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

ALABAMA

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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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

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.

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

State Statutes and Court Decisions Interpreting Statutes

 Ala. Code § 30-5-6, which governs domestic violence protection order proceedings, stated in a previous version that “[t]he court shall advise the defendant that he or she may be represented by counsel,” which the court of civil appeals held did not create a right to appointed counsel. *Leftwich v. Vansandt*, 995 So. 2d 172, 174 (Ala. Civ. App. 2008). The statute was rewritten in 2010 and the provision about the right to be represented was removed. A 1993 law review article referred to § 30-5-6 providing petitioners with a right to counsel as late as 1989, but even if this was the case, it is no longer true in the current version.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Leftwich v. Vansandt*, 995 So. 2d 172 (Ala. Civ. App. 2008), a litigant against whom a protection-from-abuse order (i.e., a domestic violence restraining order) pursuant to Section 30-5-1 of the Alabama Code had been issued argued that he had a constitutional right to appointed counsel during the civil protection-from-abuse proceedings. A violation of the protection order could have subjected the petitioner to potential criminal penalties, including incarceration. *See* Ala. Code § 30-5-9. The court stated:

The present case is a civil proceeding. Although a party to a civil action has a constitutional right to appear through privately retained counsel, there is no constitutional right to appointed counsel in a civil proceeding. Thus, we conclude that the trial court did not violate Leftwich’s constitutional rights by failing to appoint counsel to represent him.

*Leftwich*, 995 So. 2d at 173-74 (citations omitted). Noting other circumstances in which Alabama statutes required the appointment of counsel in civil cases, the court concluded that there was “no similar statutory requirement for the appointment of counsel in protection-from-abuse proceedings.” *Id.* at 174. It is unclear whether the petitioner only raised the question of a Sixth Amendment right to counsel, but in any case, the court’s opinion only addressed the Sixth Amendment and relied upon cases interpreting the Sixth Amendment; the court did not mention due process.

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B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

In guardianship proceedings, Ala. Code § 26-2A-102(b) specifies that “[a]fter the filing of a petition, the court shall . . . , unless the allegedly incapacitated person is represented by counsel, appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian ad litem.” Ala. Code § 26-2A-110(c) specifies that “[b]efore appointing a successor guardian, or ordering that a ward's incapacity has terminated, the court shall follow the same procedures to safeguard the rights of the ward that apply to a petition for appointment of a guardian.” This presumably means that the right to counsel for the guardianship establishment proceeding extends to the termination proceeding.

The law also appears to require appointed counsel for an adult subject to a petition for conservatorship or other protective order. While Ala. Code § 26-2A-135(d) states that such person is only “entitled to be represented by counsel, at the person's expense,” § 26-2A-135(b) states: “Unless the person to be protected has chosen counsel, the court shall appoint an attorney to represent the person who may be granted the powers and duties of a guardian ad litem.” The phrase “who may be granted the powers and duties of a guardian ad litem” appears to be a reference to the appropriate role of the attorney appointed to represent the subject of the conservatorship, not a reference to an attorney for the proposed conservator. As § 26-2A-135(a) clarifies: “An attorney appointed by the court to represent a minor may be granted the powers and duties of a guardian ad litem.” However, even with this clarification, it is unclear how to reconcile these two apparently conflicting provisions, where one provides for appointment of counsel and the other appears to only provide the right to privately retain counsel.

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

Federal Court Decisions Addressing Constitutional Due Process or Equal Protection

In Lynch v. Baxley, 386 F. Supp. 378, 389 (M.D. Ala. 1974), a federal court cited to decisions from other federal courts to hold that “The subject of an involuntary civil commitment proceeding has the right to the effective assistance of counsel at all significant stages of the commitment process ... Further, he has the right to be advised of his right to counsel, and to the appointment of counsel if indigent.” The court added that “The right to counsel is a right to representative counsel occupying a traditional adversarial role. Where state law requires or permits the appointment of a guardian ad litem, such appointment shall be
deemed to satisfy the constitutional right to counsel if, but only if, the appointed guardian is a licensed attorney and occupies a truly adversary position.” *Id.* The injunction implementing this ruling was ultimately vacated in *Lynch v. Sessions*, 942 F. Supp. 1419 (M.D. Ala. Sept. 30, 1996) due to the enactment of Ala. Code § 22-52-4(a) and Ala. Code § 22-52-5.

**State Statutes and Court Decisions Interpreting Statutes**

Upon petition for commitment of a mentally ill person, the probate judge “shall determine if the respondent has the funds with which to employ an attorney to represent the respondent and if the respondent has the mental ability to secure the services of an attorney. If the respondent does not have funds with which to employ an attorney or does not have the mental ability to secure the services of an attorney, the probate judge shall appoint an attorney, who may be the same person as the guardian ad litem, to represent the respondent.” Ala. Code § 22-52-4(a). Additionally, the judge “shall appoint an attorney to serve as the advocate in support of the petition to commit in all matters regarding a petition to commit.” Ala. Code § 22-52-5. Ala. Code § 22-52-14 addresses payment of appointed attorneys, as it specifies that “[i]n any commitment proceeding, the fees of any attorney appointed by the probate judge to act as advocate for the petition and any attorney or guardian ad litem appointed by the probate judge for the person sought to be committed shall be set at the rates established by Section 15–12–21 ...”

**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**

No law could be located regarding the appointment of counsel for indigent litigants in civil proceedings involving quarantine, inoculation, or sterilization.

**4. CHILD CUSTODY**

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

**State Statutes and Court Decisions Interpreting Statutes**

Effective January 1, 2009, Ala. Code § 12-15-63(b) was replaced by § 12-15-305 (“Right to counsel for petitioners or respondent parents, legal guardians, or legal custodians in dependency proceedings”) of the revised Juvenile Justice Code. *See* Act No. 2008-277, Ala. Acts 2008. Most significantly, the revised provision provides a right to appointed counsel for
parents, without a need to make a request, in all termination of parental rights cases as well as dependency proceedings. Subsection (b) of the new provision provides:

   In dependency\(^2\) and termination of parental rights cases, the respondent parent, legal guardian, or legal custodian shall be informed of his or her right to be represented by counsel and, if the juvenile court determines that he or she is indigent, counsel shall be appointed where the respondent parent, legal guardian, or legal custodian is unable for financial reasons to retain his or her own counsel.

Ala. Code § 12-15-305(b) (emphasis added).\(^3\) A footnote to this new provision in the Annotated Guide prepared by the Alabama Administrative Office of the Courts explains:

   This subsection will codify \textit{W.C. v. State Dept. of Human Resources}, 887 So. 2d 251 (Ala. Civ. App. 2003), in which the court recognized that an indigent parent in a termination of parental rights (“TPR”) matter has a due process right under the Alabama Constitution to the assistance of appointed counsel. Under this amended provision, a parent, legal guardian, or legal custodian who is a respondent in a TPR matter will be automatically entitled to appointed counsel, even if counsel is not requested.\(^4\)

The “shall be appointed” language of the new Section 12-15-305(b) is also significant in that it removes the “upon request” qualifier that existed in Section 12-15-63(b).\(^5\) Subsection (a) of the

\(^2\) It is unclear whether this provision applies to dependency proceedings initiated by a private party, rather than by the State. See \textit{T.L. v. W.C.L.}, 2016 Ala. Civ. App. LEXIS 1 (Ala. Civ. App. 2016) (grandparents filed proceeding in juvenile court in which grandparents and biological mother stipulated that child was dependent; court declines to address whether statute is applicable). The \textit{T.L.} court also held that even though the mother’s statutory right to counsel was violated, there was no constitutional right to counsel, and “[b]ecause the dependency judgment was not entered in a manner inconsistent with due process, the juvenile court did not err in denying the mother’s Rule 60(b) motion to set aside that judgment based on her lack of appointed legal representation.”

\(^3\) Section 12-15-63(b) originally provided: “In dependency cases, the parents, guardian or custodian shall be informed of their right to be represented by counsel and, upon request, counsel shall be appointed where the parties are unable for financial reasons to retain their own.”


\(^5\) Prior to passage of § 12-15-305, at least one court suggested the trial court was obliged to notify parents of their right to make a request for appointment of counsel. \textit{Smoke v. State Department of Pensions and Security}, 378 So. 2d 1149, 1150 (Ala. Civ. App. 1979) (“[t]he right of parents of the child in a dependency case to be represented by counsel at every stage of the proceeding is a fundamental one protected by statute and court decision;” statutory right to counsel “place[d] upon the courts the duty of informing parents, guardians or custodians” of their right to appointed counsel, and failure to so advise parents constitutes reversible error). Since § 12-15-305 explicitly places such an obligation on the trial court, this question is moot.
new provision also grants the juvenile court discretion to appoint counsel upon request for indigent petitioners seeking termination of parental rights. Ala. Code. § 12-15-305(a). See also Ala. Code 12-15-308(c) ("[a]t the commencement of the 72-hour hearing requirement, the juvenile court shall advise the parent, legal guardian, or legal custodian of the right to counsel and shall appoint counsel if the juvenile court determines he or she is indigent"); N.G. & P.G v. Blount Cnty Dep’t of Human Res., 2016 Ala. Civ. App. LEXIS 124 (Ala. Civ. App. 2016) ("Section 12-15-308(c) creates a statutory duty on the part of a juvenile court to inform a parent at a shelter-care hearing of his or her right to counsel and to affirmatively investigate the ability of the parent to afford counsel if the circumstances indicate that the parent might be indigent.")

In J.A.H. v. Calhoun County Department of Human Resources, 846 So. 2d 1093, 1095 (Ala. Civ. App. 2002), the Court of Civil Appeals commented incorrectly that the right to appointed counsel in cases involving the termination of parental rights differs from that in criminal trials, in that the latter right is constitutional while the former derives from statute. Notwithstanding this distinction, the court reasoned, the rights are sufficiently fundamental to warrant use of the procedural safeguards from the criminal context. Id. In particular, the court borrowed from the criminal context to hold that once counsel appointed in a termination of parental rights case is relieved from representation on conflict grounds, the court must appoint new counsel and the indigent party need not make a new request. Id. The Alabama Supreme Court has similarly analogized to appointed-counsel safeguards in criminal trials to allow a mother to collaterally attack the judgment terminating her parental rights on ineffective assistance of counsel grounds. See Ex parte E.D., 777 So. 2d 113, 115-16 (Ala. 2000).

In its most recent interpretation of former Section 12-15-63, the Court of Civil Appeals reaffirmed that the right to appointed counsel where parental rights are at stake applies to every stage of the proceedings, including appeal. See R.H. v. D.N., 5 So. 3d 1253, 1255 (Ala. Civ. App. 2008). The court held that the Juvenile Court erred in failing to appoint the mother counsel when the dependency case was on appeal. Id. Although the Court remanded the case to the juvenile court with instructions to appoint counsel for purposes of the appeal, two dissenting justices would have reversed the judgment terminating parental rights and ordered a new trial because the juvenile court had allowed the case to proceed while the mother was not represented by counsel. Id. at 1256.

The Court of Civil Appeals has also suggested that a court’s failure to appoint counsel in preliminary proceedings and those leading to temporary deprivations of custody cannot be raised on appeal if initially not raised below. See Morgan v. Lauderdale Cnty. Dep’t of Pensions & Sec., 494 So. 2d 649, 651 (Ala. Civ. App. 1986); W.C. v. State Dep’t of Human Res., 887 So. 2d at 256-57. In Morgan, the mother was not appointed counsel either at the initial dependency

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6 The statute governing appointment of counsel in termination of parental rights proceedings merely codified various constitutional rulings of Alabama courts relating to such proceedings.
hearing at which the state obtained temporary custody of her children, or on the two occasions in which the juvenile court reviewed that temporary order. Morgan, 494 So. 2d at 650. It was not until the state announced its intention to seek permanent custody of the children that the juvenile court appointed counsel for the mother. Id. The Court of Civil Appeals ultimately held that the mother had not preserved for appeal the juvenile court’s failure to appoint counsel for the initial dependency proceedings because she did not raise the issue at each of these preliminary hearings.

The Court of Civil Appeals held similarly under the new section, Ala. Code § 12-15-305. In E.D. v. Madison County Department of Human Resources, 68 So. 3d 163, 167-68 (Ala. Civ. App. 2010), the court held that the appellant was precluded from arguing lack of representation because he had not filed a timely appeal of the order. The court also stated that it would not consider whether he had received notice of his right to counsel because he raised the issue for the first time on appeal. Id. at 168 n.5. The court noted that court decisions and Section 12-15-305 protect the fundamental right to be represented by counsel at every stage of a dependency proceeding, but Section 12-15-305(b) does not require a court to appoint counsel on behalf of a respondent parent until the court determines that the respondent parent is indigent, and the juvenile court appointed counsel for the respondent parent one day after it received evidence supporting a finding of indigence. Id.

Federal Statutes and Court Decisions Interpreting Statutes

The federal Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,7 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."


7 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.
State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Ex parte Shuttleworth*, 410 So. 2d 896, 897 (Ala. 1981), a case decided a few months after the U.S. Supreme Court’s decision in *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (finding no federal categorical right to counsel in termination of parental rights cases), the Alabama Supreme Court considered the extent to which the state was required to provide notice before terminating parental rights. *Id.* at 900. It held that both notice and the appointment of counsel were required, although it did not specify which constitution it was interpreting. The Alabama Supreme Court’s precise language in *Shuttleworth*, which makes no mention of *Lassiter* whatsoever, is instructive:

The [Supreme Court in *In re Gault*] further held that in [] delinquency proceedings the child and his parents must be advised of their right to be represented by counsel and that if they are not able to afford same, counsel should be appointed to represent them. Such due process safeguards in Alabama are found in Code 1975, § 12-15-63. We can perceive no reason to guarantee these due process safeguards in a delinquency case and refuse them in a case terminating parental rights. In the former, the child is subject to severe punishment by incarceration or otherwise. In the latter, the natural bonds of family are subject to destruction. *The judicial action in both instances portends grave consequences*, indeed. Our courts, to their credit, have perceived no distinction.

*Id.* at 899 (emphasis added).

The Alabama Court of Civil Appeals has subsequently given its interpretation of *Shuttleworth*. In *K.P.B. v. D.C.A.*, 685 So. 2d 750 (Ala. Civ. App. 1996), a mother sought termination of the father’s parental rights, where the father was in prison but there had been no finding of dependency against him. Although the statute in place at the time, Section 12-15-63(b) of the Alabama Code, provided a right to appointed counsel for indigent parents in dependency proceedings, no express statutory right existed at the time in cases where parental rights were at stake but the dependency of the child was not at issue. Citing *Lassiter*, the lower court denied the father’s request for appointed counsel. See *id.* The Alabama Court of Civil Appeals reversed and held that *Shuttleworth* controlled. The court noted that the U.S. Supreme Court in *Lassiter* had noted the power of state courts to interpret their state constitutions more broadly, and then the *K.P.B.* court commented that “[i]t appears that in *Shuttleworth* the Alabama Supreme Court did adopt ‘higher standards than those minimally tolerable under the [federal] Constitution.’” The court added:

*Lassiter* was decided in June 1981. *Shuttleworth* was decided in October 1981, four months later. Because *Lassiter* had just held that there was no federal due process right to appointed counsel in a termination case, we assume that, when our supreme court
referred in *Shuttleworth* to “due process safeguards,” it meant due process safeguards provided by the *Alabama* Constitution. We conclude that in *Shuttleworth* the Alabama Supreme Court found a due process right to appointed counsel for indigents in termination-of-parental-rights cases.

*K.P.B.*, 685 So.2d at 752 (emphasis added). See also *W.C. v. State Dept. of Human Resources*, 887 So. 2d 251, 256-57 (Ala. Civ. App. 2003) (relying on *K.P.B.* for proposition that “a due-process right to appointed counsel does exist for an indigent parent in termination-of-parental-rights proceedings” but adding that “the constitutional due process clause does not require the appointment of counsel for an indigent parent in dependency and temporary custody proceedings.”). As explained earlier, the Alabama legislature has recently codified *K.P.B.* in its revision of the Juvenile Justice Code.

While the Alabama courts have recognized a due process right to counsel for parents in termination proceedings, one court declined to find such a right for parents in the dependency context. The case, *Morgan v. Lauderdale County Department of Pensions & Security*, 494 So. 2d 649, 651 (Ala. Civ. App. 1986), involved the right to counsel at dependency and temporary custody proceedings. There, the court devoted one sentence to the right to counsel and relied entirely on *Lassiter* to summarily hold that the “constitutional due process clause” (it did not specify which) does not entitle parents to counsel in such proceedings. See also *W.C. v. State Dept. of Human Resources*, 887 So. 2d 251, 256-57 (Ala. Civ. App. 2003) (citing *Morgan v. Lauderdale County* for absence of a due process right to appointed counsel for parents in dependency and temporary custody proceedings).

**B. Appointment of Counsel for Parent—Privately Initiated Proceedings**

For adoptions Ala. Code § 26-10A-22 states:

(a) In making adoption arrangements, potential adopting parents and birth parents may obtain counsel to provide legal advice and assistance.

(b) Upon the motion of any party, or upon the court’s own motion, before or after the filing of petition for adoption the court may appoint a guardian ad litem for ... any incompetent or minor who is a party to the proceeding or who would be a party to the proceeding. In the event of a contested adoption, a guardian ad litem shall be appointed. The fees of a guardian ad litem shall be assessed as court costs.

The statute does not clarify whether subpart (a) is a reference to state-funded counsel. Moreover, the Adoption Code does not define the term “guardian ad litem.” See Ala. Code § 26-10A-2. However, “guardian ad litem” is defined elsewhere in the Alabama Code as: “A licensed attorney appointed by a juvenile court to protect the best interests of an individual without being bound by the expressed wishes of that individual.” Ala. Code § 12-15-102(10).
Regarding minor parents, Ala. Code § 26-10A-8 states:

(a) Prior to a minor parent giving consent a guardian ad litem must be appointed to represent the interests of a minor parent whose consent is required. Any minor, 14 years of age and beyond, can nominate a guardian ad litem either prior to the birth of the baby or thereafter. . . .

(c) A minor father may give his implied consent by his actions. If a court finds by conclusive evidence that a minor father has given implied consent to the adoption, notice and the appointment of a guardian ad litem shall not be necessary.

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

State Statutes and Court Decisions Interpreting Statutes

Children in dependency and termination of parental rights proceedings are entitled to the services of a guardian ad litem, Ala Code. § 12-15-304(a), and this GAL must be a licensed attorney. Ala Code. § 12-15-102(10). See also Ala. Code § 26-14-11 (“In every case involving an abused or neglected child which results in a judicial proceeding, an attorney shall be appointed to represent the child in such proceedings. Such attorney will represent the rights, interests, welfare, and well-being of the child, and serve as guardian ad litem for said child.”)

Federal Statutes and Court Decisions Interpreting Statutes

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

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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(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.

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 Decisions Addressing Constitutional Due Process or Equal Protection

In Roe v. Conn, 417 F. Supp. 769, 780 (M. D. Ala. 1976), a federal court found that children have a due process right to counsel in Alabama dependency proceedings under the U.S. Constitution.⁹

D. Appointment of Counsel for Child—Privately Initiated Proceedings

For adoptions, Ala. Code § 26-10A-22(a) states:

Upon the motion of any party, or upon the court's own motion, before or after the filing of petition for adoption the court may appoint a guardian ad litem for the adoptee... In the event of a contested adoption, a guardian ad litem shall be appointed. The fees of a guardian ad litem shall be assessed as court costs.

The statute does not clarify whether subpart (a) is a reference to state-funded counsel. Moreover, the Adoption Code does not define the term “guardian ad litem.” See Ala. Code § 26-10A-2. However, “guardian ad litem” is defined elsewhere in the Alabama Code as: “A licensed attorney appointed by a juvenile court to protect the best interests of an individual without being bound by the expressed wishes of that individual.” Ala. Code § 12-15-102(10).

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⁹ While Roe predated Lassiter, it is arguably distinguishable because Lassiter was about termination of parental rights, not dependency, and was about parents, not children.
Where there is a petition for the appointment of a conservator or for other protective orders because of minority, the court “may appoint an attorney to represent the minor” if it “determines at any time in the proceeding that the interests of the minor are or may be inadequately represented.” Ala. Code § 26-2A-135(a).

In guardianships of minors, Ala. Code § 26-2A-75(d) provides that “[i]f the court determines at any time in the proceeding 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 or more years of age”, while Ala. Code § 26-2A-135(a) adds, “[u]pon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing. If the court determines at any time in the proceeding 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 or more years of age. An attorney appointed by the court to represent a minor may be granted the powers and duties of a guardian ad litem.”

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Statutes and Court Decisions Interpreting Statutes

Ala. Code § 15-12-20 states:

In . . . civil . . . nonsupport cases which may result in the jailing of the defendant . . . when a defendant is entitled to counsel as provided by law, the trial judge shall before arraignment ascertain from the accused, or otherwise: (1) Whether or not the defendant has arranged to be represented by counsel; (2) Whether or not the defendant desires the assistance of counsel; and (3) Whether or not the defendant is able financially or otherwise to obtain the assistance of counsel.

Although the statute appears to condition the right to counsel in civil nonsupport contempt on situations “when a defendant is entitled to counsel as provided by law,” at least one court has interpreted the statute to state that there is a right to counsel in such proceedings. Leftwich v. Vansandt, 995 So. 2d 172, 174 (Ala. Civ. App. 2008) (“[T]here are certain Alabama statutes that provide for appointed counsel in certain civil proceedings, e.g., ‘civil . . . nonsupport cases which may result in the jailing of the defendant,’ Ala. Code 1975, § 15-12-20 . . . .”).

The Alabama courts have discussed the question of whether the courts have an affirmative duty to notify defendants of their right to appointed counsel. For example, the
Court of Civil Appeals held in Watts v. Watts, 706 So. 2d 749 (Ala. Civ. App. 1997) that the trial court did not violate the defendant’s due process rights by failing to ascertain, pursuant to Alabama Code Section 15-12-20, whether the defendant knew he was entitled to the assistance of counsel. Id. at 752. Nevertheless, this case was accompanied by a vigorous dissent. See id. (Crawley, J., dissenting) (“I think the trial court had an affirmative duty to advise Winford of his right to counsel. Section 15-12-20 clearly places on the trial court, in the first instance, the responsibility to determine whether counsel should be appointed.”). See also Ex Parte Parcus, 615 So. 2d 78, 82 (Ala. 1993) (Maddox, J., dissenting) (in case involving parent held in criminal contempt for failure to pay support, judge observes: “The right to the assistance of counsel is such a fundamental component of due process that trial courts cannot be allowed to assume that the accused has some vague knowledge of that right and has chosen to waive it.”).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In State ex rel. Payne v. Empire Life Insurance Co., 351 So. 2d 538, 542 (Ala. 1977) (internal citations omitted), the Alabama Supreme Court found a right to counsel in criminal contempt cases, most likely under the federal constitution (since the court relied on federal cases), stating:

A proceeding in contempt for noncompliance with a lawful court decree is sui generis and not a ‘criminal prosecution’ as that term is commonly understood. Because the sanctions employed by the court, pursuant to a criminal contempt adjudication, partake so heavily of a criminal nature (i.e., the actual or potential restraint of the body), however, it is essential in all but a narrow category of cases that constitutional principles be applied to this process to assure substantial due process is afforded the accused.

The court went to hold that the “substantial due process” included the assistance of counsel “if requested.” Id. at 543. Later, the Court of Civil Appeals seemingly extended Payne to civil contempt cases. Wright v. Wright, 630 So. 2d 450, 452 (Ala. Civ. App. 1992) (husband in divorce failed to execute deed to ex-wife as required by court order; “We would note initially that, pursuant to [Payne], the accused in a contempt proceeding is entitled to assistance of counsel, ‘if requested’;” court later suggests proceeding is one for civil contempt by responding to request for attorney’s fees in the case by stating that “our supreme court has held that such fees are recoverable in civil contempt proceedings and may be awarded in the sound discretion of the trial court.”) It is unclear what effect Turner v. Rogers, 131 S.Ct. 2507 (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 Wright, as Wright relied entirely on Payne, which in turn was based on the Sixth Amendment.
B. Paternity Proceedings

State Statutes and Court Decisions Interpreting Statutes

Ala. Code § 15-12-20 states:

In all criminal cases, including paternity cases . . . when a defendant is entitled to counsel as provided by law, the trial judge shall before arraignment ascertain from the accused, or otherwise: (1) Whether or not the defendant has arranged to be represented by counsel; (2) Whether or not the defendant desires the assistance of counsel; and (3) Whether or not the defendant is able financially or otherwise to obtain the assistance of counsel in accordance with policies and procedures established by the Office of Indigent Defense Services.

One judge has suggested in the course of a dissenting opinion that “Section 15-12-20 clearly places on the trial court, in the first instance, the responsibility to determine whether counsel should be appointed.” Watts v. Watts, 706 So. 2d 749, 752 (Ala. Civ. App. 1997) (Crawley, J., dissenting)

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

State Statutes and Court Decisions Interpreting Statutes

Appointed counsel is mandated by statute in cases involving waiver of parental consent to an abortion: “The court shall advise her that she has a right to be represented by an attorney and that if she is unable to pay for the services of an attorney one will be appointed for her.” Ala. Code § 26-21-4(b). In Ex parte Anonymous, 531 So. 2d 901, 905 (Ala. 1988), the court held that “the attorney to be appointed under the parental consent act is to be a guardian ad litem ...” In 2014, the legislature added Ala. Code § 26-21-4(j), which states, “[i]n the court’s discretion, it may appoint a guardian ad litem for the interests of the unborn child of the petitioner who shall also have the same rights and obligations of participation in the proceeding as given to the district attorney’s office. The guardian ad litem shall further have the responsibility of assisting and advising the court so the court may make an informed decision and do substantial justice. The guardian ad litem shall be compensated as provided in Section 15-12-21.” The GAL has the right to appeal any trial court decision as per § 26-21-4(n). The statute is silent on whether the GAL must be an attorney, as contrasted with code provisions governing other types of procedures. See e.g. Ala. Code § 12-15-102(10) (defining guardian ad litem appointed for juvenile proceedings as “[a] licensed attorney appointed by a juvenile court
to protect the best interests of an individual without being bound by the expressed wishes of that individual.”

D. Proceedings Involving Claims by and Against Prisoners

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In a case involving an incarcerated individual who claimed he was entitled to appear in person to testify in a suit he filed to recover personal property, but apparently did not specify the constitutional grounds upon which his claim was based (the court only mentioned that the petitioner stated he was “unable to hire counsel”), the Alabama Supreme Court noted that the individual had no right to appointed counsel even though he was indigent: “Plaintiff claimed to be indigent, and the court records reflect that he is indigent, so that he was unable to hire counsel to prosecute his claim. He was not due to have counsel appointed, since this is a civil proceeding.” *Hubbard v. Montgomery*, 372 So. 2d 315-17 (Ala. 1979). However, the court did not state what constitutional provision it was addressing, and relied entirely upon a case from the District Court of Delaware that addressed only the applicability of the Sixth Amendment right to counsel to civil proceedings, creating the possibility the *Hubbard* court construed the claim to be one under the Sixth Amendment (or at least chose not to interpret the due process clause).

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10 Of note, see Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 Cornell J.L. & Pub. Pol'y 69, 70 (2001) (discussing Alabama’s practice in some trial courts of appointing guardian ad litem or attorney for fetus in abortion judicial bypass cases); *Ex Parte Anonymous*, 810 So. 2d 786 (Ala. 2001) (declining to rule on appropriateness of appointing guardian ad litem to represent fetus, in light of decision that waiver was inappropriately denied by trial court); *In re Anonymous*, 720 So. 2d 497 (Ala. 1998) (finding that guardian ad litem lacked standing to appeal trial court’s granting of waiver).
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\textsuperscript{11} and to all civil proceedings (including custody),\textsuperscript{12} 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),\textsuperscript{13} specifies that a service member 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.”

\textsuperscript{11} 50 App. U.S.C. § 3912(a) states, “This chapter applies to-- ...(2) each of the States, including the political subdivisions thereof...”
\textsuperscript{12} 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.”
\textsuperscript{13} 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.”