AMERICAN BAR ASSOCIATION

Directory of Law Governing Appointment of Counsel in State Civil Proceedings

FLORIDA

American Bar Association
Standing Committee on Legal Aid and Indigent Defendants
321 N. Clark Street
Chicago, IL 60610
Phone: 312-988-5765; FAX: 312-988-5483
http://www.americanbar.org/groups/legal_aid_indigent_defendants.html

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Preface

Important Information to Read Before Using This Directory

The *ABA Directory of Law Governing Appointment of Counsel in State Civil Proceedings* (Directory) is a compilation of existing statutory provisions, case law, and court rules requiring or permitting judges to appoint counsel for civil litigants. The Directory consists of 51 detailed research reports—one for each state plus D.C.—that present information organized by types of civil proceedings. Prior to using the Directory, please read the *Introduction,* at the Directory's home page, for the reasons behind the development of the Directory, the various sources of authority from which judicial powers to appoint counsel in civil proceedings may derive, and the structure used to organize information within each of the research reports.

Terms of Use/Disclaimers

This Directory should not be construed as providing legal advice and the ABA makes no warranties concerning the information contained therein, which has been updated to reflect the law through early 2012. The Directory does not seek to address all conceivable subsidiary issues in each jurisdiction, but some such issues were researched and addressed, including: notification of right to counsel; standards for waiver of right to counsel; standard of review on appeal for improper denial of counsel at trial; whether "counsel" for a child means a client-directed attorney or a "best interests" attorney/attorney ad litem; and federal court decisions finding a right to counsel. Similarly, the research did not exhaustively identify all law regarding the issue of compensation of appointed counsel in each jurisdiction, though discussion of such law does appear within some of the reports.

The Directory attempts to identify as "unpublished" any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched. Users should conduct independent, jurisdiction-specific research both to confirm whether a case is published and to familiarize themselves with all rules relating to the citation and use of unpublished or unreported cases.

Acknowledgments

This Directory was a multi-year project of the ABA's Standing Committee on Legal Aid and Indigent Defendants (SCLAID). We are indebted to our partner in this project, the National Coalition for a Civil Right to Counsel (NCCRC), for sharing the body of research that was adapted to form the Directory's reports. The *Acknowledgments*, at the Directory's home page, details additional specific contributions of the many individuals involved in this project.

Law Addressing Authorization or Requirement to Appoint Counsel in Specific Types of Civil Proceedings

1. SHELTER

Federal Statutes and Court Decisions Interpreting Statutes

The federal Fair Housing Act, contained within Title VIII of the Civil Rights Act of 1968, provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court…." 42 U.S.C. § 3613 (a)(1)(A). Further, "[u]pon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may-- (1) appoint an attorney for such person…." 42 U.S.C. § 3613(b).

2. SUSTENANCE

Federal Statutes and Court Decisions Interpreting Statutes

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination. While nearly all Title VII claims are brought in federal court, the U.S. Supreme Court has specified that state courts have concurrent jurisdiction with federal courts for Title VII claims. *Yellow Freight System Inc. v. Donnelly*, 494 U.S. 820, 826 (1990).

Title VII provides that "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant…." 42 U.S.C. 2000e-5(f)(1). In *Poindexter v. FBI*, the D.C. Court of Appeals observed:

> Title VII's provision for attorney appointment was not included simply as an afterthought; it is an important part of Title VII's remedial scheme, and therefore courts have an obligation to consider requests for appointment with care. In acting on such requests, courts must remain mindful that appointment of an attorney may be essential for a plaintiff to fulfill "the role of 'a private attorney general,' vindicating a policy 'of the highest priority.' … Once the plaintiff has triggered the attorney appointment provision, "courts must give serious consideration" to the plaintiff's request … such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'… Furthermore, in exercising this discretion, the court should clearly indicate its disposition of the request for appointment and its basis for that disposition.

737 F.2d 1173, 1183-85 (D.C. Cir. 1984).

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

No law could be located regarding the appointment of counsel for indigent litigants in domestic violence protection order proceedings.

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

If a "vulnerable adult" requires a protective service intervention,[1] he or she is entitled to be represented by counsel at the hearing determining whether such services are necessary, and "the court shall appoint legal counsel to represent a vulnerable adult who is without legal representation." Fla. Stat. § 415.1051(1)(c)(2) & § (2)(f)(2).

Upon a petition to determine whether a person is incapacitated (a predecessor step to guardianship),[2] Fla. Stat. § 744.331 provides that

> (a) When a court appoints an attorney for an alleged incapacitated person, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in s. 27.511(6). A private attorney must be one who is included in the attorney registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this chapter.
>
> (b) The court shall appoint an attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity. The alleged incapacitated person may substitute her or his own attorney for the attorney appointed by the court.

[1] A protective service intervention is a hearing in which the court determines whether, as a result of abuse, neglect, or "exploitation," an adult is in need of protective services by the state, such as placement in adult family-care homes, assisted living facilities, nursing homes, or "other appropriate facilities." Fla. Stat.. § 415.1051(3). *See also id.* § 415.1051(1) (describing nonemergency protective services interventions).

[2] *In re Fey*, 624 So.2d 770, 772 n.1 (Fla. App. 1993) ("Florida Probate Rule 5.550(b)(1)(B) provides that the requisite notice of filing the petition to determine incapacity shall state 'that an attorney has been appointed to represent such person;' thus, the appointment of counsel must be accomplished at the very onset of guardianship proceedings, as opposed to any time before final hearing.")

(c) Any attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.

(d) Effective January 1, 2007, an attorney seeking to be appointed by a court for incapacity and guardianship proceedings must have completed a minimum of 8 hours of education in guardianship. A court may waive the initial training requirement for an attorney who has served as a court-appointed attorney in incapacity proceedings or as an attorney of record for guardians for not less than 3 years. The education requirement of this paragraph does not apply to the office of criminal conflict and civil regional counsel until July 1, 2008.

One of the Florida Court of Appeals has said that the failure to appoint counsel in such proceedings is reversible error. *Martinez v. Cramer*, --- So.3d ----, 2013 WL 4006526 (Fla. App. 2013) (citing *In re Fey*, 624 So.2d 770, 772 (Fla. App. 1993). Counsel is also provided for review of the guardianship. Fla. Stat. § 744.464(2)(e). Additionally, Fla. Stat. § 744.3031 provides that counsel must be appointed for emergency guardianship proceedings.

State Court Rules and Court Decisions Interpreting Court Rules

Fla. Prob. R. 5.649(c) provides that "[w]ithin 3 days after a petition has been filed, the court shall appoint an attorney to represent a person with a developmental disability who is the subject of a petition to appoint a guardian advocate. The person with a developmental disability may substitute his or her own attorney for the attorney appointed by the court."

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

When an indigent person is mentally disabled and requires involuntary admission to residential services, he or she is entitled to appointed counsel at both the capacity determination, Fla. Stat. § 393.12, and the hearing to determine involuntary admission, *id.* § 393.11(6). Counsel must also be appointed for indigent people subject to petitions for involuntary outpatient placement, *see id.* § 394.4655(4), or inpatient placement, *see id.* § 394.467(4).[3]

[3] In *Auxier v. Jerome Golden Center for Behavioral Health*, 85 So.3d 1164 (Fla. App. 2012), a ward's GAL commited the ward and then opposed appointment of counsel for the ward, arguing that the GAL's own attorney could represent the ward. The Court of Appeals held that the attorney appointed pursuant to § 394.467(4) represents the ward, not any GAL that the ward might have.

Indigent parties also have the right to court-appointed counsel in proceedings regarding involuntary substance abuse treatment. *See id.* § 397.681(2).

State Court Rules and Court Decisions Interpreting Court Rules

Fla. R. Juv. P. Rule 8.350(a)(6)(2011) provides that, where the state seeks to place a dependent child in mental health facility, "[i]f the department's motion, the guardian ad litem's report, or another party based on communication with the child indicates that the child does not agree with the department's motion, then the court shall appoint an attorney to represent the child, if one has not already been appointed."

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Florida Supreme Court has found a right to counsel for civil commitment. *Pullen v. State*, 802 So.2d 1113, 1119 (Fla. 2001) ("While the right to appointed counsel in Baker Act involuntary civil commitment proceedings is provided by Florida statute, the constitutional guarantee of due process would require no less."). Though the court did not specify which constitution it was relying on, its citation to federal cases would suggest it was a holding under the federal constitution.

D. Sex Offender Proceedings

Fla. Stat. § 394.916(3) specifies that in proceedings for involuntary civil commitment of sexually violent predators, "[a]t all adversarial proceedings under this act, the person subject to this act is entitled to the assistance of counsel, and, if the person is indigent, the court shall appoint the public defender or, if a conflict exists, other counsel to assist the person."

E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings

State Statutes and Court Decisions Interpreting Statutes

If an indigent person is to be hospitalized or placed in isolation due to tuberculosis, she or he has the right to appointed counsel at the hearing. *See id.* § 392.56(3)(c).

4. CHILD CUSTODY

A. Appointment of Counsel for Parent—State-Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

Florida statutes provide indigent parents with a right to counsel in *all* dependency proceedings. Fla. Stat. § 39.013(1) ("Parents must be informed by the court of their right to counsel in dependency proceedings at each stage of the dependency proceedings. Parents who are unable to afford counsel must be appointed counsel."); *see also id.* § 39.013(9) (describing court's responsibilities under this provision). There is, however, a split of authority as to whether the term "parent" in § 39.013(1) includes the non-offending parent. *See In re A.G.,* 40 So.3d 908 (Fla. App. 2010) (finding non-offending parent is entitled to appointed counsel, and disagreeing with *C.L.R. v. Department of Children & Families*, 913 So.2d 764 (Fla. App. 2005)). Dependency proceedings often determine whether children will be placed in shelters temporarily or whether parental rights will be terminated permanently, and statutes expressly mandate appointment of counsel in each of these particular circumstances. *See id.* § 39.013(10) ("Court-appointed counsel representing indigent parents at shelter hearings shall be paid from state funds appropriated by general law."); *id.* § 39.402(5)(b)(2) (during hearings to determine the placement of children in shelters, "if indigent, the parents have the right to be represented by appointed counsel"). *Id.* § 39.807(1)(a) ("The court shall appoint counsel for indigent parents" for all stages of termination of parental rights proceedings).

If a parent voluntarily surrenders rights to a child, Florida statutory law does not provide a right to counsel in dependency proceedings. *See* Fla. Stat. § 39.807 (2011)(d) (right to counsel not applicable "to any parent who has voluntarily executed a written surrender of the child and consent to the entry of a court order therefor.") *See also Justice Admin. Comm'n v. Goettel*, 32 So. 3d 786, 787 (Fla. App. 2010) ("Because the mother executed a written surrender, she had no right to appointed counsel for her termination proceeding."). Also, grandparents do not have a statutory right to court-appointed counsel in dependency proceedings. *Justice Administrative Com'n v. Grover*, 12 So. 3d 1256 (Fla. App. 2009). A legal guardian who is not a parent similarly lacks a statutory right for appointment of counsel. *B.M. v. Dep't of Children & Families*, 842 So. 2d 936, 937 (Fla. App. 2003) ("As B.D. is not a parent of these children, there is no fundamental liberty interest of a parent involved in these proceedings.").

Federal Statutes and Court Decisions Interpreting Statutes

The federal Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,[4] provides:

In any case in which the court determines indigency, the parent or Indian custodian shall

[4] While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(b) states: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." These provisions, plus the fact that child welfare proceedings typically occur in state court, suggest that ICWA applies in state law proceedings.

> have the right to court-appointed counsel in any removal, placement, or termination proceeding….Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title."

25 U.S.C. § 1912(b).

State Court Rules and Court Decisions Interpreting Court Rules

According to Fla. R. Juv. P. Rule 8.320 (2011), "[a]t each stage of the dependency proceeding the court shall advise the parent of the right to have counsel present. The court shall appoint counsel to indigent parents or others who are so entitled to as provided by law, unless appointment of counsel is waived by that person." Fla. R Juv. P. 8.517 (created in 2013) specifies that trial counsel cannot withdraw after a dependency or termination of parental rights order until determining whether the parent wants to appeal, and if so, until an order appointing appellate counsel has been entered.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In the seminal pre-*Lassiter*[5] case of *In the Interest of D.B. and D.S.*, 385 So. 2d 83 (Fla. 1980), the Florida Supreme Court found that due process under both the Florida and U.S. Constitutions requires the appointment of counsel only where child dependency proceedings result in the permanent loss of parental custody (i.e., are essentially combined with a termination proceeding) or where "the proceedings, because of their nature, may lead to criminal child abuse charges." The court commented that "there are numerous types of juvenile dependency proceedings, but all concern the care, not the punishment, of the child. Some provide very temporary types of relief and custody, while other dependency proceedings permanently terminate the custody and care of a child." *Id*. at 90. The court reiterated its general endorsement of the multi-factor test enunciated in *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975), which instructed courts to weigh various criteria when determining the need for counsel, including the potential length of parent-child separation, the degree of parental restrictions on visitation, whether there was parental consent, whether there were disputed facts, and the complexity of the proceeding. *See Potvin*, 313 So. 2d at 706.[6] The court found, however, that

[5] *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981) (finding no absolute Fourteenth Amendment right to counsel in termination of parental rights proceedings).

[6] *Potvin* in turn drew its test largely from *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974). As noted earlier, the right to appointed counsel has since been statutorily extended to all dependency proceedings by Fla. Stat. § 39.013 and in *S.B. v. Dep't. of Children & Families*, 851 So. 2d 689, 692 (Fla. 2003), the court noted that Fla. Stat. § 39.013(1) "supersedes" the *Potvin* factors by providing an absolute right to counsel in all dependency proceedings.

because there is a constitutionally protected interest in "preserving the family unit and raising one's children," *In re D.B.*, 385 So. 2d at 90, the *Potvin* calculus always mandates appointment of counsel for the parent when termination of parental rights is at stake: "[A] constitutional right to counsel necessarily arises where the proceedings can result in permanent loss of parental custody. In all other circumstances the constitutional right to counsel is not conclusive; rather, the right to counsel will depend upon a case-by-case application of the test adopted in *Potvin* . . . ." *Id.* at 87.

The *D.B.* court concluded by noting that it was not departing from federal precedent: "The right to counsel in juvenile dependency proceedings has not been addressed by the United States Supreme Court. Further, only one federal appellate court, the Ninth Circuit in *Cleaver v. Wilcox*, has written on the issue, and we have adhered to their view." *Id.* at 94. But since *Lassiter*, the Florida Supreme Court has, without expressly noting the conflict,[7] reaffirmed its view that, when termination of parental rights are at stake, state due process always mandates appointment of counsel for the parent. *See J.B.* v. *Florida Dept. of Children and Family Services*, 768 So. 2d 1060, 1067-68 (Fla. 2000); *In re E.H.*, 609 So. 2d 1289, 1290 (Fla. 1992).

Applying the *Potvin* factors, an intermediate appellate court found that due process required counsel to be provided in a dependency proceeding even when termination of parental rights was not at stake when the indigent parent was mentally ill and thus lacked the ability to represent herself effectively. *See L.W. v. Dep't. of Health and Rehabilitative Services*, 695 So. 2d 724 (Fla. App. 1996). And in *White v. Department of Health and Rehabilitative Services*, 483 So. 2d 861 (Fla. App. 1986), the court found that the parents at issue were entitled to appointed counsel at every stage of the dependency proceedings where their admissions during the dependency proceeding "resulted in an adjudication of their abuse and neglect (which are two grounds for permanent commitment) and resulted in placement of the twins in a foster home where lack of parental visitation resulted in a charge of abandonment (a third ground for permanent commitment) and resulted in a performance agreement (the failure to perform being a fourth ground for permanent commitment)." *See also In re R.W.*, 429 So. 2d 711, 712 (Fla. App. 1983) (in dependency case, "[m]erely informing an indigent parent of the right to assistance of counsel, and referring that parent to a legal aid office, while withholding court appointment and failing to establish a knowing waiver of record, does not pass constitutional muster.") *But see In Interest of J.L.C.*, 501 So. 2d 92, 93 (Fla. App. 1987) (per curiam) (rejecting mother's argument that failure to provide counsel until termination proceeding violated due process; court cites to *D.B.* and notes that "it does not appear that the trial court's determination was based on evidence previously adduced at a dependency hearing at which the mother was not represented by counsel").

[7] One intermediate appellate court did note the conflict shortly after *Lassiter* was decided. *See In re D.D.W.*, 400 So. 2d 1310, 1311 (Fla. App. 1981).

In *S.B. v. Dep't of Children and Families*, 851 So. 2d 689, 694 (Fla. 2003), in which counsel was appointed pursuant to statute in a child dependency proceeding, the Florida Supreme Court held that "[b]ecause there is no constitutional right to counsel under the circumstances of this case, we likewise find that there is no right to collaterally challenge the effectiveness of counsel." However, there might be a right to effective assistance in cases where the right to counsel is constitutionally based. In *In re E.K.*, 33 So. 3d 125, 127 (Fla. 2d DCA 2010), the Second District Court of Florida took up this issue and called "a right to effective counsel" one without a "means by which to enforce that right." The court noted that while the state supreme court had not held that an individual has a right to effective counsel, "it appears that a parent who is constitutionally entitled to appointed counsel in a termination proceeding is implicitly entitled to *effective* assistance of counsel." *Id.* at 127. The court outlined the history of the problem in Florida courts and sought certification on the issue. *Id.* It appears that none of the parties in *E.K.* requested that the Supreme Court accept jurisdiction on certification, and no action was taken on the issue. *See* Deborah A. Schroth, *Role of the Lawyer in Dependency Cases*, JUVL FL-CLE 10-1 (2011).

State Court Decisions Addressing Court's Inherent Authority

In *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986), the Florida Supreme Court held that the court has the authority to exceed legislatively mandated statutory fee caps in order to ensure reasonable compensation for attorneys who had been appointed to represent indigent clients in criminal cases. In *Board of County Com'rs of Hillsborough County v. Curry*, 545 So.2d 930 (Fla. App. 1989), a Florida Court of Appeals extended the reasoning of *Makemson* to non-capital cases, noting that the basis for the *Makemson* decision was "the judiciary's inherent power to ensure adequate representation for indigent criminal defendants by competent counsel, regardless of whether the defendant has been charged with a capital crime." Further, the *Scruggs* court extended *Makemson* to termination of parental rights cases due to the fundamental rights at stake and suggested that it would reach a similar holding in any type of case where counsel was constitutionally required. *See Id.*

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In a decision that involved the termination of a father's parental rights pursuant to a contested adoption proceeding, the court of appeals in the Second District found that "an indigent legal parent is entitled to appointed counsel in an adoption proceeding that involves the involuntary termination of his or her parental rights . . . ." *O.A.H. v. R.L.A.*, 712 So. 2d 4 (Fla. App. 1998). In *O.A.H.*, the court found that although the applicable statute pursuant to which the father's parental rights were to be terminated (Fla. Stat. § 63.072) (repealed in 2001) did

not contain an express statutory right to counsel, under Florida's Due Process Clause, the father was nonetheless entitled to counsel, "when the proceedings can result in a permanent loss of parental rights." *Id*. at 10. In reaching its decision, the court in *O.A.H.* also found that an adoption proceeding, and the resulting termination of parental rights, is not purely a private dispute and that the State has exclusive authority to terminate legal relationship of a parent and child, and that this authority is a "state action sufficient to invoke due process concerns." *Id*. at 8. Regarding state action, the court relied upon U.S. Supreme Court precedent in *M.L.B. v. S.L.J*., 519 U.S. 102, 117 n.8 (1996). *See also M.E.K. v. R.L.K*., 921 So. 2d 787 (Fla. App. 2006) (in adoption case, Fifth District holds that trial court in adoption case erred in following *Lassiter* instead of *O.A.H.*); *In the Interest of M.C.*, 899 So. 2d 486 (Fla. App. 2005) (reaffirming *O.A.H*); *G.C. v. W.J.*, 917 So.2d 998, 999 (Fla. App. 2005) (First District case where court followed *O.A.H*).

C. Appointment of Counsel for Child—State-Initiated Proceedings

Federal Statutes and Court Decisions Interpreting Statutes

The Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,[8] provides the following with regard to any removal, placement, or termination of parental rights proceeding:

> The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title."

25 U.S.C. § 1912(b).

The federal Child Abuse Prevention and Treatment Act (CAPTA) provides:

> A State plan submitted under paragraph (1) shall contain a description of the activities that the State will carry out using amounts received under the grant to achieve the objectives of this subchapter, including— …(B) an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or

[8] While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(b) states: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." These provisions, plus the fact that child welfare proceedings typically occur in state court, suggest that ICWA applies in state law proceedings.

has in effect and is operating a statewide program, relating to child abuse and neglect that includes-- … (xiii) provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings."

42 U.S.C. § 5106a(b)(2).

State Court Rules and Court Decisions Interpreting Court Rules

Although Fla. Stat. § 39.807(2)(a) only provides that "[t]he court shall appoint a guardian ad litem to represent the best interest of the child in any termination of parental rights proceedings," Fla. R. Juv. P. 8.217(a) provides: "At any stage of the proceedings, any party may request or the court may consider whether an attorney ad litem is necessary to represent any child alleged to be dependent, if one has not already been appointed." Fla. R. Juv. P. 8.217(b) adds that "[t[he court may appoint an attorney ad litem to represent the child in any proceeding as allowed by law."

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In the pre-*Lassiter*[9] case of *In the Interest of D.B. and D.S.*, 385 So. 2d 83 (Fla. 1980), the Florida Supreme Court summarily found that "there is no constitutional right to counsel for the subject child in a juvenile dependency proceeding." *Id*. at 91.

D. Appointment of Counsel for Child—Privately Initiated Proceedings

No law could be located regarding the appointment of counsel for children in privately initiated child custody proceedings.

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Florida Supreme Court rejected a Fourteenth Amendment right to counsel in civil contempt proceedings due to a failure to pay child support. *Andrews v. Walton*, 428 So. 2d 663

[9] *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981) (finding no absolute Fourteenth Amendment right to counsel in termination of parental rights proceedings).

(Fla. 1983). The high court reasoned that since civil contempt required ability to pay (and willful failure to do so), those facing this sanction would never be sufficiently indigent to merit appointment of counsel. *Id.* at 666. However, one appellate court subsequently held that where a contemnor willfully or unintentionally divests himself/herself of the ability to pay, then counsel is required because the contemnor essentially no longer holds the keys to his/her own prison. *Bowen v. Bowen*, 454 So. 2d 565 (Fla. App. 1984).

B. Paternity Proceedings

No law could be located regarding the appointment of counsel for indigent litigants in paternity proceedings.

C. Proceedings for Judicial Bypass of Parental Consent for Minor to Obtain an Abortion

State Statutes and Court Decisions Interpreting Statutes

The Florida Parental Notice of Abortion Act, Fla. Stat. § 390.01114, provides that a minor may petition a Florida circuit court for a waiver of the notification requirements under the aforementioned Act. Upon such a petition, "the court shall advise the minor that she has a right to court-appointed counsel and shall provide her with counsel upon her request at no cost to the minor." *Id*. § 390.01114(4)(a).[10]

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The state supreme court has found appointed counsel necessary in hearings determining the need for parental consent to abortion. *See In re T.W.*, 551 So. 2d 1186, 1196 (Fla. 1989). The court stated: "In [parental consent hearings] wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy [by obtaining an abortion], counsel is required under our state constitution." *Id.* The court noted that the provision of counsel in *In re D.B.* was based on the fact that "an individual's interest in preserving the family unit and raising children is fundamental," *In re T.W.*, 551 So. 2d at 1196, and thus since "a woman's right to decide whether or not to continue her pregnancy constitutes a fundamental constitutional right," counsel is similarly required whenever one can be deprived of the authority to exercise that right. *Id.* The court cited *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1138 (7th Cir. 1983), for that court's analogous reasoning under

[10] In *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612 (Fla. 2003), the Florida Supreme Court found that the notification requirement violated the privacy provisions of the Florida Constitution, but in response, the state amended the constitution to say that the legislature may require parental notification without violating a young woman's state constitutional right of privacy, as long as the parental-notification law provides for certain exceptions and a judicial bypass.

federal law. *In re T.W.*, 551 So. 2d at 1196. In *Pearson*, the court held that "the statute impermissibly fails to provide for the appointment of counsel to minors." 716 F.2d at 1138. Despite this citation to supportive federal precedent, the *In re T.W.* court maintained that it was "expressly decid[ing] this case on state law grounds." 551 So. 2d at 1196.[11]

Also at stake in *T.W.* was the fact that the trial court had appointed counsel to act as guardian ad litem for a fetus in a judicial bypass case. The trial court had appointed counsel due to the trial court's concerns that the bypass statute was unconstitutionally vague and that minors should be required to obtain parental consent in all cases. The guardian therefore articulated these arguments essentially on behalf of the court. The Florida Supreme Court held that the appointment was "clearly improper" and that it was the Attorney General's job to make such challenges to the statute, not the court's.[12] The Florida Supreme Court passed on the question of whether appointment of counsel for a fetus would be proper absent motive by a judge to challenge the constitutionality of the statute.[13]

D. Unaccompanied Minors in Immigration Proceedings

State Statutes and Court Decisions Interpreting Statutes

In cases where a child (i) has been adjudicated dependent, (ii) found not to be a citizen of the United States, (iii) is found by the court to be eligible for "special immigrant juvenile status", and (iv) such status is in the best interest of the child, Fla. Stat. § 39.5075 requires that the "[Florida] department [of child services], or community-based care provider *shall, directly or through voluntary or contractual legal services*, file a petition for special immigrant juvenile status and the application for adjustment of status to the appropriate federal authorities on behalf of the child." Fla. Stat. § 39.5075(5) (emphasis added).

E. Proceedings Involving Claims by and Against Prisoners

[11] Note that this decision effectively overruled a prior one from a Florida federal court ruling on federal grounds. *Jacksonville Clergy Consultation Service, Inc. v. Martinez*, 707 F.Supp. 1301 (M.D. Fla. 1989).

[12] "We are compelled to comment on the trial judge's finding that the court, 'as the only entity otherwise involved [i]n the proceeding which could possibly protect the state's interest,' could have standing to challenge the constitutionality of the statute. Under no circumstances is a trial judge permitted to argue one side of a case as though he were a litigant in the proceedings. The survival of our system of justice depends on the maintenance of the judge as an independent and impartial decisionmaker. A judge who becomes an advocate cannot claim even the pretense of impartiality." *T.W.*, 551 So.2d at 1190 n.3.

[13] *See also In re Guardianship of J.D.S.*, 864 So.2d 534 (Fla. App. 2004) (GAL for fetus not appropriate because GALs can only be appointed for "persons" and fetus not a "person" under law).

State Statutes and Court Decisions Interpreting Statutes

A few cases have addressed the reach of the public defender's scope of representation in civil matters involving prisoners, mostly as a question of whether the public defenders exceeded their statutory authority. *State ex rel. entities Smith v. Brummer*, 443 So. 2d 957 (Fla. 1984) (habeas proceedings not one of the types of proceedings specified in public defender statute, so representation inappropriate); *State ex rel. Smith v. Jorandby*, 498 So. 2d 948 (Fla. 1986) (representation inappropriate for prisoner's money damages claim against state); *Bentzel v. State*, 585 So. 2d 1118 (Fla. App. 1991) (permitting public defender representation in extradition proceeding due to potential loss of liberty); *Graham v. Vann*, 394 So. 2d 176 (Fla. App. 1981) (public defender's office "did not exist at common law and is a creature of Article V, s 18, Florida Constitution, with no authority outside of that provided by statute …. There are currently five criminal actions pending against the petitioners, and the Office of the Public Defender has represented each of the individuals within the past year. We cannot believe that it was legislative intent that under such circumstances the trial judge is free to appoint counsel, but in so doing he may not consider the Office of the Public Defender.")

State Court Decisions Addressing Constitutional Due Process or Equal Protection

Generally, a petitioner's right to the appointment of counsel in postconviction proceedings is not an "organic right" and is limited to either those instances specified by statute or those rare situations where due process requires it. *See State v. Weeks*, 166 So. 2d 892 (Fla. 1964) (while Sixth Amendment does not require appointment of counsel for postconviction proceedings, "Fifth Amendment due process would require such assistance if the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need … Each case must be decided in the light of Fifth Amendment due process requirements which generally would involve a decision as to whether under the circumstances the assistance of counsel is essential to accomplish a fair and thorough presentation of the prisoner's claims"); *Keegan v. State*, 293 So. 2d 351 (Fla. 1974) (finding no "exceptional circumstance" present in petition); *Ulvano v. State*, 479 So. 2d 809 (Fla. App 1985) (criminal trial counsel's potential conflict of interest warranted appointment of counsel for postconviction challenge to original representation).

In *Black v. Rouse*, 587 So.2d 1359, 1362 (Fla. App. 1991), an appellate court rejected a right to counsel for an inmate challenging medical treatment, citing to *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), to hold that "in a civil action as opposed to a criminal action, appellant does not have a constitutional right to appointed counsel, unless the proceedings may result in his freedom being curtailed."

F. Forfeiture Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In a case involving forfeiture of seized cash, a Florida appellate court summarily stated that "we reject Plaisted's argument that the trial court erred by failing to appoint counsel to represent him in connection with his motion for return of property." *Plaisted v. State*, 46 So.3d 148, 150 (Fla. App. (2010). The court relied entirely on *United States v. Wade*, 291 F.Supp.2d 1314, 1316-17 (M.D. Fla. 2003), which had held there is no right to effective assistance of counsel in civil cases.

Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

State Statutes and Court Decisions Interpreting Statutes

Fla. Stat. § 29.007 (2011) ("Court-appointed counsel") provides:

> For purposes of implementing s. 14, Art. V of the State Constitution [relating to funding of the judiciary], the elements of court-appointed counsel to be provided from state revenues appropriated by general law are as follows:
> (1) Private attorneys appointed by the court to handle cases where the defendant is indigent and cannot be represented by the public defender or the office of criminal conflict and civil regional counsel.
> (2) When the office of criminal conflict and civil regional counsel has a conflict of interest, private attorneys appointed by the court to represent indigents or other classes of litigants in civil proceedings requiring court-appointed counsel in accordance with state and federal constitutional guarantees and federal and state statutes.
> . . .
> This section applies in any situation in which the court appoints counsel to protect a litigant's due process rights.

A private attorney appointed by a court pursuant to § 29.007 (2011) "shall be reimbursed for reasonable and necessary expenses" incurred during representation. Fla. Stat. § 27.5304 (2011). Fla. Stat. § 27.5304 lists the flat fees to be awarded to private attorneys. Counsel may seek compensation in excess of the flat fees listed in § 27.5304 only if "compensation on an hourly basis at a rate of $75.00 would be at least double the flat fee." *Justice Admin. Comm'n v. Shaman*, 59 So. 3d 1231 (Fla. App. 2011).

Federal Statutes and Court Decisions Interpreting Statutes

The federal Servicemembers Civil Relief Act (SCRA), which applies to each state[14] and to all civil proceedings (including custody),[15] provides:

> If in an action covered by this section it appears that the defendant is in military service,

[14] 50 App. U.S.C.A. § 512(a) states, "This Act [sections 501 to 515 and 516 to 597b of this Appendix] applies to-- … (2) each of the States, including the political subdivisions thereof…"

[15] 50 App. U.S.C. § 521(a) states, "This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance."

> the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed under this section to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember.

50 App. U.S.C. § 521(b)(2).

Additionally, 50 App. U.S.C. § 522(d)(1), which also applies to all civil proceedings (including custody),[16] specifies that a service member previously granted a stay may apply for an additional stay based on a continuing inability to appear, while § 522(d)(2) states: "If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding."

State Court Decisions Addressing Court's Inherent Authority

In *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986), discussed *supra* Part 4.A, the Florida Supreme Court held that the court has the authority to exceed legislatively mandated statutory fee caps in order to ensure reasonable compensation for attorneys who had been appointed to represent indigent clients in criminal cases. In *Board of County Com'rs of Hillsborough County v. Curry*, 545 So.2d 930 (Fla. App. 1989), a Florida Court of Appeals extended *Makemson* to termination of parental rights cases due to the fundamental rights at stake and suggested that it would reach a similar holding in any type of case where counsel was constitutionally required.

[16] 50 App. U.S.C. § 522(a) applies to "any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section-- (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding."