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

ARIZONA

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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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

State Statutes and Court Decisions Interpreting Statutes

“On application by a person alleging a discriminatory housing practice or by a person against whom a discriminatory housing practice is alleged, the superior court may appoint an attorney for the person.” Ariz. Rev. Stat. Ann. § 41-1491.32.

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.


State Statutes and Court Decisions Interpreting Statutes

For employment discrimination cases, appointment is permitted “in such circumstances as the court may deem just.” Ariz. Rev. Stat. Ann. § 41-1481(D).

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

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

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

Arizona Revised Statutes provide a right to counsel in all of the following:

• all proceedings for appointment of a guardian of an alleged incapacitated person, Ariz. Rev. Stat. Ann. § 14-5303(C) (“Unless the alleged incapacitated person is represented by independent counsel, the court shall appoint an attorney to represent that person in the proceeding.”);¹
• all proceedings relating to the consent by the guardian of a ward to inpatient mental health care, Ariz. Rev. Stat. Ann. § 14-5312.01(K and L) (“An attorney appointed pursuant to section 14-5303, subsection C remains the attorney of record until the attorney is discharged by the court. The court shall ensure that a ward whose guardian has been granted inpatient mental health treatment

¹ It is unclear whether this right extends to the guardianship termination proceeding. Ariz. Rev. Stat. Ann. § 14-5307(E) states: “Before substituting a guardian, accepting the resignation of a guardian or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send an investigator 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 “following the same procedures” language only applies to the investigator’s interview or to the whole termination process.
authority is represented by an attorney at all times the guardian has that authority. Unless the court finds that the ward has insufficient assets to meet the ward's reasonable and necessary care and living expenses, the ward shall pay the attorney's reasonable fees.

- all proceedings regarding the removal of legal rights of an alleged incapacitated person and placement of such person in Adult Protective Services, Ariz. Rev. Stat. Ann. § 14-5310(C) (“Unless the proposed ward is represented by independent counsel, the court shall appoint an attorney to represent the proposed ward in the proceeding on receipt of the petition for temporary appointment. The attorney shall visit the proposed ward as soon as practicable and shall be prepared to represent the interest of the proposed ward at any hearing on the petition”); and

- all proceedings for the appointment of a temporary conservator for an incapacitated person, Ariz. Rev. Stat. Ann. § 14-5401.01(C) (“Unless the person allegedly in need of protection is represented by independent counsel, the court shall appoint an attorney to represent that person in the proceeding on receipt of the petition for temporary appointment. The attorney shall visit the person allegedly in need of protection as soon as practicable and shall be prepared to represent that person’s interests at any hearing on the petition.”).

Further, a minor has a right to counsel for all proceedings for the appointment of a conservator or any other protective order. Ariz. Rev. Stat. Ann. § 14-5407(B) (“Unless the person to be protected has counsel of that person’s own choice, the court shall appoint an attorney to represent that person.”).

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

A statutory right to counsel exists in all of the following:

- proceedings relating to institutionalization or mental health hospitalization of a juvenile, unless counsel is either retained by the juvenile or waived by both the juvenile and a parent or guardian with whom the juvenile resides or resided prior to the filing of the petition, Ariz. Rev. Stat. Ann. § 8-221(C);

- all proceedings involving the release or conditional release of a person committed to a secure state mental hospital under the Arizona Criminal Code if the person who has been committed is indigent, Ariz. Rev. Stat. Ann. § 31-502(A)(8); and

- all proceedings involving a person being detained under emergency detention or subject to court-ordered treatment for a mental disorder if he cannot employ counsel to represent himself, Ariz. Rev. Stat. Ann. §36-528(D).
Arizona law further provides that a “person detained under emergency detention” “shall be advised that if he cannot employ an attorney, the court will appoint one for him. The person shall be advised that if a petition for evaluation is filed, the court will appoint the person an attorney to consult with and, if he cannot employ his own counsel, to represent him.” Ariz. Rev. Stat. Ann. §36-528(A) and Ariz. Rev. Stat. Ann. §36-528 (D). Moreover, the court “shall promptly appoint counsel for the proposed patient” when a patient is taken into custody for evaluation. Ariz. Rev. Stat. Ann. § 36-529(B). “If the person is involuntarily hospitalized, the person shall be informed by his appointed attorney of his rights to a hearing to determine whether he should be involuntarily hospitalized for evaluation and to be represented at the hearing by an attorney.” Ariz. Rev. Stat. Ann. § 36-529(D). See also Ariz. Rev. Stat. Ann. §§ 36-535 (court shall appoint counsel for proposed patient if one has not previously been appointed in connection with detention hearing), 36-537 (“If the attorney is appointed, he shall also explain that the patient can obtain his own counsel at his own expense and that, if it is later determined that the person is not indigent, the person will be responsible for the fees of the appointed attorney for services rendered after the initial attorney-client conference.”); 36-540(I) (in proceedings for court-ordered treatment, “The court may appoint as a temporary guardian or conservator pursuant to subsection H of this section a suitable person or the public fiduciary if there is no person qualified and willing to act in that capacity. The court shall issue an order for an investigation as prescribed pursuant to subsection G of this section and, unless the patient is represented by independent counsel, the court shall appoint an attorney to represent the patient in further proceedings regarding the appointment of a guardian or conservator.”)

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Arizona Supreme Court has found that an involuntary commitment proceeding on the grounds of mental illness can result in “a serious deprivation of liberty.” In re Coconino County No. MH 1425, 889 P.2d 1088, 1091 (Ariz. 1995). Several appellate courts have relied on this to find that a proposed patient must be afforded due process protection as provided in the U.S. Constitution. In re MH 2006-000023, 150 P.3d 1267 (Ariz. Ct. App. 2007); and In re Maricopa County Cause No. MH-90-00566, 840 P.2d 1042 (Ariz. App. 1992). While these cases did not address specifically the due process right to appointed counsel, one appellate court noted that “Arizona has long provided the right to counsel for a person facing an involuntary commitment,” and that by doing so (among other things), “Arizona's legislative scheme fulfills the due process requirements.” In re Jesse M., 170 P.3d 683, 685 (Ariz. Ct. App. 2007) (there was sufficient information in the record to support a finding that the defendant was not capable of making a knowing and intelligent waiver of his right to counsel).

D. Sex Offender Proceedings
There is a statutory right to counsel for any persons named in a sexually violent person petition, if the person is indigent. Ariz. Rev. Stat. Ann. § 36-3704(C) (“The person who is named in the petition is entitled to the assistance of counsel at any proceeding that is conducted pursuant to (Article 1, Chapter 37 of Title 36). If the person is indigent, the court shall appoint counsel to assist the person. The county board of supervisors may fix a reasonable amount to be paid by the county for the services of the appointed attorney.”).

E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings

State Statutes and Court Decisions Interpreting Statutes

Arizona law provides a right to counsel if a court orders a person afflicted with tuberculosis to be isolated or quarantined. Ariz. Rev. Stat. Ann. § 36-726(H). Additionally, there is a right to counsel in all proceedings relating to the isolation or quarantine of a person or groups of persons during a state of emergency or war. Ariz. Rev. Stat. Ann. § 36-789(M) (“The court shall appoint counsel at state expense to represent a person or group of persons who is subject to isolation or quarantine pursuant to (Article 9, Chapter 6 of Title 36) and who is not otherwise represented by counsel. Representation by counsel continues throughout the duration of the isolation or quarantine of the person or group of persons. The department or local health authority must provide adequate means of communication between the isolated or quarantined persons and local counsel.”).

4. CHILD CUSTODY

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

State Statutes and Court Decisions Interpreting Statutes

Parents have a statutory right to counsel in Arizona at a preliminary protective hearing to review the taking into temporary custody of a child from the home of the parent or guardian if the parent or guardian is indigent. Ariz. Rev. Stat. Ann. § 8-824(D) (West 2012) (“At the hearing, the court shall advise the parent or guardian of . . . (t)he right to counsel, including appointed counsel if the parent or guardian is indigent.”). They also have a right at an initial dependency hearing for a child initiated upon petition by a third party. Ariz. Rev. Stat. Ann. § 8-843(B) (“At the initial dependency hearing, the court shall ensure that the parent or guardian has been advised of . . . [t]he right to counsel, including appointed counsel if the parent or guardian is indigent.”).

With respect to dependency and termination of parental rights, Ariz. Rev. Stat. Ann. § 8-221(B) states: “If a . . . parent or guardian is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person or persons.” While the phrase
“entitled to counsel” might sound as if the litigant must have a right established elsewhere, the court in Daniel Y. v. Arizona Dept. of Economic Sec., 77 P.3d 55, 58 (Ariz. Ct. App. 2003) cited to § 8-221(B) for the proposition that “[b]y statute, Arizona mandates the appointment of counsel for indigent parents involved in severance proceedings.”

Parents have a right to counsel at a proceeding for permanent guardianship of a child initiated by a party to a dependency proceeding, if the parent is found to be indigent. Ariz. Rev. Stat. Ann. § 8-872(D) (“In a proceeding for permanent guardianship, on the request of a parent, the court shall appoint counsel for any parent found to be indigent if the parent is not already represented by counsel.”).

Federal Statutes and Court Decisions Interpreting Statutes

The federal Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court, 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 Decisions Addressing Constitutional Due Process or Equal Protection

A line of Arizona cases that partially predates the U.S. Supreme Court’s decision in Lassiter v. Department of Social Services, 452 U.S. 18 (1981), holds that the right to appointed counsel in some parental rights cases has a due process basis. In Ariz. State Dept. of Public Welfare v. Barlow, 296 P.2d 298, 300 (Ariz. 1956), the Arizona Supreme Court held the denial of a parent’s request to be represented by their own retained counsel in a dependency hearing violated due process. The court did not explicitly say whether it was analyzing the state or

2 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.
federal constitutional right to due process, although it did state that while the Arizona Constitution “provides distinctive procedure in juvenile matters, there is no language used from which an intention can be inferred to dispense with the fundamental rights of parents appearing” before a court of general jurisdiction in a juvenile matter. *Id.* at 301. Appellate courts have subsequently relied on *Barlow* to conclude that appointment of counsel in a severance proceeding is not merely required by statute, but a matter “of constitutional dimension.” *Daniel Y. v. Ariz. Dept. of Econ. Sec.,* 77 P.3d 55, 58 (Ariz. Ct. App. 2003); see also *Christy A. v. Ariz. Dept. of Econ. Sec.,* 173 P.3d 463, 471 (Ariz. Ct. App. 2007) (holding that “fair procedure” entitled an indigent mother to representation by appointed counsel in a dispositive evidentiary hearing related to an action for termination of her parental rights); *Denise H. v. Ariz. Dept. of Econ. Sec.,* 972 P.2d 241, 243 (Ariz. Ct. App. 1998) (noting the right to counsel in parental rights cases is afforded not only by statute but also by Arizona’s constitution under the due process clause); *In re Pima County Juvenile Action J-64016,* 619 P.2d 1073, 1075 (Ariz. Ct. App. 1980) (noting that that “due process requires appointment of counsel in a dependency proceeding where the parent faces losing custody of a child”); *but see In re Navajo County Juvenile Action No. JA-691,* 831 P.2d 368, 371, 373 (Ariz. Ct. App. 1991) (holding that mother had no right to appointed counsel before consenting to adoption, where she voluntarily placed her three children for adoption, but later claimed she made this decision under “duress.”)

In *Daniel Y.*, the court held that a father’s due process rights were violated when the juvenile court severed his parental rights without providing him with appointed counsel. 77 P.3d 55 at 58-59. The court stated that the statutory requirement of appointment of counsel for indigent persons involved in parental termination is protected and may not be changed by the state without due process of law and strict compliance with the statutes, *Id.* at 58, and further held that a failure to appoint counsel rendered any decision automatically void and reversible. *Id* at 58.4 This fundamental interest in the care and custody of children was also the decisive factor for the court in *Christy A*. There, the court reasoned that because parents have a fundamental due process interest in the care, custody, and control of their children, “when the State acts to terminate this right, it must provide appropriate fair procedures.” 173 P.3d at 470.

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

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3 The *Pima* court also relied on the fact that in 1980 (when the case was decided), the statute governing the appointment of counsel in dependency cases (Ariz. Rev. Stat. Ann § 8-225(B)) read, “[i]f a child, parent or guardian is found to be indigent, the juvenile court shall appoint an attorney ....” It saw this statutory provision as a reflection of the due process required in such proceedings. This can be contrasted with the current statutory provision (§ 8-221(B)), which reads more ambiguously, “[i]f a juvenile, parent or guardian is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney ....”

State Statutes and Court Decisions Interpreting Statutes

Ariz. Rev. Stat. Ann. § 8-221(B) states: “If a . . . parent or guardian is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person or persons.” Given that the Adoption Code is within Title 8 of the Arizona Revised Statutes, the right to counsel in § 8-221 should apply to adoption proceedings.5

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

State Statutes and Court Decisions Interpreting Statutes

With respect to dependency and termination of parental rights cases, Ariz. Rev. Stat. Ann. § 8-221(B) states: “If a juvenile . . . is found to be indigent and entitled to counsel, the juvenile court shall appoint an attorney to represent the person . . . unless counsel for the juvenile is waived by both the juvenile and the parent or guardian.” Then, § 8-221(B) specifies that the court shall appoint an attorney for the juvenile if indigent and entitled to counsel, while § 8-221(A) states, “[i]n all proceedings involving . . . dependency or termination of parental rights that are conducted pursuant to this title and that may result in detention, a juvenile has the right to be represented by counsel” (emphasis added). An examination of the legislative history reveals that this “detention” limitation was very likely not intended to apply to child welfare proceedings. Prior to 1997, § 8-221(A) read, “In all proceedings conducted pursuant to this title and the rules of procedure for the juvenile court, a juvenile has the right to be represented by counsel.” In 1997, the legislature amended the statute to read, “In all proceedings involving offenses that are conducted pursuant to this title and that may result in detention, a juvenile has the right to be represented by counsel.” The “result in detention” language was added at a time where there was no reference to dependency or termination of parental rights cases, and was apparently intended to screen out some incorrigibility proceedings where incarceration is not an option. Haas v. Colosi, 202 Ariz. 56, 40 P.3d 1249, 1252 (Ariz. App. 2002). Finally, in 1998, the legislature amended the statute to its current form: “In all proceedings involving offenses, dependency or termination of parental rights that are conducted pursuant to this title and that may result in detention, a juvenile has the right to be represented by counsel.” This history suggests the legislature did not consider the “detention” limitation already existing when adding the reference to child welfare cases. Supporting this interpretation is the fact that a dependency or termination of parental rights case will never result in detention for the juvenile, so applying this “detention” limitation would render the amendment a nullity.

Note, however, that Ariz. Rev. Stat. Ann. § 8-106 mentions only a right to “consult with an attorney” as part of the notice going to the birth parents.

5
It is true that § 8-221(I) specifies, “[i]n all juvenile court proceedings in which the dependency petition includes an allegation that the juvenile is abused or neglected, the court shall appoint a guardian ad litem to protect the juvenile’s best interests. This guardian may be an attorney or a court appointed special advocate.” However, given that the GAL appointed pursuant to subsection (I) need not be an attorney, it does not appear that subsection (I) fulfills the requirements of § 8-221(B), but rather permits the court to appoint a GAL in addition to the attorney.

In a permanent guardianship proceeding, the court may appoint counsel for the child if a guardian ad litem has not been appointed. Ariz. Rev. Stat. Ann. § 8-872(D). However, upon the motion to appoint a permanent successor guardian to the original permanent guardian, Ariz. Rev. Stat. Ann. § 8-874(C)(2) specifies that the court shall “Appoint an attorney for the child and appoint an attorney for the proposed successor guardian, if necessary.”

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.” 25 U.S.C. § 1912(b).

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

A State plan submitted under paragraph (1) shall contain a description of the activities that the State will carry out using amounts received under the grant to achieve the objectives of this subchapter, including— ...(B) an assurance in the form of a certification

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6 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.
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

Ariz. Fam. Law Proc. R. 10(G) provides that “The court shall not appoint a best interests attorney, a child’s attorney, or a court-appointed advisor from a state or county-funded juvenile dependency roster unless the court finds that a child may be the victim of child abuse or neglect as defined in A.R.S. § 8-201.”

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Appeal in Yavapai County Juvenile Action No. J-8545, the Arizona Supreme Court found that as a matter of due process (it did not specify under which constitution, state or federal), an independent attorney\(^7\) should have been appointed for the children in a case involving temporary custody and dependency.\(^8\) 680 P.2d 146 (Ariz. 1984). The court entered an order granting temporary custody of the children to the maternal grandmother who lived in California and rights of visitation to a paternal aunt and uncle who lived in Arizona. The father and the paternal aunt and uncle appealed on the grounds that the children had not been represented by counsel. The court then found that the children should have been represented by counsel, because of inherent conflicts of interest. The juvenile court apparently assumed that the attorney for one or the other appellant could represent the best interests of the children. In the view of the Arizona Supreme Court, this assumption was wrong. An attorney representing an appellant could not, for instance, represent the children if there were deficiencies in the home environment of the appellant. If the attorney advanced the interests

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\(^7\) Ariz. Rev. Stat. Ann. § 8-225(A) provided children with the right to be represented by counsel, but not necessarily independent counsel.

\(^8\) At the time, § 8-225(a) (the predecessor to § 8-221(a)) read, “(i)n all proceedings conducted pursuant to (Title 8) and the Rules of Procedure for the Juvenile Court, a child has the right to be represented by counsel.” Since the statute at that time did not require that the proceeding “may result in detention,” the children were entitled to appointment of counsel in the dependency proceeding.
of the children by pointing out these deficiencies, the attorney would be violating the
attorney’s duty to provide zealous representation of the appellant. However, the court added
that “due process does not require independent counsel for children in each and every case in
which they are involved. We hold today that the trial court shall appoint independent counsel,
upon request of an interested party or sua sponte, where such counsel would contribute to
promoting the child’s best interest by serving an identifiable purpose such as advocating the
child’s position in the dispute or ensuring that the record be as complete and accurate as
possible, or it shall state why such appointment is unnecessary.”

Ct. App. 2016) (finding appointment of counsel under Yavapai unnecessary where court
appointed attorney as GAL, even though child’s brother told child’s attorney that child, unlike
GAL, wanted reunification; court says that “[The GAL] did not indicate there was any potential
conflict of interest that would affect her representation as to B.E.’s best interest nor did she
provide the court with any information that would warrant the need for additional or separate
counsel. Neither Mother or B.E.’s sibling testified about the purported conversation with B.E.
There was no offer of proof, only a bald statement by Mother's counsel, and the court was well
within its discretion in concluding that, absent more, this vague, multi-layered hearsay
statement was insufficient to trigger any obligation to appoint additional counsel for B.E.”)

D. Appointment of Counsel for Child—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

In a dissolution case, the court may “appoint an attorney to represent the interests of a
minor or dependent child with respect to the child’s support, custody and parenting time.”
Ariz. Rev. Stat. Ann. § 25-321. The court may also enter an order for costs, fees, and
disbursements in favor of the child’s attorney. The order may be made against either or both
concluded that the trial court had abused its discretion by failing to appoint counsel in a
particular custody case involving allegations of abuse and neglect. In reaching this conclusion,
the court considered the factors articulated in Matter of Appeal in Yavapai County Juvenile
Action No. 8545, 680 P.2d 146 (Ariz. 1984): 1) allegations by each parent that the other had
placed the child’s welfare in danger by abuse or neglect; 2) undisputed evidence of the child’s
maturity and ability to communicate his circumstances even though the child was only 7½; 3)
an independent attorney able and willing to serve as an effective advocate for the child; and 4)
the fact that the independent attorney could help ensure that the record before the court was
accurate and complete and had, in fact, already presented evidence to the court that had not
been presented by either parent.
The *J.A.R.* court noted, however, that, unlike the juvenile court, the domestic relations court had no authority to compensate the minor’s counsel. *Id.* at 1329. Therefore, in order for the child to be represented by independent counsel, either one or both of the parents had to agree to pay the fees and expenses of counsel for the child or obtain *pro bono* representation for the child.

**State Court Rules and Court Decisions Interpreting Court Rules**

As discussed *supra*, in a dissolution case, by statute the court *may* “appoint an attorney to represent the interests of a minor or dependent child with respect to the child’s support, custody and parenting time.” Ariz. Rev. Stat. Ann. § 25-321. The Arizona Rules of Court state factors for the judge to take into consideration in exercising his or her discretion to appoint pursuant to the statute: “1) Whether there is an allegation of abuse or neglect of a child; 2) Whether the parents are persistently in significant conflict with one another; 3) Whether there is a history of substance abuse by either parent or family violence; 4) Whether there are serious concerns about the mental health or behavior of either parent; 5) Whether the child is an infant or toddler; and 6) Whether the child has special needs.” Ariz. Fam. Law Proc. R. 10(A). The court may also consider any other reason deemed appropriate. The annotations to these rules cite two additional resources to assist the court in making decisions under Section 25-321 of the Arizona Revised Statutes: (i) The American Bar Association Standards of Practice for Lawyers Representing Children in Custody Cases, adopted August 2003, and (ii) The National Conference of Commissioners on Uniform State Laws 2005 draft of the Representation of Children in Abuse and Neglect and Custody Proceedings Act.

5. **MISCELLANEOUS**

   **A. Civil Contempt Proceedings**

   **State Statutes and Court Decisions Interpreting Statutes**

   A court may appoint counsel for any person before a hearing (such as contempt hearings) that may result in incarceration of a person alleged to have violated a court order relating to counseling, treatment, education programs, or other restraining or protective order relating to the supervision, protection and control of a minor, if the court finds that the person is indigent. Ariz. Rev. Stat. Ann. § 8-234(G) (“Before a hearing that may result in incarceration for a person who is alleged to have violated a court order under this section, the court shall advise the person that the person has the right to be presented by counsel and that the court may appoint counsel if the court finds that the person is indigent.”).

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

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

State Statutes and Court Decisions Interpreting Statutes

A minor has a statutory right to counsel when seeking a judicial waiver for consent to have an abortion. Ariz. Rev. Stat. Ann. § 36-2152(D) (“The court shall advise her that she has the right to court appointed counsel and, on her request, shall provide her with counsel unless she appears through private counsel or she knowingly and intelligently waives her right to counsel.”). One federal court has held that the requirement in Arizona that the minor request counsel does not meet the requirements for bypass procedures established by the U.S. Supreme Court. Planned Parenthood of S. Arizona and its Corporate Chapter, Arizona Women's Clinic, Inc. v. Neely, 804 F.Supp. 1210, 1217 (D. Ariz. 1992).

D. Juvenile Delinquency, Status Offenses, or Child in Need of Services Proceedings

State Statutes and Court Decisions Interpreting Statutes

Juveniles in incorrigibility proceedings (which can include habitual truancy) have a statutory right to counsel. See Lana A. v. Woodburn, 116 P.3d 1222, 1225 (Ariz. App. 2005) (interpreting Ariz. Stat. 8-221(A), which states that juvenile defendant has right to counsel in proceedings “that may result in detention,” and finding it applies to incorrigibility proceedings).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Kory L., 979 P.2d 543 (Ariz. Ct. App. 1999), the appellate court followed State ex rel. Corbin v. Hovatter, 698 P.2d 225 (Ariz. Ct. App. 1985), in finding that an indigent mother had no due process right to appointed counsel during the delinquency proceedings against her son. Although the trial court had appointed counsel for her at a subsequent restitution hearing, the appellant argued that she was entitled to appointed counsel at her son’s change-of-plea hearing because that was when he stipulated to the restitution amount. The court rejected this argument without much discussion. Applying the Mathews v. Eldridge, 424 U.S. 319 (1976), balancing test, the court found the appellant’s interests to be weak:

Appellant’s physical liberty is not at stake; Appellant’s financial interest is no stronger than the State’s interest that the victim receive restitution; and the risk of procedural error in a restitution hearing is not high . . . . Whether a restitution hearing produces a just result largely depends on the exercise of judicial
discretion. Appellant could certainly be represented by counsel on the restitution issue, if she so desired, but Appellant had no right to appointed counsel.

_Id_. at 546. The court did not specify whether it was applying _Lassiter v. Department of Social Services_, 452 U.S. 18 (1981), to a state or federal constitutional due process right in _In re Kory L_.

E. Emancipation Proceedings

_State Court Rules and Court Decisions Interpreting Court Rules_

Arizona Rules of Procedure for the Juvenile Court provide that the court may appoint a guardian ad litem for a minor seeking emancipation at any time during emancipation proceedings. The guardian ad litem may be an attorney, volunteer special advocate or other qualified person. _Ariz. Juv. Ct. R. P. 91_. Additionally, juveniles in Arizona have “the right to be represented by counsel in all delinquency and incorrigibility proceedings as provided by law.” _Ariz. Juv. Ct. R. P. 10(A)_.

F. Proceedings Involving Fraud or Racketeering

_State Court Decisions Addressing Constitutional Due Process or Equal Protection_

In _State ex rel. Corbin v. Hovatter_, 698 P.2d 225 (Ariz. Ct. App. 1985), the Arizona Court of Appeals held that there is no due process right to appointed counsel in civil actions brought by the state under the Arizona Fraud Act and the Arizona Racketeering Act. The defendant apparently did not raise the state constitution, nor did the court specify whether it was applying _Lassiter v. Department of Social Services_, 452 U.S. 18 (1981), to the state or federal constitution. Citing _Lassiter_, the court stated that its “due process analysis begins from the presumption that an indigent’s right to appointed counsel is recognized only where the litigant may lose his physical liberty if he loses the litigation.” _Id_. at 226. The court next stated that its analysis would use the balancing approach set forth in _Mathews v. Eldridge_, 424 U.S. 319 (1976) (measuring personal interests at stake, risk of error, and state’s interest). In applying the _Mathews_ balancing test, the court observed that “(u)less the individual’s interests are strong, the state’s interests weak, and the risk of error high, it cannot be said that due process requires the appointment of counsel.” _Id_. at 226. The court reasoned that although “it is conceivable that a civil penalty could be so high as to constitute an overriding personal interest, we cannot say that a maximum penalty of $5,000 per violation reaches that level,” and added that it could find no precedent requiring appointment of counsel where a civil penalty may be imposed. _Id_. The court also distinguished parental termination hearings or involuntary commitment proceedings, where the defendants must contend with expert medical and psychiatric testimony, from fraud or racketeering acts where they are confronted with allegations.
regarding their behavior, noting that “the elements of fraud and racketeering are not so technical that an adult could not reasonably understand and defend against such allegations.” Id. at 226-27.

G. Contract Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Encinas v. Mangum, 54 P.3d 826 (Ariz. Ct. App. 2002), the Arizona Court of Appeals held that an indigent defendant in a civil contract dispute who could not afford a lawyer did not have a due process right to appointed counsel. Relying on State ex rel. Corbin v. Hovatter, 698 P.2d 225 (Ariz. Ct. App. 1985), and Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the appellate court simply stated: “Suarez may represent herself. Suarez may hire a lawyer. The fact that she may not be able to afford a lawyer in this civil (contract) action does not violate due process.” Id. at 828. The court provided no rationale for this holding, other than to cite Lassiter for the proposition that “an indigent’s right to appointed counsel is recognized only where the litigant may lose his or her physical liberty.” Id. As in Hovatter, neither constitution was explicitly mentioned.

I. Proceedings Involving Claims by or Against Prisoners

State Court Decisions Addressing Constitutional Due Process or Equal Protection


J. Attorney Discipline Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Arizona Supreme Court rejected the argument that an indigent respondent attorney was entitled to appointed counsel in disciplinary proceedings before the State Bar. See In re Wade, 814 P.2d 753, 763 (Ariz. 1991) (“Although rule 53(c)(2), Ariz.Sup.Ct.Rules, provides that a respondent in a disciplinary proceeding ‘is entitled to be represented by a lawyer . . .,’ we do
not believe that this entitlement extends to the appointment of counsel at State Bar expense. . . [B]ecause disciplinary proceedings are not criminal prosecutions, an indigent respondent's request for appointed counsel is properly refused.” (citations omitted). The court in Wade did not mention which constitution it was addressing, although it did appear to be engaged in a constitutional analysis and not simply an effort to interpret the statute.

K. Restoration of Right to Own Firearms

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Court of Appeals declined to find a right to counsel for a person seeking restoration of her firearm rights after being discharged from psychiatric commitment. Pinal County Bd. of Sup'rs v. Georgini, 334 P.3d 761 (Ariz. App. 2014). The person had been represented by the Pinal County Public Defender (PCPD) in the civil commitment case, but the litigant was pro se in her petition to restore her gun rights, and the petition was denied. The court then appointed the PCPD to represent her for the gun rights case, to which the state objected. The court held that representation was not appropriate under Ariz. R.Crim. P. 6.1(b), which permits appointment in the “interests of justice”, because the restoration proceeding was a civil one (notwithstanding its placement in a title addressing criminal matters).

The court first found that Ariz. Stat. § 11-584(A)(3), which provides a right to counsel to those “entitled to counsel as a matter of law” in “mental disorder hearings … under title 36, chapter 5”, was inapplicable because a) the proceeding in question was not under Title 36; and b) the question of whether to restore gun rights was not one mental health as much as whether the person “is not likely to act in a manner that is dangerous to public safety” and whether eliminating her firearms restriction “is not contrary to the public interest.” The court then observed that Ariz. Stat. § 11-584(A)(10) had been amended to permit PCPD representation “in any other proceeding or circumstance in which a party is entitled to counsel as a matter of law”, so the court reasoned it had to determine if the petitioner had a constitutional right to counsel.

After noting the Lassiter presumption against providing counsel where physical liberty is not at stake, the Pinal County court pointed out, “the presumption identified in Lassiter is not dispositive” and observed that the interest in question was not a “mere interest in property”, citing to the U.S. Supreme Court’s Second Amendment decision in District of Columbia v. Heller, 554 U.S. 570 (2008). However, it also noted that Heller explained the right is not unlimited, and that this case involved a restoration of rights, not an initial imposition on such rights (which had happened during the commitment proceeding where the woman was represented by counsel). The fact that Arizona had a statute providing a procedure for restoration of gun rights (Ariz. Stat. § 13–925) meant that there was a “a state interest created by Arizona law”, but the court
cited to U.S. Supreme Court precedent to reason that there was only a “limited due process interest” in proceedings to restore rights that were “forfeited in accordance with due process.”

Looking to the risk of error, the Pinal County court held that while a hearing under § 13-925 could involve expert testimony (a factor cited in Lassiter), “the ultimate subject of the hearing—whether T.J. is unlikely to act in a manner that endangers public safety or compromises public interest—“is one as to which [she] must be uniquely well informed and to which [she] must have given prolonged thought.” It also observed that the U.S. Supreme Court had declined to find a right to counsel in Vitek v. Jones, 445 U.S. 480, 495–97 (1980) (involving transfer of prisoner to mental health facility), although actually the Vitek Court did say there was a right to a “qualified and independent adviser who is not a lawyer.” The court also pointed out that “a person who necessarily takes the position that she no longer suffers from a disabling mental condition and is now capable of responsibly possessing a deadly weapon has less need for assistance than one facing an involuntary commitment petition.” The court also observed that the U.S. Supreme Court warned in Turner v. Rogers that proceedings that are “less adversarial in nature” could be negatively impacted by the introduction of counsel, and relied on Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (involving probation and parole revocation). The Pinal County court also felt that there were sufficient procedural protections embedded in the statute, such as including written findings and allowing appellate review.

Finally, the Pinal County court concluded that the state’s interest was a) not necessarily adverse to the person seeking rights restoration because it had an interest in protecting Second Amendment rights; and b) impacted by the financial considerations given that the restoration statute “limits neither the time frame in which a petition may be filed nor the number of times a petitioner may seek relief.”

L. Medical Malpractice

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Chapa v. Barker, 2015 WL 115001 (Ariz. App. 2015), involving a prisoner not given proper medical treatment, the court held that “Although Chapa has a right to avail himself of the courts in bringing a well-pled claim for medical malpractice, adjudicating Chapa's claim, regardless of the outcome, would not impact Chapa's physical liberty. Thus, he is not entitled to counsel at the taxpayers' expense, and the trial court did not err in denying the request for appointed counsel.”
**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\(^9\) and to all civil proceedings (including custody),\(^10\) 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.

50 USCS § 3931(b)(2).

Additionally, 50 USCS § 3932(d)(1), which also applies to all civil proceedings (including custody),\(^11\) 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.”

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

The Arizona Supreme Court has also said that the court “has authority to require a lawyer’s services, even on a pro bono basis, to assist in the administration of justice.” *Scheehle v. Justices of the Supreme Court of the State of Ariz.*, 120 P.3d 1092, 1102 (Ariz. 2005), although it has added “a county is not liable for fees and disbursements to counsel assigned to [an

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\(^9\) 50 USCS § 3912(a) states, “This Act [50 USCS §§ 3901] applies to-- ...(2) each of the States, including the political subdivisions thereof...”

\(^10\) 50 USCS § 3931 states, “This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.”

\(^11\) 50 USCS § 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.”

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