Fundamental and Harmless Error
By Joel R. Brandes

In Newton v McFarlane,[1] the Family Court stated only its conclusion - that the mother had established changed circumstances and that awarding custody to the mother was in the child's best interests - but no decision was ever issued. The Appellate Division, citing CPLR 4213[b] observed that "[i]nherent in the proposition that a reviewing court will give deference to the findings made by the hearing court is that the hearing court issued either a written or oral decision setting forth its findings of fact and conclusions of law... No deference can be given to a decision which does not exist or to findings which were not made."

A trial court decision in a matrimonial or family court matter must comply with CPLR 4213 (b) which requires that the decision of the court must state the facts it deems essential. [2] The mechanics of complying with this mandate requires the trial court to (1) determine the facts; (2) determine the applicable law; (3) apply the law to its findings of facts and (4) then exercise its discretion in reaching its conclusion. Based upon its findings of fact and conclusions of law a judgment or order is then entered. Court rules require that findings of fact and conclusions of law be in a separate paper from the judgment.[3]

Many lawyers appeal from a trial court decision on the ground that the trial court made numerous evidentiary errors, and are confounded when the Appellate Division affirms the judgment. This occurs when the errors are harmless error. On the other hand, reversal is required when the error is a fundamental error. In this article we will discuss the distinction between fundamental error and harmless error in matrimonial and family court matters.

When a trial court makes evidentiary errors or rulings which operate to deny an individual his fundamental right to a fair trial, an appellate court must reverse the judgment and grant a new trial, without regard to any evaluation as to whether the errors contributed to the result, and even in the absence of an objection. This is called a "fundamental error".[4]

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[1] Newton v McFarlane, 2019 N.Y. Slip Op. 04386, 2019 WL 2363541, at *6 (2 Dept., 2019)

[2] CPLR § 4213

[3] 22 NYCRR § 202.50

[4] Rodriguez v Cato, 63 AD2d 922, 406 NYS2d 100 [1st Dept 1978].

The denial of the right to assistance of counsel is a fundamental error. In Moloney v. Moloney, [5] the court held that the deprivation of a party's fundamental right to counsel in a custody or visitation proceeding required reversal, without regard to the merits of the unrepresented party's position. In DiBella v DiBella, [6] the Appellate Divison held that the deprivation of a party's statutory right to counsel requires reversal, without regard to the merits of the unrepresented party's position. In the absence of the requisite statutory advisement of her right to counsel or a valid waiver of such right the mother was deprived of her fundamental right to counsel.

It is a fundamental error for a party to be denied due process.[7] In Pringle v Pringle[8] reversal was required because the hearing conducted by the Hearing Examiner failed to comply with the rudiments of due process. The Appellate Division observed that a hearing to determine an application for modification of a support order is governed by the rules of evidence. Unsworn testimony is inadmissible and unverified financial data cannot serve as a basis for a Family Court order for support. The colloquy among counsel and the Hearing Examiner was not a substitute for testimony.

The failure of a court to advise a respondent of his right to counsel before respondent partially admitted the allegations in a PINS petition was been held to be reversible error as a denial of due process.[9]

In Matter of King v King,[10] a custody proceeding, the court held that although a movant seeking to vacate a default is generally required to demonstrate both that there was a reasonable excuse for his failure to appear and a meritorious defense no showing is required where a party's fundamental due process rights have been denied. Notice is a fundamental component of due process. In the absence of notice to the wife, Family Court's sua sponte consideration of extraneous allegations violated the wife's due process rights.

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[5] Moloney v Moloney, 19 AD3d 496, 798 NYS2d 455 [2d Dept 2005]

[6] DiBella v DiBella, 161 AD3d 1239, 75 NYS3d 371 [3d Dept 2018]

[7] See Pringle v Pringle, 296 AD2d 828, 744 NYS2d 784 [4th Dept 2002]

[8] Id

[9] See Matter of Mark S., 144 AD2d 1010, 534 NYS2d 53 [4th Dept 1988]; Matter of Damian C., 161 AD2d 1206, 556 NYS2d 429 [4th Dept 1990].

[10] King v King, 167 AD3d 1272, 91 NYS3d 283 [3d Dept 2018]

The denial of the right to testify and to present witnesses is the denial of a fundamental right. In Matter of Liska J v Benjamin K, [11] a custody proceeding, the father was deprived of procedural due process when Family Court excluded testimony as to his fitness as a parent. As a result, the father was prevented from addressing all of the relevant factors, including who should be the primary custodian and what he did to foster a relationship between the child and the mother. The father's stepfather was precluded from testifying as to his observations of the father as a parent. The Appellate Division held the court's failure to allow the father a full and fair opportunity to present evidence, coupled with the court's own limitations on its decision, constituted a fundamental due process error requiring reversal of Family Court's order.

The denial of the right to cross-examine witnesses and the right to confer with counsel are fundamental errors requiring reversal. In Matter of Dominic B.,[12] the courts failure to afford the mother the opportunity to cross-examine a key witness, a caseworker for petitioner, constituted a denial of her fundamental right to due process. In Matter of Turner v Valdespino,[13] Family Court violated the mothers fundamental due process rights when it instructed her not to consult with her attorney during recesses, which resulted in her being unable to speak to her attorney over extended periods of time. Family Courts conduct deprived the mother of due process.

The failure to advise a party of the right to counsel in a proceeding where he is entitled to the assignment of counsel is reversable error. In Matter of Tyler D,[14] the Appellate Division held that the failure to apprise a respondent in a PINS proceeding of the right to remain silent constituted reversible error, even if the respondent consented to the disposition in the presence of counsel or fails to seek to withdraw his or her admissions based on the failure.

The inability of a trial court to state any facts in support of its determination after the case was remitted by the Appellate Division to it for the purpose of formulating findings of fact constituted fundamental error.[15]

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[11] Liska J. v Benjamin K., 2019 WL 2835000 [3d Dept, 2019]

[12] In re Dominic B., 138 AD3d 1395, 30 NYS3d 769 [4th Dept 2016]

[13] Turner v Valdespino, 140 AD3d 974, 34 NYS3d 124 [2d Dept 2016]

[14] Matter of Tyler D. (Anonymous), 166 AD3d 612, 87 NYS3d 338 [2d Dept 2018]

[15] Rosenblatt-Roth v Rosenblatt-Roth, 78 AD2d 771, 433 NYS2d 652 [4th Dept 1980]

At the other end of the spectrum there is harmless error. CPLR 2002 codifies the 'harmless error" rule in New York. It provides that: "An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced."

Under CPLR 2002 the erroneous admission of improper evidence is harmless error, and not a basis for reversal if the outcome probably would have been the same even if the evidence had been excluded. Where the trial court erroneously excludes competent and relevant evidence, reversal is appropriate only if the excluded evidence probably would have been a "substantial influence" in producing a different result.[16] For example, reversal was not required where improperly admitted evidence was of a "quibbling nature. "[17] The reading of deposition transcript into evidence was harmless error where it's contents were merely duplicative of evidence that had been independently admitted.[18]

In Wilbur v Wilbur, [19] the parties' stipulated to prevent the court from considering the fault of either party prior to the commencement of the divorce action. Trial Term, in that portion of its decision dealing with maintenance, pointed out that it was plaintiff's "initiative to break up the marriage". The Appellate Division held that in light of the parties' stipulation, this was improper. However, the error was harmless since Trial Term's decision demonstrated a careful analysis of all of the relevant statutory factors and since the amount awarded was fair and appropriate.

It has been held that an error is harmless where the admissible evidence amply supports the court's determination, and it does not appear from the record that the court relied upon that inadmissible evidence in making its determination.[20] Error in admitting a document is harmless where it does not appear that the court relied on the document, and the other evidence adduced at the hearing supports the court's determination.[21]

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[16] See, e.g., Khan v Galvin, 206 AD2d 776, 615 NYS2d 111 [3d Dept 1994]; Walker v State, 111 AD2d 164, 488 NYS2d 793 [2d Dept 1985].

[17] Fishman v Scheuer, 39 NY2d 502, 349 NE2d 815 [1976]

[18] Green Is. Assoc. v Lawler, Matusky & Skelly Engineers, 170 AD2d 854, 566 NYS2d 715 [3d Dept 1991]

[19] Wilbur v Wilbur, 116 AD2d 953, 498 NYS2d 525 [3d Dept 1986]

[20] In re Michael G., 300 AD2d 1144, 752 NYS2d 772 [4th Dept 2002]

[21] See In re Sherri M.K., 292 AD2d 868, 869, 739 NYS2d 325 [4th Dept 2002]; Matter of Barone v Milks, 289 AD2d 931, 734 NYS2d 763 [4th Dept 2001]; Liza C. v Noel C., 207 AD2d 974, 616 NYS2d 819 [4th Dept 1994].

In Matter of Lane v Lane, [22] the Appellate Division held that Family Court erred in admitting the statements made to the court-appointed psychologist by the son's half-sister about abuse she and another half-sister had suffered at the hands of the mother. Although previous allegations of abuse or neglect made by a child are admissible in custody or visitation proceedings if they are corroborated, the half-sister's statements to the forensic evaluator were largely uncorroborated. However, the error was harmless, as there was a sound and substantial basis in the record for the Family Court's determination, without consideration of the statements, that it was not in the son's best interests to have unsupervised contact with his mother.

Where a Law Guardian's report contained inadmissible hearsay, the error was harmless where there was no indication that the court relied upon the report in making its determination and the admissible evidence at the hearing supported the court's determination.[23]

However, although individual errors might be deemed harmless when considered separately, a new trial will be ordered when these errors, considered collectively, cause substantial prejudice to a party,[24] or are unduly prejudicial. [25]

Conclusion

As we have seen, there is a substantial difference between fundamental error and harmless error. An attorney considering an appeal must consider this distinction when advising a client whether or not to take an appeal from an adverse order or judgment.

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[22] Lane v Lane, 68 AD3d 995, 892 NYS2d 130 [2d Dept 2009]

[23] See, Matter of Barone v Milks, Supra.

[24] Platovsky v City of New York, 275 AD2d 699, 700, 713 NYS2d 358, 360 [2d Dept 2000]

[25] McGloin v Golbi, 49 AD3d 610, 611, 853 NYS2d 378, 379 [2d Dept 2008]