: *In re Daniella G.* (2018), *Morgan v. Getter* (2014), and *C.O. v. M.M.* (2004).

**BRIEF ANSWERS**

1. The right to testify is a part of the due process right to “a meaningful opportunity to be heard.” The judge’s discretion is not absolute; testimony can be blocked for certain reasons. For example, the possible benefit of testimony by a minor can be outweighed by the psychological harm to the minor.
2. The right to present evidence is a part of the due process right to “a meaningful opportunity to be heard” and being allowed to do so could “sufficiently protect the defendant’s due process rights.”
3. The right to cross-examine witnesses is a part of the due process right to “a meaningful opportunity to be heard.” However, this right in a civil proceeding does not rise to the full Sixth Amendment right enjoyed by criminal defendants.

**DISCUSSION**

In general, “parents have a fundamental liberty interest in the care, custody, and management of their children.” *In re Daniella G.,* 23 Cal.App.5th 1083, 1092 (2018). Due process requires that “the right of the defendant to be heard…requires that the defendant be given an opportunity to testify and present evidence.” *C.O. v. M.M.,* 442 Mass. 648, 656 (2004).See *Commonwealth v. Delaney,* 425 Mass. 587, 591 (1997); *Commonwealth v. Durling,* 407 Mass. 108, 113 (1990); *Roche v. Massachusetts Bay Transp. Auth.,* 400 Mass. 217, 222 (1987). Additionally, “[w]hile a defendant’s right to present evidence is not absolute, and…a judge may limit cross-examination for ‘good cause’ in certain situations…judicial discretion is not unlimited.” *C.O.,* 442 Mass. at 657.Certain factors will mitigate whether the exclusion of these rights was within the proper discretion of the trial court, such as whether the testifying witness is an adult or child. Unlike criminal defendants, parents in child welfare proceedings do “not have a right to ‘full confrontation and cross-examination’ under the Sixth Amendment…” *In re Daniella G.,* 23 Cal.App.5th at 1092.

**I. RIGHT TO TESTIFY**

In *C.O. v. M.M.,* the defendant in a criminal case appealed the denial of his motion to modify an ex parte temporary abuse prevention order that was issued against him by plaintiff’s daughter. 442 Mass. 648 (2004). The defendant was a seventeen-year-old high school student accused of sexually assaulting a fifteen-year-old schoolmate. *C.O.,* 442 Mass. at 649. The plaintiff in this case, C.O., is the mother of the young woman who was allegedly abused. *Id.* The plaintiff's affidavit claimed that the defendant offered to drive the daughter home from school. Along the way, the defendant stopped at his house, invited the young woman inside, and then forcibly sexually assaulted her in his bedroom. *Id.* The defendant denied the incident happening. *Id.* Shortly after, the plaintiff filed a complaint and supporting affidavit on behalf of her daughter and obtained an ex parte abuse prevention order against the defendant pursuant to [G.L. c. 209A, § 4](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000042&cite=MAST209AS4&originatingDoc=Ia991b757d45811d983e7e9deff98dc6f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.UserEnteredCitation)). *Id.* Next, the defendant was arrested and arraigned on charges stemming from the assault, and the Brockton District Court extended the abused protection order. *C.O.,* 442 Mass. at 650. The defendant ultimately made a motion to modify the abuse prevention order, which was denied. *Id.* This decision is from the defendant’s timely appeal of that denial. *Id.*

The court issued three relevant findings: (1) the trial court's refusal to allow defendant to present evidence and cross-examine witnesses during a hearing on whether to continue an temporary abuse prevention order violated the defendant's constitutional and statutory right to be heard; (2) the trial court's refusal to allow defendant to testify was not a proper exercise of judicial discretion; and (3) the fact that a separate criminal matter relating to alleged sexual assault was pending at time of this hearing…had no bearing on defendant's due process rights to present evidence and cross-examine witnesses. *C.O.,* 442 Mass. at 648, 656-659.

The court provided there was “no question that the defendant was denied a meaningful opportunity to be heard.” *C.O.,* 442 Mass. at 656. Moreover, “the right of the defendant to be heard” and the right to due process “requires that the defendant be given an opportunity to testify and present evidence.” *Id.* See *Commonwealth v. Delaney,* 425 Mass. 587, 591 (1997); *Commonwealth v. Durling,* 407 Mass. 108, 113 (1990); *Roche v. Massachusetts Bay Transp. Auth.,* 400 Mass. 217, 222 (1987). The opinion pointed out that “on four separate occasions” the defendant’s counsel had argued for his right to call witnesses. *C.O.,* 442 Mass. at 657. The plaintiff argued that even if the defendant’s right to testify, call and cross-examine witnesses was denied, it was in the proper discretion of the judge. *C.O.,* 442 Mass. at 657. The court disagreed: “While a defendant’s right to present evidence is not absolute, and…a judge may limit cross-examination for ‘good cause’ in certain situations…judicial discretion is not unlimited.” *Id.*

In a California case, *In re Daniela G.,* the appeals court affirmed the lower court, finding that the exclusion of a minor’s testimony comported with due process.The court found that the juvenile court properly refused to compel minors to testify where the possible benefit of testimony was outweighed by the psychological harm it would cause to the minors. 23 Cal.App.5th at 1083. In this case, the plaintiff father was accused of molesting his stepdaughter and grooming his biological daughter, Daniela G., for sexual abuse. *Daniela G.,* 23 Cal.App.5th at 1086-1088. Two social workers testified that having the minor (Daniela G.) testify would be “extremely detrimental” to her because of (1) age, and (2) the nature of the allegations. *Daniela G.,* 23 Cal.App.5th at 1089.

### On appeal, the father argued that he was denied his right to due process because the juvenile court “refused to require” Daniela and her stepsister to testify. *Daniela G.,* 23 Cal.App.5th at 1090.The father claimed that there was “insufficient evidence” that testifying would hurt Daniela G. *Id.* Moreover, the father claimed that his due process right to confront and cross-examine a witness was violated. *Id.* The court rejected these arguments and affirmed the lower court ruling in four respects: (1) the testimony of child would not have materially affected the juvenile court's resolution of issues; (2) the testimony of the stepdaughter would not have materially affected juvenile court's resolution of the issues; (3) the evidence was sufficient to demonstrate that testifying would have been psychologically harmful to child, so as to support exclusion of testimony; and (4) evidence was sufficient to demonstrate that the stepdaughter would have been psychologically harmed by testifying, so as to support exclusion of her testimony. *Daniela G.,* 23 Cal.App.5th at 1086.

### The father also argued that the child should not have been allowed to testify in chambers. A minor can testify in separate chambers, “without a parent present” in certain circumstances. *Daniela G.,* 23 Cal.App.5th at 1090. Because the father raised this argument on appeal, but not in juvenile court, the appeals court agreed that he “forfeited this argument by not raising it below.” *Id.* The court is also not required to make a minor testify in chambers if they are not allowed to testify in court. *Id.*

### The court also spoke to this not being an argument of unavailability under Section 240, [[1]](#footnote-1) but an argument of discretion: “…a juvenile court has discretion to refuse to require a child to testify even when [section 240](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000207&cite=CAEVS240&originatingDoc=Ifd36c9a063a511e88a14e1fba2b51c53&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))'s requirements are not met if the material effect of the child's testimony on the relevant issues is outweighed by the psychological injury the child risks by testifying.” *Daniela G.,* 23 Cal.App.5th at 1091. In their decision, the appeals court looked to the principles in another case, *Jennifer J.,* 8 Cal.App.4th at 1085-1086, 1088 (1992). Some of these factors include whether “the child is competent to testify” and whether the child “is both practically and legally ‘available’ to testify.” *Daniela G.,* 23 Cal.App.5th at 1092. This, in conjunction with the appeals court finding there was sufficient evidence of harm, led to holding that the juvenile court here used proper discretion in refusing to require a minor to testify, because the material effect of the testimony was outweighed by the psychological harm to the child. *Id*. Even if the evidence is relevant, the goal is to “preserve and promote the best interests of the child.” *Id.* Additionally, while the parents “have a fundamental liberty interest” in the care of their children, and a due process right to “a meaningful hearing,” they do not have the same Sixth Amendment right to “full confrontation and cross-examination” the way a criminal defendant does. *Daniela G.,* 23 Cal.App.5th at 1092.

**II. RIGHT TO PRESENT EVIDENCE**

The opinion in *C.O.* held that “[t]he defendant was never permitted to present evidence,” despite his counsel arguing for that right. 442 Mass. at 657. The court reasonably pointed out that counsel being able to argue for the right was *not* a substitute for being given the right. *Id.* An error addressed by the court in *C.O.* was the trial judge’s claim that “the defendant’s right to present evidence at an upcoming criminal hearing would sufficiently protect the defendant’s due process rights.” *C.O.,* 442 Mass. at 658. Again, there is no substitution here. A pending criminal matter is a different matter entirely. *Id.* While abuse prevention order proceedings “were intended” to be informal, “the proceedings may not violate the due process rights of defendants in an attempt to accommodate plaintiffs.” *C.O.,* 442 Mass. at 659

**III. RIGHT TO CROSS-EXAMINE WITNESSES**

In *C.O.,* the plaintiff mother rebutted that even if the defendant’s right to testify, call and cross-examine witnesses was denied, it was at the proper discretion of the judge. 442 Mass. at 657. The court disagreed: “While a defendant’s right to present evidence is not absolute, and…a judge may limit cross-examination for ‘good cause’ in certain situations…judicial discretion is not unlimited.” *Id.* For example, cross-examination can be limited or denied “to avoid harassment,” “intimidation of witnesses, confusion, delay,” or “other abuses.” *C.O.,* 442 Mass. at 658. But in this case, there was nothing on the record showing “of any of the grounds enumerated…that would justify a limitation of these rights.” *Id.* In short, each side deserves a fair opportunity to “challenge each other’s evidence.” *C.O.,* 442 Mass. at 657.

The father in *Daniela G.* argued that the “cross-examination of Daniela was ‘critical’ because her “hearsay statements…formed the basis of the allegations against him.” *Daniela G.,* 23 Cal.App.5th at 1094. He further argued that the court would be able to gauge how “stressed” Daniela was around him, for the purposes of determining visitation. But the court said the determination “that visitation was inappropriate was based primarily on father's failure to show even a ‘slight understanding of the horror of what he perpetrated on these two little girls,’ not on Daniela's expressed wishes.” *Id.* Because Daniela’s testimony “would not have materially affected the court’s resolution” of the issues, the lack of cross-examination was not found to have been a due process violation. *Id.*

In a custody case from the Supreme Court of Kentucky, the court found that the mother’s right to due process included the right to conduct cross-examination of the child’s guardian *ad litem* (GAL). *Morgan v. Getter,* 441 S.W.3d 94 (2014). As background, the father involved sought modification of the custody arrangement with the child’s mother. *Morgan v. Getter,* 441 S.W.3d at 96. The trial court decided to appoint a GAL to the child involved “to investigate the situation, file a repost summarizing his findings, and to make a recommendation as to the custody issues raised by the parties.” *Id.* At trial, the GAL’s evidentiary report helped the court determine custody should be switched from the mother to the father. *Id.* The mother appealed, partially on the grounds that the trial court’s denial of her request to cross-examine the GAL on his evidentiary report violated her due process right. *Morgan v. Getter,* 441 S.W.3d at 98. Although the case was moot because the child had turned 18, the court wanted to review the case as a matter of public policy. *Id.* Part of the issue at trial was the trial court’s dilemma in the GAL being a “friend of the court” or FOC, who can actively participate as legal counsel for the child through calling and cross-examining witnesses, opening and closing statements, etc. *Morgan v. Getter,* 441 S.W.3d at 111. This makes some courts reluctant to allow cross-examination of a GAL/FOC. On the other hand, the GAL must advocate for the “child’s best interests” in an unbiased way, even if that conflicts with the child’s direct wishes. *Id.* This, of course, can create an ethical dilemma because a lawyer is not supposed to “act as an advocate at a proceeding in which he or she is likely to be a necessary witness.” *Id.* While the court sympathized with the dilemma in not mixing these roles, a party’s constitutional right should trump the rule and state interest here. *Id.* Under the *Mathews* analysis, the mother has a “protected liberty interest in the care and protection of her daughter.” *Morgan v. Getter,* 441 S.W.3d at 112. See *Troxel v. Granville,* 530 U.S. 57, 65 (2000). That liberty interest was “adversely affected” by the custody proceedings. *Id.* Allowing the cross-examination of the GAL would have allowed the mother to “test the accuracy of the GAL’s report” as well as exposing his “assumptions and potential biases.” *Id.* Moreover, disallowing the cross-examination of the GAL, who had a strong bearing in determining the outcome of this liberty interest, “created a real and substantial risk that [the mother’s] fundamental interests would be erroneously impaired.” *Id.*

**CONCLUSION**

The right to testify is a part of the due process right to “a meaningful opportunity to be heard.” While the right to testify is a due process right and the judge’s discretion is not absolute, testimony can be blocked for certain reasons. Under *In re Daniela G.* (2018), the possible benefit of testimony by a minor can be outweighed by the psychological harm to the minor. Therefore, excluding that testimony could be affirmed as a proper use of discretion by the trial judge. Generally, proceedings may not “may not violate the due process rights of defendants in an attempt to accommodate plaintiffs,” and this specifically applies to the due process right to present evidence. Cross-examination can be limited or denied “to avoid harassment,” “intimidation of witnesses, confusion, delay,” or “other abuses.” However, cross-examination is important to due process rights because it allows a party the opportunity to “test the accuracy” of the witness as well as exposing the witness’s “assumptions and potential biases.” Because parents have a fundamental liberty interest in the care, custody, and management of their children, the due process right to testify, bring evidence, and cross-examine witnesses plays an important role in protecting the erroneous deprivation of that fundamental liberty.

1. Under [Section 240](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000207&cite=CAEVS240&originatingDoc=Ifd36c9a063a511e88a14e1fba2b51c53&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), a witness is unavailable to testify if the witness is “[d]ead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity.” ([§ 240, subd. (a)(3)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000207&cite=CAEVS240&originatingDoc=Ifd36c9a063a511e88a14e1fba2b51c53&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_28cc0000ccca6)). Ann. Cal. Evid. Code § 240. Unavailable as a Witness. The father in *Daniela G.* argued that because the child was not found to be suffering from a then-existing physical or mental illness, she was not unavailable to testify, and should have testified. 23 Cal.App.5th at 1090-1091. [↑](#footnote-ref-1)