AMERICAN BAR ASSOCIATION
Directory of Law Governing Appointment of Counsel in State Civil Proceedings

ALASKA

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## ALASKA

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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 2017. 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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Gamboa v. Alaska Hous. Fin. Corp., 2017 Alas. LEXIS 80 (Alaska 2017), the court declined to recognize a right to counsel for an individual appealing an administrative proceeding regarding modification of his housing subsidies. The court simply stated:

Gamboa's case does not fall within one of the previously recognized categories of civil cases that trigger a right to counsel ... See Bustamante v. Alaska Workers' Comp. Bd., 59 P.3d 270, 272, 274 (Alaska 2002) (listing termination of parental rights, child custody, paternity, and civil contempt proceedings as the types of cases triggering a civil right to counsel and noting that "we review for an abuse of discretion" the "decision to appoint counsel for a civil litigant"). In addition, we agree with the superior court that "Gamboa's administrative appeal claim does not merit publicly-funded counsel under the Mathews v. Eldridge balancing test," which we have adopted when determining whether due process requires the appointment of public counsel in civil cases. See Dennis O. v. Stephanie O., 393 P.3d 401, 406-07 (Alaska 2017).

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.


State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Bustamante v. Alaska Workers' Comp. Bd., 59 P.3d 270, 274-75 (Alaska 2002), the court declined to recognize a right to counsel in a worker’s compensation case. The court observed that the workers' compensation board has extensive experience with pro se litigants and that there is a “statutory framework for the recovery of attorney's fees for successful workers' compensation claimants.” The court also pointed to the “extraordinary fiscal burden” of appointing counsel for all claimants.

In Kalmakoff v. Commercial Fisheries Entry Comm’n, 693 P.2d 844, 847 n. 4 (Alaska 1985), a fisherman was denied a commercial permit, and the court held, “To the extent that Kalmakoff is asking us to hold that applicants have a constitutional right to be represented by Commission-appointed attorneys at administrative hearings, we reject his invitation. ‘While civil litigants have a constitutional right of access to the courts in limited situations, they have no general right to the assistance of counsel once access has been provided.’”

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

A parent, guardian or other representative appointed by the court may file a protective order on behalf of a minor, and in such situations, the court may appoint an attorney or guardian ad litem to represent the minor. Alaska Stat. § 18.66.100(a). However, the statute adds, “Notwithstanding AS 25.24.310 or this section, the office of public advocacy may not be
appointed as a guardian ad litem or attorney for a minor in a petition filed under this section unless the petition has been filed on behalf of the minor.” *Id.*

**B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings**

**State Statutes and Court Decisions Interpreting Statutes**

A guardianship for an incapacitated person shall be used “only as is necessary to promote and protect the well-being of the person . . . .” Alaska Stat. § 13.26.201. The respondent is entitled to be represented by counsel in these proceedings. Alaska Stat. § 13.26.226(b). If the respondent is financially unable to employ an attorney, the court shall appoint the office of public advocacy under Alaska Stat. § 13.26.291 to represent the respondent in the proceedings. *Id.*

Alaska Stat. § 13.26.286(c) specifies that “Before removing a guardian, changing the guardian’s responsibilities, accepting the resignation of a guardian, or ordering that a ward’s guardianship be changed or terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian and applying the least restrictive alternative necessary to meet the needs of the ward after consideration of alternatives to guardianship services, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.” It is unclear whether the “same procedures” language applies to just the visitor’s observation or to all procedures (such as the right to counsel) required for appointment proceedings.

Alaska Stat. § 13.26.430(a), which governs a petition for conservatorship of a person of disability or a minor, states that “[i]f, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.” *Id.* Subsection (b) adds that “[u]pon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of the person’s own choice, the court must appoint a lawyer to represent the person.” *Id.* at § 13.26.430(b).

**State Court Decisions Addressing Constitutional Due Process or Equal Protection**
In *In re Freddy A.*, No. S–13988, 2012 WL 1058856, at *4 (Alaska March 28, 2012) (unpublished),¹ the Alaska Supreme Court held that parents of disabled children that have reached the age of majority do not have a right to counsel for guardianship review proceedings under the due process clause of either the state or federal constitutions. Applying the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), analysis, the court commented first that “Mia’s parental interest subsided when Freddy turned 18 and became an adult under the law” and that she was not at risk of termination of parental rights because “[h]er parental rights terminated when Freddy became an adult.” *Id.* The court also examined the stated purpose of the statutes and held that “[e]ven though she is Freddy’s mother, Mia’s interests are not to be considered in choosing a guardian. As the incapacitated adult, Freddy’s interests, not his mother’s, are paramount in the guardianship proceedings.” *Id.* at *5. As well, the court found the state’s *parens patriae* interest to be strong, and given the mother’s diminished interest, it held that “[t]his examination of the respective interests involved allows us to truncate the *Mathews* analysis.” *Id.*

**C. Civil Commitment or Involuntary Mental Health Treatment Proceedings**

**State Statutes and Court Decisions Interpreting Statutes**

While Alaska Stat. § 47.30.725(d) speaks of a right to be “represented by an attorney” in civil commitment proceedings, other statutory provisions clarify that this is a right to appointed counsel. First, Alaska Stat. § 18.85.100(a) (the public defender statute) provides a right to counsel to an indigent person “against whom commitment proceedings for mental illness have been initiated.” Second, during the initial involuntary commitment procedures, upon petition by any adult, the court must first order a screening investigation, and within 48 hours after completion of that screening, the court must appoint counsel if the court finds probable cause of mental illness. Alaska Stat. § 47.30.700(a).

**State Court Decisions Addressing Constitutional Due Process or Equal Protection**

The Alaska Supreme Court has held that the right to counsel extends to cases of involuntary commitment and involuntary administration of psychotropic medication proceedings, pursuant to the due process clause of the Alaska Constitution. *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 383 (Alaska 2007). In *Wetherhorn*, the respondent challenged her involuntary commitment for 30 days and the non-consensual administration of psychotropic medication. *Id.* at 373. She claimed that she was deprived of her right to counsel during the hearing because her counsel failed to deploy a number of strategies that may have been pertinent to her case. *Id.* at 383. The Court first explained that the right to counsel

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¹ Unpublished decisions may be cited in briefs and oral arguments for purposes of establishing res judicata, estoppel, or the law of the case. An unpublished decision may also be cited for its persuasive value if a party believes that no published opinion would serve as well as the unpublished decision. Alaska R. App. P. 214(d)(1).
provided for in Alaska Stat. § 47.30.725(d) “includes both the right to effective counsel and the right to challenge court orders based on a claim of ineffective assistance of counsel.”\(^2\) \textit{Id.} The Court then added that because “a respondent's fundamental rights to liberty and to privacy are infringed upon by involuntary commitment and involuntary administration of psychotropic medication proceedings, the right to counsel in civil proceedings is guaranteed by the due process clause of the Alaska Constitution.” \textit{Id.} (citing Alaska Const. Art. I, § 7; V.F v. State, 666 P.2d 42, 45 & n. 2 (Alaska 1983)). The Court also noted that, “the right to challenge a court order based on a claim of ineffective assistance of counsel derives necessarily from the right to the effective assistance of counsel.” \textit{Id.} at 384.

**D. Sex Offender Proceedings**

No law could be located regarding the appointment of counsel for indigent civil litigants in sex offender proceedings. However, this jurisdiction might not have a mechanism for confining sexually dangerous/violent persons.

**E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings**

*State Statutes and Court Decisions Interpreting Statutes*

An indigent person required to be isolated, quarantined or tested under a public health order (Alaska Stat. §§ 18.15.355-18.15.395), is entitled to be represented by an attorney. Alaska Stat. § 18.85.100(a). The attorney shall be provided at the public's expense if paying for the attorney services and facilities and court costs would cause undue hardship to the indigent person. Alaska Stat. § 18.85.100(b).

### 4. CHILD CUSTODY

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

*State Statutes and Court Decisions Interpreting Statutes*

In emergency proceedings where the state takes custody of children, parents “may be represented at public expense and without court order by an attorney employed by the Public Defender Agency in connection with the hearing held under [Alaska Stat. § 47.10.142(d)],” which is the temporary custody hearing occurring no more than 48 hours after the child has been taken into custody. Alaska Stat. § 18.85.100(e). If the person who was represented by the Public Defender Agency at public expense without a court order is later found to not be indigent, the court must assess against the represented person the cost to the Public Defender

\(^2\) Alaska Statute § 47.30.725(d) states that “[t]he respondent has the right to be represented by an attorney, to present evidence, and to cross-examine witnesses who testify against the respondent at the hearing.”
Agency of providing the representation. Alaska Stat. § 18.85.100(e). Continued representation by the Public Defender Agency is contingent upon a finding of indigency under Alaska Stat. § 18.85.100 (a-d) and a court order. Alaska Stat. § 18.85.100(e).³

Under Alaska Stat. § 25.23.180(h), “[t]he respondent to a petition filed for the termination of parental rights on grounds set out in (c)(3) of this section is entitled to representation in the proceedings by an attorney. If the respondent is financially unable to employ an attorney, the court shall appoint the office of public advocacy to represent the respondent in the proceedings.” Alaska Stat. § 25.23.180(c)(3) covers situations where “the parent committed an act constituting sexual assault or sexual abuse of a minor under the laws of this state or a comparable offense under the laws of the state where the act occurred that resulted in conception of the child . . . .”

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 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.”


State Court Rules and Court Decisions Interpreting Court Rules

Rule 12 of the Children in Need of Aid Rules provides guidance as to when counsel is to be appointed in CINA cases for parents:

³ In R.C. v. State, Dept. of Health and Social Services, 760 P.2d 501, 507 n. 19 (Alaska 1988), the court held that it did not offend due process to only appoint an attorney after the emergency custody hearing, although it is unclear whether Alaska Stat. § 18.85.100 existed at that time.

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(a) 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.
(a) Notice of Right to Counsel. The court shall inform the parties at the first hearing at which they are present of their respective rights to be represented by counsel at all stages of the proceedings.

(b) Appointed Counsel. The court shall appoint counsel pursuant to Administrative Rule 12:

   (1) for a parent or guardian who is financially unable to employ counsel;
   (2) for a parent on active military duty who has not appeared prior to entry of an adjudication;
   . . .

(c) Waiver of Right to Counsel. The court shall accept a valid waiver of the right to counsel by any party if the court determines that the party understands the benefits of counsel and knowingly waives those benefits.

(d) Appointment of Counsel for Absent or Unknown Parent. The court shall appoint counsel to represent an absent parent at any hearing in which the termination of parental rights is or may be in issue if the parent has failed to appear after service of notice, including service by publication, and the court concludes that a continuance is not likely to result in the attendance of the non-appearing parent. The court is not required to appoint counsel for a parent if the court is satisfied that the identity of the parent is unknown.

AK R CINA Rule 12.

Adoption Rule 8(b) explains which termination proceedings require the appointment of counsel:

   . . .

   (2) In involuntary termination cases brought against an indigent parent under Alaska Stat. § 25.23.180(c)(3), which involves a situation where parents allegedly committed an act of sexual assault or sexual abuse of a minor resulting in the conception of a child and termination of parental rights is in the best interest of the child. In such cases, the court must appoint the Office of Public Advocacy to represent the parent;

   (3) In involuntary termination of parental rights cases brought against an indigent parent by either the state or a state-funded entity (such as Alaska Legal Services Corporation or the Alaska Pro Bono Program) on grounds other than stated in Alaska Stat. § 25.23.180(c)(3) or if the indigent parent is defending against a claim that the indigent parent's consent to adoption is not required;

AK R ADOPT Rule 8(b).
State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *V.F. v. State*, 666 P.2d 42, 45 (Alaska 1983), the Alaska Supreme Court held that “the due process clause of the Alaska Constitution guarantees indigent parents a right to the effective assistance of counsel in proceedings brought to terminate their parental rights.” The court relied on *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979) (holding that Alaska Constitution’s due process clause “requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child”). In *V.F.* the court also held that there is a constitutional right to effective assistance of counsel in a proceeding brought to terminate parental rights. *V.F.*, 666 P.2d at 45.

However, for termination proceedings, while “the due process clause of the Alaska Constitution grants indigents the right to appointed counsel...[t]he right to the effective assistance of counsel does not extend . . . to the right to reject appointed counsel and have new counsel appointed in the absence of any showing of cause for such change." *P.M. v. State*, 42 P.3d 1127, 1132-33 (Alaska 2002). In *P.M.*, a father who faced the termination of his parental rights refused to work with two separate appointed attorneys, threatened them, and filed bar complaints against them. *Id.* at 1130. The Alaska Supreme Court upheld the Superior Court’s refusal to appoint replacement counsel, relying on a large body of case law refusing to so appoint where the “request for replacement counsel lacked merit or was being used as a delay tactic.” *Id.* at 1133 (citing *Coleman v. State*, 621 P.2d 869, 877-78 (Alaska 1980)).

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

Under Alaska Stat. § 25.23.180(n), “[a] person who relinquished parental rights is entitled to the appointment of an attorney . . . to the same extent as if the parent's rights had not been terminated in a child-in-need-of-aid proceeding” in the following situations:

i. When the person who voluntarily relinquished parental rights requests a review hearing “upon a showing of good cause, to seek enforcement or modification of or to vacate a privilege retained in the termination order” after a termination order is

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5 The court further stated in footnote 3 that it was providing a more expansive right than recognized under the federal Constitution: “The United States Supreme Court has recently held in *Lassiter* . . . that indigent parents do not have an automatic right to counsel under the United States Constitution in proceedings brought to terminate their parental rights. Our decision, however, is in accordance with the growing number of jurisdictions which have held that the right to counsel in termination proceedings exists under the state constitution.” *V.F.*, 666 P.2d at 45 n. 4.
entered, Alaska Stat. § 25.23.180(l);
   ii. When a prospective adoptive parent or guardian requests that the court decline to
incorporate a retained privilege after a termination order is entered but before the
entry of an adoption or legal guardianship decree, Alaska Stat. § 25.23.180(m).

Pursuant to Alaska Stat. §47.10.089(i), if there is a petition for reinstatement of parental rights
by a person who previously relinquished them, that person is entitled to appointment of
counsel to the same extent as if the parent’s rights had not been terminated in a child-in-need-
of-aid proceeding.

“[I]ndigent parties in cases involving child custody in which the opposing party is
represented by counsel provided by a public agency” are entitled to the appointment of
counsel by the office of public advocacy. Alaska Stat. § 44.21.410(a)(4). This statute is a
codification of Flores v. Flores, 598 P.2d 893 (Alaska 1979) (party to litigation has right under
due process clause of Alaska Constitution to be provided with appointed counsel from the
private bar when opposing party is represented by public agency). The Flores case also held
that the Alaska Legal Services Corporation was a “public agency” for purposes of § 44.21.410.
Id. At 895. Most recently, the court held in In the Matter of Alaska Network on Domestic
Violence and Sexual Assault, 264 P.3d 835, 836 (Alaska 2011), that the Alaska Network on
Domestic Violence and Sexual Assault (ANDVSA), a nonprofit corporation, is also a “public
agency” for purposes of § 44.21.410.

State Court Rules and Court Decisions Interpreting Court Rules

Adoption Rule 8(b) explains which adoption proceedings require the appointment of
counsel:

   (1) Parents of Indian children, following Administrative Rule 12(e)(1)(A)(i). The
appointment is at public expense. AK R ADOPT Rule 8(b)(1);

   (3)(B) In adoptions seeking to bypass the consent requirements, as per Alaska Stat. §

AK R ADOPT Rule 8. For the last situation (adoptions seeking to bypass consent), Alaska Admin.
R. 12(e) specifies that for any appointments of counsel required by the constitution but not
covered by an existing statute, the court appoints a member of the Alaska Bar Association, and
according to the Alaska Courts’ Customer Service Division, these appointments are paid by the
court itself.

State Court Decisions Addressing Constitutional Due Process or Equal Protection
In *Matter of K.L.J.*, 813 P.2d 276, 278 (Alaska 1991), the court held that “the Alaska Constitution mandates that the superior court appoint an attorney when an indigent parent’s right to consent to an adoption of his or her child may be waived under Alaska Stat. § 25.23.050(a).” The court noted that Alaska had adopted the balancing test from *Mathews v. Eldridge*, to determine what process was due. *Matter of K.L.J.*, 813 P.2d at 279 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under *Mathews*, judges should take into consideration three distinct factors:

the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

*Id.* (citing *Keyes v. Human Hospital Alaska, Inc.* 750 P.2d 343, 353 (Alaska 1988)). “The private interest of a parent whose parental rights may be terminated via an adoption petition is of the highest magnitude.” *Id.* The court found sufficient state involvement required to invoke due process. *Id.* at 283. The court believed that “due process requires that” an “indigent natural parent be appointed an attorney to assist him in demonstrating why his consent to the adoption of his child should not be rendered unnecessary.” *Id.* at 286.

In a child custody proceeding, if one parent is represented by counsel appointed by a public agency, and the other spouse is indigent, then “the due process clause of the Alaska

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6 Alaska Stat. § 25.23.050(a) specifies that consent to adoption is not required in the following situations:

(1) for purposes of this section, a parent who has abandoned a child for a period of at least six months;
(2) a parent of a child in the custody of another, if the parent for a period of at least one year has failed significantly without justifiable cause, including but not limited to indigency,
   (A) to communicate meaningfully with the child, or
   (B) to provide for the care and support of the child as required by law or judicial decree;
(3) the father of a minor if the father’s consent is not required by AS 25.23.040(a)(2);
(4) a parent who has relinquished the right to consent under AS 25.23.180;
(5) a parent whose parental rights have been terminated by order of the court under AS 25.23.180(c)(3) or AS 47.10.080(c)(3);
(6) a parent judicially declared incompetent or mentally defective if the court dispenses with the parent’s consent;
(7) a parent of the person to be adopted, if the person is 18 or more years of age;
(8) a guardian or custodian specified in AS 25.23.040(a)(3) or (4) who has failed to respond in writing to a request for consent for a period of 60 days or who, after examination of the guardian’s or custodian’s written reasons for withholding consent, is found by the court to be withholding consent unreasonably; or
(9) the spouse of the person to be adopted, if the requirement of consent to the adoption is waived by the court by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances constituting an unreasonable withholding of consent.

Alaska Stat. § 25.23.050(a).
Constitution guarantees the right to counsel” for the indigent spouse. *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979). In reaching this holding, the Alaska Supreme Court held that the due process clause of the Alaska Constitution is flexible and the “concept should be applied in a manner which is appropriate in the terms of the nature of the proceeding.” *Id.* (citing *Otton v. Zaborac*, 525 P.2d 537, 539 (Alaska 1974)). It also observed that the right to direct the upbringing of a child is a basic civil liberty that is protected by the due process clause of the Federal Constitution. *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645 (1972) and other U.S. Supreme Court cases). And the court found that the Alaska Legal Services Corporation counted as a “public agency.” *Id.* at 895. Then, in *In re Alaska Network on Domestic Violence & Sexual Assault*, 264 P.3d 835, 841 (Alaska 2011), the court held that the Alaska Network on Domestic Violence and Sexual Assault (ANDVSA) also counted as a “public agency” under *Flores* for purposes of appointment of counsel for someone facing an adversary represented by ANDVSA. The court noted that “the term ‘public agency’ in *Flores* must be understood as referring primarily to the nature of an organization's funding sources, and not to an organization's status as a government agency.” *Id.* at 839.

However, in *Dennis O. v. Stephanie O.*, 393 P.3d 401 (Alaska 2017), the court declined to extend *Flores* to a situation where the opposing side is represented by privately retained counsel, since that situation did not raise the “unfairness” situation in *Flores* of the state providing assistance to one side only. The court also added

Procedural safeguards, including the Family Law Self-Help Center and informal resolution programs, also reduce the risk of erroneous deprivation for these parents. The court may appoint a custody investigator, a guardian ad litem, or an attorney for a child. And judges have experience providing procedural assistance to self-represented parties. Because these cases do not involve the inherent unfairness of a state agency representing one parent, and because of the ways that the judicial system assists self-represented parents in custody cases, the probable value of court-appointed counsel here is lower than in cases where we have mandated court-appointed counsel.

*Dennis O* did hold that “the trial courts are guardians of due process; to determine whether due process requires appointment of counsel in a particular case, trial courts are required to engage in a prospective analysis, weighing the risks of erroneous deprivation and balancing the *Mathews* factors. If the particular facts of a case demonstrate that the parent would otherwise be deprived of a meaningful opportunity to be heard, procedural due process may require court appointment of counsel to a parent in a custody proceeding.” Then, in *Dara v. Gish*, 2017 Alas. LEXIS 118 (Alaska 2017), the court stated that “The reasoning in *Dennis O*. applies also in the third-party custody context; if the third party seeking custody does not enjoy state-appointed counsel then no ‘fairness concerns’ demand, as a rule, appointing counsel for the opposing parent.”
The constitutional right to counsel in visitation proceedings is limited. In *Hamilton v. Hamilton*, No. S-5331, 1994 WL 16459407, at *3 (Alaska March 9, 1994) (unpublished), the court held that as a matter of due process, “an indigent litigant is not entitled to court-appointed counsel where the issue in question is solely the extent of that individual’s visitation with his or her minor child.” The court refused to extend *K.L.J.* and *Flores* to this situation, and also noted that limited visitation cannot be equated with the termination of parental rights. *Hamilton v. Hamilton*, at 3.

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

State Statutes and Court Decisions Interpreting Statutes

In Child in Need of Aid (CINA) proceedings (the Alaska equivalent of abuse/neglect cases), whenever “it appears to the court that the welfare of a child will be promoted by the appointment of an attorney to represent the child, the court may make the appointment.” Alaska Stat. § 47.10.050. Alaska Stat. § 47.10.010 further explains that in CINA proceedings, when there is controversy concerning custody of a child, “the court may appoint a guardian of the person and property of a child, may appoint an attorney to represent the legal interests of the child, and may order support from either or both parents.” Alaska Stat. § 47.10.010.

Federal Statutes and Court Decisions Interpreting Statutes

The Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,9 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

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8 In *In re Freddy A.*, No. S–13988, 2012 WL 1058856, at *4 n.33 (Alaska March 28, 2012) (unpublished), the Alaska Supreme Court commented, “Although *Hamilton* is an unpublished memorandum decision, we cite to it for its persuaive value.”

9 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.
presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.”


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 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

Rule 12 of the Children in Need of Aid Rules provides guidance as to when counsel is to be appointed in CINA cases for children:

(a) Notice of Right to Counsel. The court shall inform the parties at the first hearing at which they are present of their respective rights to be represented by counsel at all stages of the proceedings.
(b) Appointed Counsel. The court shall appoint counsel pursuant to Administrative Rule 12:

   ... 
   (3) for a child when the court determines that the interests of justice require the appointment of an attorney to represent the child's expressed interests; and
   (4) for a non-attorney guardian ad litem when legal representation of the guardian ad litem is necessary.
(c) Waiver of Right to Counsel. The court shall accept a valid waiver of the right to counsel by any party if the court determines that the party understands the benefits of counsel and knowingly waives those benefits.
D. Appointment of Counsel for Child—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

Alaska Stat. § 25.23.125(b) states, “The court may appoint a guardian ad litem or attorney, or both, under AS 25.24.310 for a minor who is to be adopted.”

Alaska Stat. § 13.26.147(d) states that in a proceeding for guardianship of a minor, “If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 years of age or older.” Alaska Stat. § 13.26.186(c) echoes the same language about appointment of counsel for the minor in guardian removal proceedings.

Section 25.24.310(a) of the Alaska Statutes states that “[i]n an action involving a question of the custody, support, or visitation of a child, the court may, upon the motion of a party to the action or upon its own motion, appoint an attorney or the office of public advocacy to represent a minor with respect to the custody, support, and visitation of the minor or in any other legal proceeding involving the minor’s welfare”. Alaska Stat. § 25.24.310(a). “When custody, support, or visitation is at issue in a divorce, it is the responsibility of the parties or their counsel to notify the court that such a matter is at issue” and upon notification, “the court shall determine whether the minor or other child should have legal representation or other services and shall make a finding on the record before trial. If the parties are indigent or temporarily without funds, the court shall appoint the office of public advocacy.”  Id.

State Court Rules and Court Decisions Interpreting Court Rules

Rule 12 of the Rules Governing the Administration of All Courts states that “Appointments may be made in the following types of cases without prior approval of the administrative director, but only in cases in which the required services would not otherwise be provided by a public agency:.... (ii) Attorneys for minor children and indigent parents or custodians of minor children in minor guardianship cases brought pursuant to AS 13.26.060(d).” Alaska Ct. R. 12(e)(1)(A)(ii).

5. MISCELLANEOUS

A. Civil Contempt Proceedings
State Court Decisions Addressing Constitutional Due Process or Equal Protection

Relying on the due process clauses of both the state and federal constitutions, the Alaska Supreme Court ruled that an indigent person faced with a civil contempt proceeding is entitled to court-appointed counsel. *Otton v. Zaborac*, 525 P.2d 537, 538 (Alaska 1974). The court based its rationale on the fact that there is a right to a jury trial in a contempt proceeding. *Id.* (citing *Johansen v. State*, 491 P.2d 759 (Alaska 1971)). “If there is no accompanying right to counsel, the right to trial by jury becomes meaningless.” *Id.* at 540 (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 45-46 (1972) (Justice Powell, concurring)). In *Otton*, the defendant was involved in a civil contempt proceeding for nonpayment of child support. *Id.* at 537-38. The court noted that there is a very real threat of incarceration in these cases, which more closely relates to penal proceedings. *Id.* at 538. According to the court, “One facing a possible deprivation of liberty must be afforded all of the fundamental constitutional rights guaranteed by the federal and state constitutions.” *Id.* at 539. The court also concluded that there was sufficient state action in a contempt proceeding initiated by a private party.10 *Id.*

It is unclear what effect *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011) (Fourteenth Amendment does not require right to counsel in civil contempt, at least where opponent is neither the state nor represented and matter is not “especially complex”) would have on *Otton*. The question might be whether *Otton* would be considered to have an independent state constitutional ground. The *Otton* court repeatedly referred to the state and federal constitution in the same breath (i.e., “We have consistently held that one facing a possible deprivation of liberty must be afforded all of the fundamental constitutional rights guaranteed by the federal and state constitutions”), which makes it difficult to tell. *Otton v. Zaborac*, 525 P.2d at 539.

10 “Chief Justice Traynor, when discussing state involvement in civil mesne process, a procedure also initiated by and for the benefit of a private party, said:

‘A state cannot deprive a person of his life, liberty, or property without affording him an opportunity to be heard by a tribunal empowered to decide the lawfulness of the deprivation. . . . Under the statutory scheme for mesne civil arrest the state deprives the defendant of his liberty through the process of its trial courts executed by its law enforcement officers. Although the statutory machinery is set in motion by a private plaintiff to satisfy a civil claim, the deprivation of the liberty is effected by the State.’ *In re Harris*, 69 Cal.2d 486, 72 Cal.Rptr. 340, 343, 446 P.2d 148, 151 (1968). (citations omitted)

In a contempt proceeding for nonsupport the deprivation of liberty is also effected by the state. Although the proceeding is characterized by its purpose of providing a remedy for a private party, disobedience of a lawful court order is a contempt ‘of the authority of the court.’ AS 09.50.010. Appearance in a contempt proceeding is compulsory. The court trustee plays a role in the initiation of the enforcement proceedings. AS 09.55.210(5); Civil Rule 67(b). Imprisonment to coerce compliance is a remedy supplied by the state through both its judicial machinery and its penal institutions. AS 09.50.050. This use of the state's judicial machinery demonstrates state action which brings into play the due process clause.” *Otton v. Zaborac*, 525 P.2d at 538-39.
B. Paternity Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Reynolds v. Kimmons*, 569 P.2d 799, 803 (Alaska 1977), the Alaska Supreme Court held that an indigent defendant has a right to the appointment of counsel in a paternity suit in which the plaintiff is represented by the state. The Court based its decision on the due process clause of the Alaska Constitution. *Id.* at 801. In upholding the right to counsel, the Court noted that, “principles justifying appointment of counsel in criminal cases also apply to certain civil or quasi-civil proceedings.” *Id.* The Court observed that, for example, “a parent of a child under sixteen years of age who willfully fails to furnish support, without lawful excuse, may be held criminally liable and subject to a fine of not more than $500.00 or imprisonment for not more than twelve months or both.” *Id.* Due to the possibility of a loss of liberty, due process requires the appointment of counsel. *Id.* Additionally, the Court pointed out that paternity suits are brought by the state and “a determination of one of society’s most important relationships, that of parent-child, is at stake.” *Id.* at 802. These are also important considerations that lead to the right to counsel in paternity cases. *Id.*

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

State Statutes and Court Decisions Interpreting Statutes

Under Alaska Stat. § 18.16.030(a), “[a] woman who is pregnant, unmarried, under 18 years of age, and unemancipated who wishes to have an abortion without notice to or the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without notice to or the consent of a parent, guardian, or custodian.” Alaska Stat. § 18.16.030(a). Section (d) of the statute explains that, “[i]f the complainant has not retained an attorney, the court shall appoint an attorney to represent the complainant.” Alaska Stat. § 44.21.410(a)(4) then provides that the office of public advocacy shall “provide legal representation in cases involving judicial bypass procedures for minors seeking abortions under AS 18.16.030.”

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11 The court noted that “The lawsuit was initiated by the Child Support Enforcement Agency, although the suit was brought in the name of the child’s mother.” *Reynolds v. Kimmons*, at 802.

12 The counsel provision should not actually come into play since both the notice and consent provisions have been invalidated. A prior version of the law required consent, and the Alaska Supreme Court held that that version violated the privacy provisions of the Alaska Constitution. *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007). Then in 2016, the Alaska Supreme Court held that a newly-enacted parental notification provision
D. Proceedings Involving Violation of Municipal Ordinance

State Statutes and Court Decisions Interpreting Statutes

An action for a civil penalty in Alaska that is filed against a minor for violations of municipal ordinances does not give rise to the right to counsel appointed at public expense. Alaska Stat. § 29.25.072(c).

E. Proceedings Involving Petition for Removal of Minority

State Statutes and Court Decisions Interpreting Statutes

Under Alaska Stat. § 09.55.590(a),

A minor who is a resident of this state and is at least 16 years of age, who is living separate and apart from the parents or guardian of the minor, capable of sustained self-support and of managing one's own financial affairs, or the legal custodian of such a minor, may petition the superior court to have the disabilities of minority removed for limited or general purposes.

Section (e) specifies that for these proceedings, “[t]he court may appoint an attorney or a guardian ad litem to represent the interests of the minor at the hearing.” Alaska Stat. § 09.55.590(e).

F. Civil Forfeiture Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

An indigent claimant does not have a constitutional right to appointed counsel at public expense in a civil in rem forfeiture proceeding, although a court can appoint counsel in certain situations. Resek v. State, 706 P.2d 288, 289 (Alaska 1985). In Resek, the court first determined that forfeiture actions were not within the intended meaning of “criminal prosecution” under Article 1, Section 11 of the Alaska Constitution that requires counsel to be appointed for defendants in criminal prosecutions. Id. The court also rejected the argument that due process required the appointment of counsel, commenting that “[t]his court has found such a right under the state constitution only when basic liberty interests are at stake, such as the parent-child relationship . . . . The federal due process clause has been even more strictly construed.”

However, the court concluded that holding the forfeiture proceeding prior to criminal proceedings raised serious implications for the Fifth Amendment protection against self-incrimination. The court therefore held that if there are criminal charges pending, the self-incrimination issue can be resolved simply by staying the civil in rem proceeding until the criminal prosecution is concluded, but “[i]n the situation in which there are no criminal charges pending or the forfeiture proceeding has not been stayed, the trial court has the discretion to require that counsel be provided to an indigent claimant, at least for the purpose of protecting the claimant's privilege against self-incrimination.” 

G. Proceedings to Establish Child Support Obligation

**State Statutes and Court Decisions Interpreting Statutes**

The court may appoint counsel “to represent an unmarried 18-year-old child with respect to post-majority support while the child is actively pursuing a high school diploma or an equivalent level of technical or vocational training and living as a dependent with a parent or guardian or a designee of the parent or guardian.” Alaska Stat. § 25.24.310(a).

H. Education of Children with Disabilities

**State Statutes and Court Decisions Interpreting Statutes**

Alaska Stat. § 44.21.410(a)(10) requires the Office of Public Advocacy to provide representation to "an indigent parent of a child with a disability; in this paragraph, 'child with a disability' has the meaning given in AS 14.30.350." Given that AS 14.30.350 is located in the education code, this appointment provision seemingly would apply only to school proceedings. However, in *In re Protective Proceedings of Freddy A.*, 2012 Alas. LEXIS 46 (Alaska 2012) (unpublished), involving a parent seeking to be appointed counsel in a proceeding regarding a guardianship of her developmentally disabled adult child, the court cited to § 14.30.350 for the proposition that "If Freddy were a minor, there would be little question that Mia is entitled to appointed counsel." But the court clarified that this provision does not provide a right to counsel for parents of disabled children that have reached the age of majority.

I. Matters Involving Personal Property

**State Court Decisions Addressing Constitutional Due Process or Equal Protection**

In *Barber v. Schmidt*, 354 P.3d 158 (Alaska 2015), the court denied appointment of counsel to prisoners denied the right to purchase video game systems because the interest at
stake was the “possession of property” and “These economic interests are insufficient to require the appointment of counsel as a matter of due process.” Id. at 162.
Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

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, 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.


Additionally, 50 App. U.S.C. § 3932(d)(1), which also applies to all civil proceedings (including custody),\(^{16}\) specifies that a servicemember previously granted a stay may apply for an additional stay based on a continuing inability to appear, while § 3932(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

Courts in Alaska do not have the inherent power to compel an attorney to be appointed as counsel without adequate pay. In *Delisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987), the court reversed two of its prior cases to hold that

requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a

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\(^{14}\) 50 App. U.S.C.A. § 3912(a) states, “This chapter applies to-- ...(2) each of the States, including the political subdivisions thereof...”

\(^{15}\) 50 App. U.S.C. § 3931(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.”

\(^{16}\) 50 App. U.S.C. § 3932(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.”
program intended to benefit the public upon the attorney rather than upon the citizenry as a whole. As such, the appropriation of the attorney's labor is a “taking” under the provisions of Alaska Constitution article I, section 18.

Id. at 443. The court noted that some have argued that an attorney’s labor is not “property” within the meaning of the takings clause, but concluded that “[w]hatever the merit of this argument under the federal Constitution, we reject it as it applies to the Alaska Constitution.” Id. at 440. Therefore, when a court appointment compels an attorney to represent an indigent defendant, the attorney is entitled to fair market value of his/her services defined as “the compensation received by the average competent attorney operating on the open market.” Id. at 443. Although the court did not state it explicitly, it appeared to believe that compensation would be handled under former Administrative Rule 12. See Id. at 443 n. 8. Indeed, this would likely be the case, as Rule 12(e)(5) provides that fee petitions for appointments not explicitly authorized by other statutes (like the public defender statute) must be submitted on forms provided by the court to the administrative director of the Alaska Court System.17

17 In State v. Superior Court, 718 P.2d 466, 467 (Alaska 1986) (per curiam), counsel was appointed pursuant to a federal statute requiring the appointment of counsel before a default can be entered against someone active in the military. While the court noted that “payment of some fee to appointed counsel is appropriate,” it held that it had no authority to mandate the Attorney General to pay. State v. Superior Court, at 467. The court also noted that Administrative Rule 12(d)(2) states that “indigent persons requiring counsel but not provided for under AS 44.21.410 or AS 18.85.100, the public defender statute, shall be provided with counsel at the expense of the Alaska Court System.” Id.