

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

CALIFORNIA

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Table of Contents

Preface	1
Law Addressing Authorization or Requirement to Appoint Counsel in Specific Types of Civil Proceedings ..	2
1. SHELTER	2
Federal Statutes and Court Decisions Interpreting Statutes	2
2. SUSTENANCE	2
Federal Statutes and Court Decisions Interpreting Statutes	2
State Court Rules and Court Decisions Interpreting Court Rules	2
State Court Decisions Addressing Constitutional Due Process or Equal Protection	3
3. SAFETY AND/OR HEALTH	3
A. Domestic Violence Protective Order Proceedings	3
State Statutes and Court Decisions Interpreting Statutes	3
B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings	3
State Statutes and Court Decisions Interpreting Statutes	3
State Court Decisions Addressing Constitutional Due Process or Equal Protection	4
C. Civil Commitment or Involuntary Mental Health Treatment Proceedings	4
State Statutes and Court Decisions Interpreting Statutes	4
State Court Decisions Addressing Constitutional Due Process or Equal Protection	5
D. Sex Offender Proceedings	6
State Statutes and Court Decisions Interpreting Statutes	6
E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings	6
4. CHILD CUSTODY	6
A. Appointment of Counsel for Parent—State-Initiated Proceedings.....	6
State Statutes and Court Decisions Interpreting Statutes	6
Federal Statutes and Court Decisions Interpreting Statutes	7
State Court Decisions Addressing Constitutional Due Process or Equal Protection	8
State Court Decisions Addressing Court’s Inherent Authority	9
B. Appointment of Counsel for Parent—Privately Initiated Proceedings	10
State Statutes and Court Decisions Interpreting Statutes	10
State Court Decisions Addressing Constitutional Due Process or Equal Protection	12
C. Appointment of Counsel for Child—State-Initiated Proceedings	13
State Statutes and Court Decisions Interpreting Statutes	13
Federal Statutes and Court Decisions Interpreting Statutes	14
D. Appointment of Counsel for Child—Privately Initiated Proceedings.....	15
State Statutes and Court Decisions Interpreting Statutes	15
State Court Rules and Court Decisions Interpreting Court Rules	17
A. Civil Contempt Proceedings	18
State Court Decisions Addressing Constitutional Due Process or Equal Protection	18
B. Paternity Proceedings	19
State Court Decisions Addressing Constitutional Due Process or Equal Protection	19
C. Proceedings for Judicial Bypass of Parental Consent for Minor to Obtain an Abortion	20
State Statutes and Court Decisions Interpreting Statutes	20
D. Proceedings to Establish Child Support Obligation or Reimbursement	20

State Court Decisions Addressing Constitutional Due Process or Equal Protection	20
State Court Decisions Addressing Court’s Inherent Authority	23
E. Parole Revocation Proceedings	23
State Statutes and Court Decisions Interpreting Statutes	23
F. Proceedings Involving Claims by or Against Prisoners	23
State Statutes and Court Decisions Interpreting Statutes	23
State Court Decisions Addressing Constitutional Due Process or Equal Protection	24
State Court Decisions Addressing State Constitution’s Open Courts Provision	24
State Court Decisions Addressing Court’s Inherent Authority	26
G. Administrative Proceedings	27
State Court Decisions Addressing Constitutional Due Process or Equal Protection	27
H. Civil Forfeiture Proceedings	28
State Court Decisions Addressing Constitutional Due Process or Equal Protection	28
I. Gang Injunction Proceedings	28
State Court Decisions Addressing Constitutional Due Process or Equal Protection	28
Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally	29
Federal Statutes and Court Decisions Interpreting Statutes	29
State Court Decisions Addressing Court’s Inherent Authority	30
State Court Decisions Addressing Incorporation of English Common Law and Statutes	31

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 February 2016. 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)(B). In *Poindexter v. FBI*, 737 F.2d 1173, 1183-85 (D.C. Cir. 1984) the D.C. Court of Appeals observed:

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

State Court Rules and Court Decisions Interpreting Court Rules

One county's local court rule requires appointment of counsel in proceedings for spousal property transactions "if the petition proposes a substantial transfer to the petitioner." Cal. Contra Costa Super. Ct. L.R. 7.501(2).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Staley v. California Unemployment Insurance Appeals Board*, 86 Cal. Rptr. 294 (Ct. App. 1970), a Court of Appeal rejected the request for appointment of counsel in an unemployment benefits hearing, noting that "[t]here is no question but that appellant's unemployment compensation claim is a property right and represents serious and important state responsibility. However, a requirement of appointment by the state of counsel in such a case has not been suggested as a constitutional requirement in either California or federal constitutional cases." *Id.* at 295. The court dismissed the possibility that the U.S. Supreme Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970), formed the basis for an argument for appointment of counsel. 86 Cal. Rptr at 295. The court also refused to require the state to notify claimants that free counsel might be available through one of the legal services programs. *Id.* at 295-296.

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protective Order Proceedings

State Statutes and Court Decisions Interpreting Statutes

California courts have the discretion to appoint counsel to represent the petitioner in proceedings relating to the enforcement of a domestic violence protective order, and can order the respondent to pay the counsel fees. Cal. Fam. Code § 6386.

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

California affords civil litigants a statutory right to counsel in some proceedings when their physical liberty is threatened. *See, e.g.*, Cal. Prob. Code § 3140(d)(1) (requiring appointment of private counsel or public defender upon request for spouse alleged to lack legal capacity for proposed transaction involving community real or personal property); Cal. Welf. & Inst. Code § 15705.30(b) (requiring appointment of counsel for an endangered adult placed in protective custody).

Cal. Health & Safety Code § 416.95 provides a right to counsel for an adult developmentally disabled person for whom guardianship or conservatorship is sought. For guardianship and conservatorship proceedings for people other than developmentally disabled

adults, appointment of counsel is required if requested (“whether or not such person lacks or appears to lack legal capacity”), and extends to both the establishment and termination of guardianships/conservatorships. Cal. Prob. Code § 1471(a). If not requested, appointment is discretionary with the judge and appropriate where “appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the [person]” Cal. Prob. Code § 1470(b).¹ If court-ordered medical treatment is sought for a ward or conservatee, then “[u]pon the filing of the petition, unless an attorney is already appointed the court shall appoint the public defender or private counsel under Section 1471, to consult with and represent the ward or conservatee at the hearing on the petition and, if that appointment is made, Section 1472² applies.” Cal. Prob. Code § 2357.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *In re Guardianship of Ethan*, 271 Cal.Rptr. 121 (Ct. App. 1990), a California Court of Appeal found that an alleged father seeking sole custody of a child and a determination that the child’s guardian was not the legal father had no due process right to appointed counsel. *Id.* at 127-1283-1414. Although the court applied the factors articulated in *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979) (discussed *infra* Part 5.B), to arrive at its decision, it cited *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), in support of the principle that due process requires appointed counsel only in actions threatening a litigant’s physical liberty. *Id.* at 126-127.

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

California affords civil litigants a statutory right to counsel in some proceedings when their physical liberty is threatened, such as civil commitment proceedings. *See, e.g.*, Cal. Welf. & Inst. Code § 4801(a) (addressing a party committed as a developmentally disabled patient); Cal. Welf. & Inst. Code § 5346(c) (addressing a party ordered by the court to obtain assisted outpatient treatment); Cal. Welf. & Inst. Code § 6500(b)(4) (in proceedings for commitment of persons dangerous to self or others, “the person alleged to have a developmental disability shall be informed of his or her right to counsel by the court, and if the person does not have an attorney for the proceedings, the court shall immediately appoint the public defender or other attorney to represent him or her”); Cal. Penal Code § 2972 (requiring appointment of county public defender for indigent person in hearing to commit prisoner civilly to facility after completion of sentence due to mental disorder).

¹ Interestingly, in this type of guardianship proceeding, which is done as a probate proceeding, “involuntary commitment is not contemplated,” *In re Conservatorship of Person of John L.*, 225 P.3d 554 (Cal. 2010), but counsel is still appointed on request.

² Section 1472 addresses compensation of the appointed attorney, including whether the indigent person is to pay any portion of the fee.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

Prior to the U.S. Supreme Court's decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the California Supreme Court declared in *In re Hop*, 623 P.2d 282, 289 (Cal. 1981), that in the civil commitment of a developmentally disabled minor, such person is "entitled to the appointment of counsel, for, consistent with the views expressed by us in *Roger S.*, '(i)nasmuch as a minor (or a developmentally disabled adult) may be presumed to lack the ability to marshal the facts and evidence, to effectively speak for himself and to call and examine witnesses, or to discover and propose alternative treatment programs, due process also requires that counsel be provided'"

In *People v. Salter*, 148 Cal.Rptr.3d 652 (Cal. App. 2012), the attorney for a defendant in a criminal proceeding argued that the defendant was incompetent, and despite the defendant asserting that she wanted a hearing on the issue of competency, her attorney waived her statutory right to a jury trial on the issue (and the trial judge noted the attorney could do this even over her objection). The judge found the defendant to be incompetent and committed her to a mental institution for up to 3 years. On appeal, the defendant argued she was entitled to a second attorney to represent her interest in proving herself competent since her primary attorney was arguing against her wishes. The Court of Appeal first noted that a competency proceeding is civil, and therefore the right to a jury trial is only statutory, not constitutional, and can be waived by counsel. The Court of Appeal went on to observe that, "what applies to a criminal case does not necessarily apply to a competency proceeding, 'because it is a special proceeding.'" 148 Cal.Rptr.3d at 655. The court then cited to a case in which the California Supreme Court said: "The sole purpose of a competency proceeding is to determine the defendant's present mental competence, i.e., whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner Because of this, the defendant necessarily plays a lesser personal role in the proceeding than in a trial of guilt. How can a person whose competence is in doubt make basic decisions regarding the conduct of a proceeding to determine that very question?" *Id.* (citing *People v. Masterson* 884 P.2d 136 (Cal. App. 1994)). The defendant argued that "she was denied her due process right to be heard on her claim that she was competent, because her attorney argued she was incompetent and no one advocated the contrary proposition on her behalf." 148 Cal.Rptr.3d at 656. But the court responded that "there is no evidence that defendant asserted in the trial court that she was in fact competent or wanted another attorney to advocate that position." *Id.* The court also cited to another Court of Appeal decision (which had similarly denied the request for a second attorney) that stated: "It is immaterial that the defendant expressly objects to the course his counsel chooses. To permit a prima facie incompetent defendant to veto counsel's decision to argue that the client is incompetent would increase the danger that the defendant would be subjected to criminal proceedings when he or she is unable to assist counsel in a rational manner." *Id.* at 777. (citing *People v. Jernigan*, 1 Cal.Rptr.3d 511, 513-514 (Cal. App. 2003)).

D. Sex Offender Proceedings

State Statutes and Court Decisions Interpreting Statutes

California affords civil litigants a statutory right to counsel in some proceedings when their physical liberty is threatened, such as sexually violent predator proceedings. See Cal. Welf. & Inst. Code §§ 6603(a) (initial commitment); 6605(a)(3) (review of commitment).

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

In proceedings to declare children dependents of the court on grounds of abuse or neglect, the court must appoint representation if the parent is indigent *and* the petitioning agency is recommending that the child be placed in out-of-home care (or where the child was in out-of-home care when taken into custody). *Id.* § 317(b).³ Otherwise, it is generally left to the court's discretion as to whether to appoint counsel for the parent, *id.* at § 317(a). "Alleged fathers have less rights in dependency proceedings than biological and presumed fathers. An alleged father does not have a current interest in a child because his paternity has not yet been established ... Therefore, he is not a 'parent' within the meaning of section 317." *In re O. S.*, 126 Cal. Rptr. 2d 571, 575 (2002).

In any proceeding to have a minor child declared free from the custody and control of either or both parents, the parent of the minor child has a right to appointed counsel if unable to afford a private attorney. Cal. Fam. Code § 7862; Cal. Welf. & Inst. Code § 366.26(f)(2).⁴

³ A distinction is made for "parent[s] or Indian custodian[s] in an Indian child custody proceeding" who desire but are unable to afford counsel. The provision of counsel to such persons is governed by section 1912 of the Indian Child Welfare Act, 25 U.S.C. § 1912, and title 25, section 21.13 of the Code of Federal Regulations. Cal. Welf. & Inst. Code § 317(a)(2).

⁴ In *R.H. v. Superior Court*, 209 Cal.App.4th 364, 147 Cal.Rptr.3d 8 (Cal. App. 2012), a court found no right to counsel under Cal. Welf. & Inst. Code § 366.26(f)(2) for prospective adoptive parents in proceedings to remove a child from the home of the prospective adoptive parents, even if they already have temporary custody of the child pending adoption. It also held that de facto parents are not considered "parents" for statutory interpretation purposes.

In terms of the right to counsel on appeal of termination cases, in *In re Jacqueline H.*, 577 P.2d 683, 687 (Cal. 1978), *superseded by statute*, Cal. Civ. Code § 237.7 (current version at Cal. Fam. Code § 7895), the California Supreme Court interpreted the old California Civil Code § 232 (the predecessor to section 300 *et seq.* of the California Welfare and Institutions Code) and held that under that statute, parents were entitled to counsel when appealing an adverse judgment if the children were dependent at the time. The legislature responded to *Jacqueline H.* by enacting Cal. Fam. Code § 7895, which provides for a right to counsel for parents appealing termination of parental rights (TPR) decisions involving dependent children of the juvenile court. This led to some debate between the courts of appeal as to whether TPR cases involving children who were *not* dependent children of the juvenile courts implicated a right to counsel on appeal.⁵ In *In re J.W.*, 126 Cal. Rptr. 2d 897, 901-02 (2002), the California Supreme Court held that despite the clear language of section 7895 of the California Family Code, the statutory right extended to parents in *all* TPR proceedings who are appealing decisions relating to declaring children free of the custody and control of their parents. The court relied in part on its prior holding in *Jacqueline H.* and on its belief that the legislature had not expressed any desire to limit that holding. *Id.* In *In re Bryce C.*, 48 Cal. Rptr. 2d 120 (1995), however, the California Supreme Court held that the statute did *not* provide a right to counsel for parents on appeal where the *state* is the one appealing the lower court's ruling. *See id.* at 124. The court did note that a trial court still had *discretion* (under the due process approach articulated in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981)) to appoint counsel in an appropriate case. *Id.* Further, the California Supreme Court has held that appointed appellate counsel do not need to file an *Anders* brief in order to withdraw from an appeal that appointed counsel judges to be without merit. *In re Sade C.*, 55 Cal. Rptr. 2d 771, 785 (1996) (limiting reach of *Anders v. California*, 386 U.S. 738 (1967), to criminal cases). An appellate court extended the *Bryce* reasoning to dependency cases. *In re Joshua B.*, 56 Cal. Rptr. 2d 556, 558 (Ct. App. 1996). *See also In re Simeth*, 115 Cal. Rptr. 617, 617 (Ct. App. 1974) (finding statutory right to counsel in dependency proceeding, based on statute at that time).

Federal Statutes and Court Decisions Interpreting Statutes

The federal Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,⁶ provides:

⁵ *See Appellate Defenders, Inc. v. Cheri S.*, 42 Cal. Rptr. 2d 195, 198 (Ct. App. 1995) (finding that the right to appellate counsel exists regardless of whether the child was a juvenile court dependent, and disagreeing with *In re Curtis S.*, 30 Cal. Rptr. 2d 739 (Ct. App. 1994)).

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(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.

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.”

25 U.S.C. § 1912(b).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

With respect to dependency proceedings, where physical liberty is not at risk, California courts appear to have definitively adopted the reasoning proclaimed by the U.S. Supreme Court in *Lassiter v. Department of Social Services* that due process generally requires the appointment of counsel only where the absence of counsel made a “determinative difference” in the outcome of the proceedings. *Lassiter*, 425 U.S. at 33; see *In re Meranda P.*, 65 Cal. Rptr. 2d 913, 918 (1997) (citing *Lassiter* to hold that “[w]ith respect to a parent’s assertion of a violation of the constitutional right to counsel, the parent must also show there was a ‘determinative difference’ in the outcome of the proceeding by reason of the parent’s lack of counsel, such that the proceeding was rendered fundamentally unfair to the parent”); *In re Ronald R.*, 44 Cal. Rptr. 2d 22, 30 (Ct. App. 1995) (“In post-*Lassiter* dependency cases in California, it appears settled that whether a due process right to counsel existed at the lower court hearing depends on whether the presence of counsel would have made a ‘determinative difference’ in the outcome of the proceeding”).

The application of this requirement has nonetheless resulted in differing outcomes in California courts. Compare *In re Ronald R.*, 44 Cal. Rptr. 2d. at 30-31 (finding that even though trial court erred in permitting mother’s appointed counsel to withdraw from dependency hearing without appointing substitute counsel, no due process violation occurred because mother had not shown that presence of counsel would have resulted in different outcome at hearing), and *In re Christine P.*, 277 Cal. Rptr. 290, 298-99 (Ct. App. 1991) (finding counsel would not have made determinative difference)⁷ and *R.H. v. Superior Court*, 147 Cal.Rptr.3d 8, 13-15

⁷ The *Christine P.* court noted that the California Supreme Court had sent “mixed signals” on the right to counsel in dependency proceedings. *Id.* at 296. For instance, the high court held in *Walker v. Superior Court*, 47 Cal. 3d 112, 134 (1988), that “those who are indigent receive appointed counsel” and relied upon *Christina H.*, 227 Cal. Rptr. 41, 43 (Ct. App. 1986), an appellate court decision in which the court stated that “in many [dependency] cases an indigent parent possesses both a statutory and constitutional right to appointed counsel.” But then in *In re Malinda S.*, 272 Cal. Rptr. 787, 796 (1990), the California Supreme Court cited a different appellate court decision for the proposition that “the parent [cannot] seek reversal on the grounds of incompetency of counsel.” 277 Cal.

(Cal. App. 2012) (finding no due process right to counsel for either de facto or prospective adoptive parents in dependency case; court notes that the risk of error was low because prospective/de facto parents had counsel for concurrent dependency case of two different children in same household, a proceeding that involved same allegations as those in instant case and that had wound up in dependency finding; court also noted that de facto parents have “limited rights,” while prospective adoptive parents’ rights are “even more circumscribed,” and that rights of de facto or prospective adoptive parents are minimal where such parents have committed abuse), with *In re Claudia S.*, 31 Cal. Rptr. 3d 697, 707 (Ct. App. 2005) (conducting dependency hearings in absence of mother, presumed father, or counsel for either of them violated due process where counsel for the parents could have informed court of irregularities with respect to notice and thereby halted proceedings), and *In re O.S.*, 126 Cal. Rptr. 2d 571, 576 (Ct. App. 2002) (citing *Mathews* balancing test factors from *Lassiter* and then concluding without analysis that with regards to indigent parent, “[u]nder the facts of this case, he had a constitutional right to effective counsel”) and *In re Emilye A.*, 12 Cal. Rptr. 2d 294, 301-02 (Cal. App. 1992) (holding that “a parent has not only a statutory right but also, under certain circumstances, a constitutional right to counsel in dependency proceedings, particularly, as in this case, where the petition contained an allegation of sexual abuse by father, which could result in criminal charges against him,” then applying *Mathews* factors to find right to counsel).

In *In re Andrew*, a California appellate court discussed *Lassiter* before concluding that “in light of the standards announced by the United States Supreme Court and applied by our Supreme Court, we cannot say the appellant had a constitutional right to appointed counsel” at a proceeding to terminate her parental rights. 32 Cal. Rptr. 2d 670, 674-75 (Ct. App. 1994). See also *In re James S.*, 278 Cal. Rptr. 295 (Ct. App. 1991) (finding no due process right to counsel in dependency proceedings because interest at stake was less than that of TPR hearing); *In re Ammanda G.*, 231 Cal. Rptr. 372 (Ct. App. 1986) (indigent parent entitled to counsel on due process grounds under the criteria in *Lassiter* in context of TPR hearing).

State Court Decisions Addressing Court’s Inherent Authority

In *In re Joseph T.*, 101 Cal. Rptr. 606, 614 (Ct. App. 1972), indigent parents appealing a juvenile court order in a dependency proceeding depriving them of custody of their child urged the court to exercise its “inherent power” to appoint counsel for them. *Id.* at 614. The Court of Appeal narrowly construed the argument, finding that appellants’ reliance on *Ferguson v. Keays*, 4 Cal. 3d 649 (1971) (finding courts have power to waive filing fees pursuant to English common law), was misplaced because *Ferguson* did not define the court’s inherent power to appoint counsel where not mandated by the Constitution or the Legislature. *Joseph T.*, 101 Cal. Rptr. at 614-15.

Rptr. at 296 (emphasis omitted). As *Christine P.* noted, “[p]resumably, a parent could seek reversal on the grounds of incompetency of counsel if there were a constitutional right to counsel.” 277 Cal. Rptr. at 296.

In *In re Jacob E.*, the Court of Appeal for the Second District held that the juvenile court erred in appointing counsel to a mother in a child dependency proceeding where the mother's parental rights had been previously terminated. 18 Cal. Rptr. 3d 15, 25-27 (Ct. App. 2004). The court found that because "the Welfare and Institutions Code and the Rules of Court specifically state the procedure upon which the juvenile court can appoint counsel," there was "no need to establish other means through the exercise of the court's inherent power." *Id.* at 26; *see also People v. Ponce*, 92 Cal. Rptr. 3d 667, 671 (Ct. App. 2009) ("Where the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives.") The court responded to the mother's argument that, independent of any statutory authority, the court had the inherent power to appoint her counsel by distinguishing the cases upon which the mother relied. *In re Jacob E.*, 18 Cal. Rptr. 3d 15, 25-27. In particular, the court found that the case law cited by the mother concerned either the validity of legislation affecting the inherent powers of the court, *Superior Court v. City of Mendocino*, 51 Cal. Rptr. 2d 837 (Ct. App. 1996), or the court's exercise of power to establish means to control the litigation pursuant section 187 of the Code of Civil Procedure, *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882 (Ct. App. 1992); *Asbestos Claims Facility v. Berry & Berry*, 267 Cal. Rptr. 896 (Ct. App. 1990). *Jacob E.*, 18 Cal. Rptr. 3d at 26. Thus, without clearly deciding whether it had inherent power to appoint counsel, the appellate court held that the juvenile court erred in appointing counsel to the mother. *Id.*

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

As to nonconsensual adoptions, Cal. Fam. Code § 8606 of the Adoption Code requires that, in the absence of consent, the child was either a) abandoned or b) freed from parental control in order to be available for adoption. The latter proceedings are governed by Cal. Fam. Code § 7862,⁸ which provides a right to counsel for the parent.⁹ See also Cal. Welf. & Inst. Code § 366.26(f)(2) (guaranteeing counsel for parents in all matters, including adoption and guardianship, that involve dependent children).

California law in some circumstances provides counsel for parents voluntarily relinquishing parental rights. Cal. Fam. Code § 8800(d)(1) states that in independent adoptions, the birth parents must be notified of "their right to have an independent attorney advise and represent them in the adoption proceeding and that the prospective adoptive parents may be required to pay the reasonable attorney's fees up to a maximum of five hundred dollars (\$500) for that representation, unless a higher fee is agreed to by the parties", while § 8800(e) adds

⁸ Cal. Fam. Code § 7841 allows private parties to file for under § 7862.

⁹ The statute does not clarify whether a prospective adoptive parent would be considered a "parent."

that “[u]pon the petition or motion of any party, or upon motion of the court, the court may appoint an attorney to represent a child's birth parent or parents in negotiations or proceedings in connection with the child's adoption.” Where a parent seeks to relinquish rights to an adoption agency, Cal. Fam. Code § 8700.5(b) states:

The waiver of the right to revoke relinquishment may not be signed until the department, delegated county adoption agency, or public adoption agency of another state has completed an interview, unless the waiver is signed in the presence of a judicial officer of a court of record of any state or an authorized representative of a private adoption agency licensed within or outside of California. If the waiver is signed in the presence of a judicial officer, the interview and witnessing of the signing of the waiver shall be conducted by the judicial officer. If the waiver is signed in the presence of an authorized representative of a licensed adoption agency, the interview shall be conducted by the independent legal counsel for the birth parent or parents ...

If a parent seeks to voluntarily relinquish her rights in an adoption arising within the context of a parentage action, Cal. Fam. Code § 7605(a) states:

In any proceeding to establish physical or legal custody of a child or a visitation order under this part,¹⁰ and in any proceeding subsequent to entry of a related judgment, the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a government entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding.

Regarding private guardianships of children, Cal. Prob. Code § 1516.5(a) states, “A proceeding to have a child declared free from the custody and control of one or both parents may be brought in accordance with the procedures specified in Part 4 (commencing with Section 7800) of Division 12 of the Family Code within an existing guardianship proceeding” if certain conditions are met, and if so, subsection (c) provides that “The rights of the parent, including the rights to notice and counsel provided in Part 4 (commencing with Section 7800) of Division 12 of the Family Code, shall apply to actions brought pursuant to this section.” In turn, Cal. Fam. Code § 7862 provides a right to counsel for the parent. However, if the guardianship proceeding is not connected to a termination proceeding (i.e., a proceeding to free the child “from custody and control”), then § 1516.5(a) would not govern.

¹⁰ This “part” is Part 3 (Uniform Parentage Act). Parents may relinquish custody in an adoption pursuant to Cal. Fam. Code § 7660-7662, which are also under Part 3.

With respect to traditional custody disputes under California's Family Code, the guardian does not have a right to counsel. See Cal. Fam. Code § 3150 (addressing only appointment of counsel for the child).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *In re Jay*, 197 Cal. Rptr. 672 (Ct. App. 1983), a case involving the right to counsel in stepparent adoptions, the Court of Appeal suggested that in *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979) (discussed *infra* Part 5.B), the California Supreme Court had expressly rejected the concept (later articulated in *Lassiter*) of a presumption that appointed counsel is not required absent a threat to physical liberty:

In *Salas*, *supra*, the Court specifically rejected, as a matter of California law, the contention that appointed counsel is required only when imprisonment is imposed. California precedents do not give rise to such a presumption under the California Constitution and, indeed, hold just the opposite. We therefore evaluate the present case under the California Constitution, article I, section 7, and do not presume that appointed counsel is required only where physical liberty is at stake.

Id. at 679 (citations omitted). Applying the factors outlined in *Salas* the Court of Appeal held that an indigent noncustodial parent accused of negligence has a due process right to appointed counsel in a stepparent adoption proceeding. *Id.* at 681.

In *In re Marriage of Campi*, a California Court of Appeal found no right to counsel governing dissolution-based custody proceedings. 152 Cal.Rptr.3d 179, 188-89 (Cal. App. 2013) (noting that private custody cases lack statute providing right to counsel, and “there is no such risk of a loss of the custody of a child, because custody is awarded to one or both parents, not the state.”)

A pair of cases has dealt with the right to counsel in probate guardianship cases. In *In re Christian G.*, 124 Cal. Rptr. 3d 642, 655-56 (Ct. App. 2011), the parent had not been appointed counsel because the person seeking control of their child had used the probate guardianship process (which included no right to counsel) rather than the dependency process (which does have a right to counsel). The court ultimately construed the case as one dealing with “whether families have the right to pursue a different judicial path to guardianship of an abused or neglected child than would be pursued if the abuse or neglect came to the county's attention via reports from outsiders.” *Id.* at 652. The court noted that “[a]lthough a guardianship does not technically terminate a parent's rights, it does suspend them indefinitely, and it often leads to practical or legal termination of the parent-child relationship, or both,” *id.* at 653, and that

“[the] preference for family continuity and reunification is absent in the context of a guardianship proceeding,” *id.* at 654. Ultimately the court determined that the trial court should have initiated a referral to Child Protective Services for a dependency evaluation, since the parent seeking guardianship had alleged neglect, so it did not have to reach the question of the lack of appointed counsel for guardianship proceedings. *Id.* at 659-662.

Then, in *In re H.C.*, 130 Cal. Rptr. 3d 316 (Ct. App. 2011), the same court (First District, although Division 3 instead of Division 2) directly addressed the question and found no right to counsel in probate guardianship proceedings. *Id.* at 326. It started by commenting that “it is now beyond debate that *Lassiter* controls whether a parent must be provided counsel in proceedings implicating the parent's custody or parental rights.” *Id.* at 323. The court then applied the three factors articulated by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), noting first that the mother did not face termination of her parental rights, and that “unlike the dependency scheme, none of the findings that can lead to termination are made in the initial guardianship proceeding.” *Id.* at 324. The court also relied on the fact that those seeking guardianship had not expressed a desire to adopt the child and that the mother was not at risk of criminal charges. *Id.* at 324-25. With respect to risk of error, the court pointed out that the state is not a party to guardianship proceedings and that consequently the situation “did not present the David and Goliath scenario created when the power of the state is brought to bear upon an unrepresented parent.” *Id.* at 325. The court also noted the less complex nature of the proceedings and the trial judge’s efforts to ensure the mother participated fully as evidence of reduced risk of error. *Id.* at 325-26. It then found that the mother’s interest did not outweigh the *Lassiter* presumption against the appointment of counsel. *Id.* at 326.

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

State Statutes and Court Decisions Interpreting Statutes

The California Welfare and Institutions Code provides children certain rights to counsel in proceedings to declare children dependents of the court on grounds of abuse or neglect. See Cal. Welf. & Inst. Code §§ 300.2, 316. At the detention hearing, held after a minor child has been taken into temporary custody upon belief that the minor is suffering from abuse or neglect and that the minor’s health or safety is immediately threatened if the minor is left unattended, a court will appoint counsel to represent a minor child unless it finds that there would be no benefit to the child in doing so. *Id.* § 317(c)(1); see *id.* §§ 305, 315. The basis of any finding that a child would not benefit must be stated on the record. *Id.* § 317(c)(1). “The California Supreme Court has said that “the court should not automatically appoint separate counsel for separate children.” *In re Celine R.*, 1 Cal. Rptr.3d 432, 440 (Cal. 2003). Moreover, “the failure to appoint separate counsel for separate siblings is subject to the same harmless error standard as error in not appointing counsel for the children at all.” *Id.* at 443. Rather, the Celine court held that “an attorney may not represent multiple clients if an actual conflict of interest between

clients exists and may not accept representation of multiple clients if there is a reasonable likelihood an actual conflict of interest between them may arise.” *Id.* at 442.

In any proceeding to have a minor child declared free from the custody and control of either or both parents, a minor child not previously adjudicated dependent will be appointed counsel only at the discretion of the court. Cal. Fam. Code § 7861 (“The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child require representation by counsel, the court shall appoint counsel to represent the child, whether or not the child is able to afford counsel.”) However, in a proceeding to terminate parental rights to a dependent child, the court “shall” appoint counsel to represent the minor child unless it finds no benefit in doing so, and the court must state its reasons for so finding. Cal. Welf. & Inst. Code § 366.26(f)(1). Moreover, in *In re Richard E.*, 146 Cal. Rptr. 604, 607 (1978), *superseded by statute*, Cal. Civ. Code § 237.5 (current version at Cal. Fam. Code §§ 7861), the California Supreme Court found that it would be an abuse of discretion to not consider whether to appoint counsel for the child and to not appoint counsel where “the court finds a child has separate interests not protected in the contest between parents and a petitioner [A]ppointment of counsel is [] required in the absence of an affirmative showing the minor's interests would otherwise be protected.” However, the court in *Richard E.* applied the “harmless error” test and found no prejudice in the instant case from the trial judge’s failure to make a showing that the minor’s interests were protected. *Id.* at 608.

Federal Statutes and Court Decisions Interpreting Statutes

The Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,¹¹ 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.”

¹¹ 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.

25 U.S.C. § 1912(b).

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

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

D. Appointment of Counsel for Child—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

In any proceeding to have a minor child declared free from the custody and control of either or both parents, the court “shall” appoint counsel to represent a dependent child minor child unless it finds no benefit in doing so. Cal. Welf. & Inst. Code § 366.26(f)(1). A minor child not previously adjudicated dependent will be appointed counsel only at the discretion of the court. Cal. Fam. Code § 7861 (“The court shall consider whether the interests of the child require the appointment of counsel. If the court finds that the interests of the child require representation by counsel, the court shall appoint counsel to represent the child, whether or not the child is able to afford counsel.”) *Id.*

If a parent seeks to voluntarily relinquish her rights in an adoption arising within the context of a parentage action,¹² Cal. Fam. Code § 7635(d) states:

¹² Cal. Fam. Code § 7660 of the parentage code states:

If a mother relinquishes for or consents to, or proposes to relinquish for or consent to, the adoption of a child who has a presumed parent under Section 7611, the presumed parent shall be given notice of the adoption proceeding and have the rights provided under Part 2 (commencing with Section 8600) of Division 13, unless that parent's relationship to the child has been previously terminated or determined by a court not to exist or the presumed parent has voluntarily relinquished for or consented to the adoption of the child.

Cal. Fam. Code § 7661 states:

In any initial or subsequent proceeding under this chapter [Determination of Parent and Child Relationship] where custody of, or visitation with, a minor child is in issue, the court may, if it determines it would be in the best interest of the minor child, appoint private counsel to represent the interests of the minor child pursuant to Chapter 10 (commencing with Section 3150) of Part 2 of Division 8.

For all other types of relinquishment proceedings, as well as custody proceedings in general, Cal. Fam. Code § 3150 et seq states:

- (a) If the court determines that it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding, provided that the court and counsel comply with the requirements set forth in Rules 5.240, 5.241, and 5.242 of the California Rules of Court.
- (b) Upon entering an appearance on behalf of a child pursuant to this chapter, counsel shall continue to represent that child unless relieved by the court upon the substitution of other counsel by the court or for cause.

3151. (a) The child's counsel appointed under this chapter is charged with the representation of the child's best interests. The role of the child's counsel is to gather evidence that bears on the best interests of the child, and present that admissible evidence to the court in any manner appropriate for the counsel of a party. If the child so desires, the child's counsel shall present the child's wishes to the court. The counsel's duties, unless under the circumstances it is inappropriate to exercise the duty, include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as the counsel considers necessary to ascertain evidence relevant to the custody or visitation hearings.

3153. (b) Upon its own motion or that of a party, the court shall determine whether both parties together are financially unable to pay all or a portion of the cost of counsel appointed pursuant to this chapter, and the portion of the cost of that counsel which the court finds the parties are unable to pay shall be paid by the county. The Judicial Council shall adopt guidelines to assist in determining financial eligibility for county payment of counsel appointed by the court pursuant to this chapter.

If the other parent relinquishes for or consents to, or proposes to relinquish for or consent to, the adoption of a child, the mother shall be given notice of the adoption proceeding and have the rights provided under Part 2 (commencing with Section 8600) of Division 13, unless the mother's relationship to the child has been previously terminated by a court or the mother has voluntarily relinquished for or consented to the adoption of the child.

For guardianship proceedings conducted under the probate code, Cal. Prob. Code § 1470(a) states:

The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division [Guardianship, Conservatorship, and Other Protective Proceedings] if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

With respect to traditional private custody disputes under California's Family Code, the court has discretion to appoint counsel to the minor child. See Cal. Fam. Code § 3150.

State Court Rules and Court Decisions Interpreting Court Rules

Cal. Rules of Court, Rule 5.240, which governs appointment of counsel to represent a child in family law proceedings, states:

(a) Appointment considerations

In considering appointing counsel under Family Code section 3150, the court should take into account the following factors, including whether:

- (1) The issues of child custody and visitation are highly contested or protracted;
- (2) The child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;
- (3) Counsel representing the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;
- (4) The dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child.
- (5) It appears that one or both parents are incapable of providing a stable, safe, and secure environment;
- (6) Counsel is available for appointment who is knowledgeable about the issues being raised regarding the child in the proceeding;
- (7) The best interest of the child appears to require independent representation; and
- (8) If there are two or more children, any child would require separate counsel to avoid a conflict of interest.

(b) Request for appointment of counsel

The court may appoint counsel to represent the best interest of a child in a family law proceeding on the court's own motion or if requested to do so by:

- (1) A party;
- (2) The attorney for a party;

- (3)The child, or any relative of the child;
- (4)A mediator under Family Code section 3184;
- (5)A professional person making a custody recommendation under Family Code sections 3111 and 3118, Evidence Code section 730, or Code of Civil Procedure section 2032.010 et seq.;
- (6)A county counsel, district attorney, city attorney, or city prosecutor authorized to prosecute child abuse and neglect or child abduction cases under state law; or
- (7)A court-appointed guardian ad litem or special advocate;
- (8)Any other person who the court deems appropriate.

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *In re D.W.*, 20 Cal. Rptr. 3d 274 (Ct. App. 2004), the court found that the petitioner, who was incarcerated after being adjudged an uncooperative material witness in a criminal case, had a due process right to counsel before being held in civil contempt because, given the “risk of loss of physical liberty, the due process requirement of a meaningful opportunity to be heard cannot be met unless counsel is appointed.” *Id.* at 280 (citing *Iraheta v. Superior Court*, 83 Cal.Rptr.2d 471 (1999)).

In *County of Santa Clara v. Superior Court*, 5 Cal. Rptr. 2d 7 (Ct. App. 1992), a Court of Appeal relied upon decisions from a number of other jurisdictions to hold that indigent civil contemnors have a right to appointed counsel. *Id.* at 10-12 (involving failure to pay child support). The court cited to *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), and relied upon the threat to physical liberty, rejecting the state’s argument that some cases would not be complex enough to warrant counsel by commenting that “the U.S. Supreme Court made clear that complexity, as a determinant of what due process requires, will come into play only in a situation in which there is no risk the citee will lose his or her personal freedom.” *County of Santa Clara*, 5 Cal. Rptr. 2d at 12.

The *Santa Clara* decision must be qualified in several ways. First, the court concluded the following with regard to the case at hand:

we need not grapple with distinctions between ‘criminal’ and ‘civil’ contempt or between federal and state grounds for the conclusions we reach Patently the proceedings here were initiated and conducted under the punitive provisions of Code Civ.Proc., § 1218, rather than under the remedial provisions of *id.*, § 1219. There is no

showing that Legaspi was ever formally given an opportunity to avoid imprisonment by voluntarily purging the contempt. Thus even under ‘the most conservative analysis, that provided under the federal Constitution,’ this was a criminal contempt subject to federal due-process guarantees.

Id. at 11 n.8. Because of this, anything in *Santa Clara* reaching the question of civil contempt is arguably dicta. Additionally, the U.S. Supreme Court’s holding in *Turner v. Rogers*, 131 S.Ct. 2507, 2515-20 (2011) (Fourteenth Amendment does not require categorical right to counsel in civil contempt, at least where opponent is neither the state nor represented) would likely have a significant impact on *Santa Clara*, due to the *Santa Clara* court’s heavy reliance on its mistaken interpretation of *Lassiter*¹³ and its citation only to Fourteenth Amendment cases. It is likely that *Santa Clara* would no longer be good law with respect to any cases within the reach of *Turner* (opposing side neither the state nor represented, matter not especially complex, etc.). Finally, the court commented that its prior rulings held both that courts cannot require the state to pay appointed counsel fees absent statutory authority and also that attorneys cannot be required to work without pay, and thus any perceived right may “be an empty one.” *Santa Clara*, 5 Cal. Rptr. 2d at 12.

B. Paternity Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

Prior to the U.S. Supreme Court’s decision in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), a 4-3 majority of the California Supreme Court ruled in *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979), that due process requires appointment of counsel to represent indigent defendants in paternity proceedings in which the state appears as a party or appears on behalf of a mother or child. *Id.* at 234. The court appeared to rule simultaneously on the requirements of the federal and state constitutions. *See id.* at 229. The *Salas* majority applied a balancing test to determine whether due process required the appointment of counsel:

[The] court must examine the nature and magnitude of the interests involved, the possible consequences appellants face and the features which distinguish paternity proceedings from other civil proceedings. These factors must then be balanced against the state’s interests.

¹³ The court relied heavily on its perception that *Lassiter* required the appointment of counsel whenever physical liberty is at stake, and rejected taking a case-by-case approach in order to examine the complexity of the specific proceeding, holding that “[i]n *Lassiter* ... the U.S. Supreme Court made clear that complexity, as a determinant of what due process requires, will come into play only in a situation in which there is no risk the citee will lose his or her personal freedom.” *Santa Clara*, 5 Cal. Rptr. 2d at 12.

Id. at 230. The court noted that “[a]n adjudication of paternity may profoundly affect a person’s life” since it might “disrupt an established family and damage reputations.” *Id.* Further, “a court’s determination of paternity exposes a defendant to deprivation of property and, potentially, liberty” since failure to pay child support is enforceable by garnishment of wages and via criminal proceedings. *Id.* Moreover, the *Salas* majority found that “[w]hile an indigent is entitled to counsel if prosecuted criminally for nonsupport, the most significant element of the offense paternity may have already been determined in a civil proceeding in which the defendant was unrepresented by counsel.” *Id.* at 231. Thus, the California Supreme Court extended the civil right to counsel to a defendant whose physical liberty was not threatened as a consequence of the immediate action, but by potential future proceedings.

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

State Statutes and Court Decisions Interpreting Statutes

In proceedings where minors seek a judicial waiver of the parental consent requirement for an abortion, the minor has a right to appointed counsel. Cal. Health & Safety Code § 123450(b) (“The court shall . . . advise her that she has a right to court-appointed counsel upon request.”). However, the California Supreme Court has said that requiring parental consent violates the privacy provisions of California Constitution. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 800 (Cal. 1997). Thus, the right to counsel is essentially moot in this area, since the waiver process is not needed.

D. Proceedings to Establish Child Support Obligation or Reimbursement

State Court Decisions Addressing Constitutional Due Process or Equal Protection

Several cases have grappled with the right to counsel in proceedings where a state or county seeks to establish a child support obligation or reimbursement. In *County of Los Angeles v. Superior Court*, 162 Cal. Rptr. 636 (Ct. App. 1980), the county brought an action to establish an obligation, and the court cited to *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979) (discussed *supra* Part 5.B) for the proposition that “the Supreme Court held that an indigent defendant in a paternity and child support action prosecuted by the district attorney is constitutionally entitled to appointment of free counsel to represent him. Accordingly, the county does not contest the appointment itself, but it contends that the court erred in ordering it to pay attorneys' fees” Then, in *County of Ventura v. Tillett*, 183 Cal. Rptr. 741 (Ct. App. 1982), *disapproved of on other grounds*, *County of Los Angeles v. Soto*, 35 Cal.3d 483, 674 P.2d 750 (Cal. 1984), the Court of Appeal held that an indigent mother was entitled to counsel in proceedings involving a stipulated judgment to pay child support. The *Tillett* court relied on *County of Los Angeles* to broadly hold, “[a]n indigent defendant in a child support action prosecuted by the district

attorney under Welfare and Institutions Code section 11350 is constitutionally entitled to appointment of free counsel to represent him.” *Id.* at 747.

Subsequent to *County of Los Angeles* and *Tillett*, several courts suggested that a child support matter must be connected to a paternity action in order to trigger a right to counsel. In *County of Orange v. Dabbs*, 35 Cal. Rptr. 2d 79 (Ct. App. 1994), the state sued to establish paternity and also sought to secure a child support order requiring the father to reimburse welfare benefits paid to the mother.¹⁴ The trial court refused to order reimbursement of the benefits, and the state appealed, raising the question of appointment of counsel for the appeal. The Court of Appeal found a right to counsel even though a reimbursement order does not have the potential for incarceration, because “where the state has appealed and brought its resources to bear against a responding indigent parent, counsel should be appointed. Even if he cannot be jailed, Dabbs faces a significant monetary claim. Under the circumstances of this particular case, appointed counsel is necessary to assure a ‘level playing field.’” *Id.* at 82. The court did not make it clear which constitution it was addressing, although it relied on *Salas*, which interpreted both the state and federal constitutions. While the *Dabbs* court found a right to counsel, it took issue with the *Tillett* opinion. It observed that *Tillett*’s reliance on *County of Los Angeles* “may have been misplaced” because “[p]resumably, the lower court action against the parent in [*County of Los Angeles*] involved both paternity and support, hence the county’s concession and the court’s perfunctory citation to *Salas*.” *Id.* at 82 n.4. In other words, the *Dabbs* court felt that *Tillett* had erred because the child support issue in that case did not stem from a paternity case, while the child support actions in *Salas* and *County of Los Angeles* did.¹⁵

In *Clark v. Superior Court*, 73 Cal. Rptr. 2d 53, 56 (Ct. App. 1998), the court addressed actions to establish a child support obligation for absent fathers to repay welfare benefits paid to the mothers, where “the actions brought by the family support division do not involve either contempt or paternity.” It first applied the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), factors and observed that since only money was at issue, “as a matter of legal precedent for purposes of the right to make a claim on the taxpayers for the cost of a free lawyer, monetary interests have traditionally never been accorded the same importance as staying out of jail.” *Id.* at 56. It then added that “[a] parent who is able to support his or her children has no *legitimate* interest at all in not supporting them, and moreover has no legitimate interest in sloughing off that responsibility onto the taxpayers.” *Id.* at 57. With respect to the risk of error, the court commented that “while the sheer complexity of the statute at first blush suggests a high risk of erroneousness, that risk is undercut by the fact that the statute is a math problem, and

¹⁴ The defendant admitted paternity, so the only legal dispute was the amount of child support ordered. *Id.* at 81 n.2.

¹⁵ Indeed, the court in *Salas* stated at the opening that “[t]hese consolidated cases present a narrow question: Are indigent defendants in paternity proceedings prosecuted by the state constitutionally entitled to appointed counsel?” *Salas*, 593 P.2d at 229.

therefore susceptible to calculation by a computer.” *Id.* at 57-58. The court also quoted from *Crider v. Superior Court*, 18 Cal.Rptr.2d 757, 761 (Ct. App. 1993), for the proposition that “[b]ecause the judgment for reimbursement under [Welfare and Institutions Code] section 11350 is a money judgment in a civil action for debt rather than a child support order, we hold it may not be enforced by contempt.” Finally, with respect to the government’s interest, the court stated that “[t]his factor clearly and decisively favors no taxpayer-funded counsel in Title IV–D cases. The whole point, after all, of Title IV–D was to save the taxpayers’ money. An entitlement to free counsel for indigent defendants could easily mean that more tax dollars would be spent on Title IV–D cases than the program saved in welfare costs.” *Clark*, 73 Cal Rptr. 2d at 58-59.

The *Clark* court then examined *Salas*, *Dabbs*, and *Tillett*. It distinguished *Salas* as follows: “We are not dealing with paternity suits here, and there are three reasons not to extrapolate *Salas*’ holding on paternity cases to reimbursement cases.” *Id.* at 60 (noting, among other things, that reimbursement calculations are primarily mathematical, as opposed to paternity determinations that rely on scientific evidence.) *Clark* then stated that *Dabbs* was only about “whether the appellate court should exercise its *discretion* to appoint counsel in a case of first impression concerning the retroactive application of a statute where the indigent parent had *won* at trial and the *government* was the appellant.” *Id.* at 60-61.¹⁶ And the *Clark* court took issue with *Tillett*’s reliance on *County of Los Angeles*, stating that “it would be a total misreading of the opinion to extrapolate what the *County of Los Angeles* court said about *Salas* to Title IV–D child support enforcement actions where paternity is not an issue In all probability, nobody focused on the significance of the words ‘in a paternity ... action’ in the reference to the *Salas* decision” *Clark*, 73 Cal.Rptr.2d at 62.

Finally, the *Clark* court considered whether the California Constitution required a different result, based on the imbalance of power between the state and the private litigants. It concluded:

None of these cases [*Dabbs*, *Tillett*] have been so bold as to state that imbalance of resources is its own, independent factor which would justify a result under California law not otherwise called for under *Lassiter*. And clearly, imbalance cannot be a decisive factor, as it is the rare case where the state does not have greater resources than a private party in any sort of litigation. If imbalance were decisive then every category of case in which the state is a litigant against a private party would require the presence of

¹⁶ While the court appears mostly correct in its characterization of *Dabbs*, it is unclear why it viewed that decision as one about a court exercising discretion. In *Dabbs*, the court characterized the legal question as “whether an indigent noncustodial parent is *entitled* to appointed counsel in responding to an appeal from the superior court’s refusal to enforce the mandate of section 11350.” *Dabbs*, 35 Cal.Rptr.2d at 80 (emphasis added).

taxpayer-funded counsel to ease the ambient “disparity in bargaining power.” As we have seen, civil tax cases and drug forfeiture cases disprove that notion.

Id. at 62.

State Court Decisions Addressing Court’s Inherent Authority

In *County of Los Angeles v. Superior Court*, 162 Cal. Rptr. 636 (Ct. App. 1980), the court considered whether it had the authority to pay an attorney that had been appointed for a proceeding to establish a child support obligation. The court first concluded there was no available statutory authority, then held that “[a]llocation of liability for payment of attorneys’ fees in such causes is the prerogative of the Legislature and not of the courts Until the Legislature fixes liability on some particular governmental entity to pay such attorneys’ fees, appointed counsel in such causes act pro bono publico in the manner appointed counsel formerly acted for indigent defendants in state and federal criminal causes.” *Id.* at 638.

E. Parole Revocation Proceedings

State Statutes and Court Decisions Interpreting Statutes

With respect to parole revocation proceedings:

(3) A parolee shall, upon request, be entitled to counsel at state expense only if, considering the request on a case-by-case basis, the board or its hearing officers determine: (A) The parolee is indigent; and (B) Considering the complexity of the charges, the defense, or because the parolee's mental or educational capacity, he or she appears incapable of speaking effectively in his or her own defense. (4) In the event the parolee's request for counsel, which shall be considered on a case-by-case basis, is denied, the grounds for denial shall be stated succinctly in the record.

Cal. Penal Code § 3044.

F. Proceedings Involving Claims by or Against Prisoners

State Statutes and Court Decisions Interpreting Statutes

California provides counsel for indigent persons in postconviction capital cases through the California Habeas Corpus Resource Center, an institution created as part of the state’s

judicial branch. See Cal. Gov't Code § 68661. The legislature has mandated that the state Supreme Court "offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings." *Id.* § 68662. The Center employs attorneys to represent such prisoners, recruit members of the private bar to accept death penalty habeas corpus cases, and maintain a roster of attorneys qualified as counsel in these postconviction proceedings. *Id.* at 68661(a), (c), (d).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Payne v. Superior Court*, 17 Cal. 3d 908, 926 (1976), the Supreme Court of California vacated a default judgment against an inmate sued for civil money damages and unable to either obtain an attorney or appear personally to defend himself. *Id.* at 926. Although the court made clear that not all indigents have a right to appointed counsel in civil cases, it found that if the state would not allow the incarcerated prisoner to appear personally in court, *id.* at 926-27, then counsel had to be appointed in order to protect the inmate's fundamental property interest, *id.* at 924. The *Payne* court made no suggestion that the right to counsel depended on the existence of a threat to physical liberty, but rather grounded its opinion on the due process right to access the courts. *Id.* The court rendered its decision based on both the California and U.S. Constitutions. *Id.* at 914 n.3.

State Court Decisions Addressing State Constitution's Open Courts Provision

In *Payne*, the Supreme Court of California found that an indigent prisoner deprived of both personal attendance and representation by counsel in a suit threatening his property interest was essentially denied access to the courts. 17 Cal. 3d at 922-23. The Court then addressed the remedies available to secure the right of access to the court and held that the trial court has discretion to determine how access should be achieved in a particular case. *Id.* at 924. While the *Payne* court recognized that appointment of counsel might be the only solution in some instances, it did not hold that a denial of appointed counsel to an indigent prisoner is unconstitutional. *Id.*

The *Payne* court provided guidelines to explain how the trial court should proceed in determining when to appoint counsel:

The access right . . . comes into existence only when a prisoner is confronted with a bona fide legal action threatening his interests. If a prisoner is merely a nominal defendant with nothing of consequence at stake, no need emerges for an appointed attorney. Thus, before appointing counsel for a defendant prisoner in a civil suit the trial court should determine first whether the prisoner is indigent. If he is indigent and the court decides that a continuance is not feasible, it should then ascertain whether the prisoner's interests are actually at stake in the suit and whether an attorney would be helpful to him under the circumstances of the case. The latter determination should be comparatively simple: if the prisoner is not contesting the suit against him, or any

aspect of it, there is no need for counsel; but if he plans to defend the action and an adverse judgment would affect his present or future property rights, an attorney should be appointed.

Id. (citations omitted). Subsequent decisions by the California courts have addressed the appropriate interpretation of these guidelines. *Payne* also observed that “If and how counsel will be compensated is for the Legislature to decide. Until that body determines that appointed counsel may be compensated from public funds in civil cases, attorneys must serve gratuitously in accordance with their statutory duty not to reject ‘the cause of the defenseless or the oppressed.’” *Id.* at 920 n.6.

In *Yarbrough v. Superior Court*, 216 Cal. Rptr. 425 (1985), the Supreme Court revisited its holding in *Payne* in considering the right of an indigent prisoner to court appointed counsel to defend him in a wrongful death action. After reaffirming the *Payne* guidelines, the Supreme Court addressed whether the prisoner had a threatened interest given that he had no assets to pay any judgment for damages. *Id.* at 587-88. The *Yarbrough* court recognized that interpreting the guidelines to include the expectation of remote future property interests would significantly expand the right to appointed counsel. *Id.* However, the court held that a trial court must nevertheless consider whether the defendant’s future economic fortunes would be affected by a judgment against him. *Id.* at 588. In addition, the Supreme Court found that, in considering the ability of counsel to be helpful to the prisoner, the court must look to the issue of damages, not just liability. *Id.* Thus, the Supreme Court concluded that the trial court should not have ignored that the codefendants, jointly and severally liable, would likely attempt to assign all responsibility on the prisoner. *Id.* Given these findings, the *Yarbrough* court returned the matter to the trial court for reconsideration of the question of the prisoner’s access to the courts. *Id.* It also stated:

We are fully aware that we have not dealt with the issues which have triggered the flood of amicus briefs mentioned in footnote 1: the power of the trial court to appoint an unwilling attorney to represent an incarcerated civil defendant, as well as its power and duty to provide funds for counsel's services and costs and, of course, the source of such funds. The fact that we find that it would be premature to discuss these issues in this particular case should not be interpreted to mean that we find that courts are powerless in those regards. The problem is, however, primarily a legislative one. It is our hope that the Legislature, working closely with the State Bar and other interested groups, will use the respite afforded by our disposition on this case to enact a fair legislative solution to the vexing problems which, for the time being, have been placed on the judicial backburner.

Id. at 589.

Because the decisions of *Payne* and *Yarbrough* permit California trial courts to select among several remedies to secure an indigent prisoner's access to the court, appointment of counsel is not a necessary outcome. In *Wantuch v. Davis*, 39 Cal. Rptr. 2d 47 (Ct. App. 1995), one California court found nine means of providing an indigent prisoner who is a plaintiff sufficient access to court:

(1) deferral of the action until the prisoner is released; (2) appointment of counsel for the prisoner; (3) transfer of the prisoner to court; (4) utilization of depositions in lieu of personal appearances; (5) holding of trial in prison; (6) conduct of status and settlement conferences, hearings on motions and other pretrial proceedings by telephone; (7) propounding of written discovery; (8) use of closed circuit television or other modern electronic media; (9) implementation of other innovative, imaginative procedures.

Id. at 51-52 (citations and footnotes omitted). California courts have also recognized that the provision of any one remedy may suffice, and a prisoner has no legal right to additional remedies. See *Arnett v. Office of Administrative Hearings*, 56 Cal. Rptr. 2d 774 (Ct. App. 1996) (holding that where a licensed physician incarcerated for felony offenses was represented by counsel at disciplinary proceedings by the state medical board, the physician had no legal right to be present at the proceedings or to an indefinite continuance of the proceedings).

State Court Decisions Addressing Court's Inherent Authority

The Supreme Court of California has explained that Cal. Gov't Code § 68661 "confers *no* constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings." *In re Barnett*, 31 Cal. 4th 466, 475 (2003) (emphasis added). Instead, the statute is merely the codification of "the long-standing practice" of the Court to appoint counsel to indigent inmates wishing to petition for a writ of habeas corpus challenging the legality of death judgments. *Id.* This practice was first announced in a habeas corpus proceeding challenging the constitutionality of the death penalty. *In re Anderson and Saterfield*, 69 Cal. 2d 613, 633 (1968). There, the Court held that, "as a matter of policy," to "protect the interests of defendants and promote the cause of justice," the Court would appoint counsel to represent indigent defendants in: (1) proceedings for post-conviction review in the Supreme Court of California, (2) proceedings for appellate or other post-conviction review of state court judgments in the United States Supreme Court, or (3) applications for clemency. *Id.* Presumably the ability to adopt this "policy" rests on the inherent power of the courts, although the Court did not say so.

At one time, a Court of Appeal gave a fairly expansive view of the power to compensate appointed counsel:

a court today, faced with a request to compensate appointed counsel, finds itself in a different position from that in which a court sat in earlier years. For [earlier courts] to have ordered a fee for appointed counsel would have required the court itself to initiate and declare a policy of public compensation for appointed counsel before the Legislature had formulated a general policy in its favor. For a court today to award a fee to appointed counsel no longer requires the court to initiate a policy, for it is clear the Legislature has adopted a general policy in favor of compensation. The sole issue, therefore, is whether the general policy should be applied in the particular instance of a narcotic commitment proceeding and the county charged with the cost of the appointment.

Luke v. Los Angeles County, 74 Cal. Rptr. 771, 773 (Ct. App. 1969).

However, the view seems to have changed since then, at least with respect to prisoner cases. As noted by one California Court of Appeal, “[c]ourts do not have the power to require the expenditure of public funds to compensate appointed counsel for indigent prisoners in civil actions.” *Wantuch v. Davis*, 39 Cal. Rptr. 2d 47, 52 n.6 (Ct. App. 1995) (citations omitted); see also *County of Santa Clara v. Superior Court*, 5 Cal. Rptr. 2d 7, 12 (Ct. App. 1992) (noting inability to order payment for appointed counsel in child support contempt case but holding that “this proceeding was so clearly criminal in nature as to bring it within the statutory provision for public compensation of appointed counsel contained in Penal Code section 987.2”); *County of Fresno v. Superior Court*, 146 Cal. Rptr. 880, 882-884 (Ct. App. 1978).

G. Administrative Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *White v. Board of Medical Quality Assurance*, 180 Cal. Rptr. 516 (Ct. App. 1982), a California Court of Appeal failed to mention *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), in rejecting a claim that an alleged denial of the right to effective counsel rendered an administrative hearing on charges of unprofessional conduct unfair. Without citing *Lassiter*, the court distinguished *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979) (discussed *supra* Part 5.B), as involving an indigent defendant not fluent in the English language in an action, “exposing the defendant to a possible deprivation of liberty.” *Id.* at 521. The court then held that “the right to ‘effective’ counsel in civil proceedings that lack overhanging criminal penalties has yet to be recognized.” *Id.*

In *Borror v. Department of Investment*, 92 Cal. Rptr. 525 (Ct. App. 1971), a Court of Appeal held that there is no right to counsel in a real estate license revocation proceeding under either the California or federal constitutions. *Id.* at 529-530. After quickly dispensing with the applicability of the Sixth Amendment and the state constitutional equivalent, the court held that while there is a due process right to be represented by counsel retained by the party, “[n]o

case has come to our attention which requires that counsel be appointed for a party in an administrative proceeding where he is indigent, but cases have held to the contrary.” *Id.* at 530. The court also held that although the results of an administrative proceeding might indirectly lead to criminal charges later, “the possibility that criminal charges might result from an administrative proceeding does not transform the nature of the proceeding from a civil to a criminal one.” *Id.* at 530. The court conceded that the distinction between civil and criminal cases had become less important in terms of determining due process rights, but argued that some administrative proceedings were more analogous to criminal proceedings in nature. *Id.* at 531-32. The license revocation procedure at issue (and other administrative disciplinary procedures), on the other hand, “does not bear a close identity to the aims and objectives of criminal law enforcement, but has for its objective the protection of the public rather than to punish the offender.” *Id.* at 532.

H. Civil Forfeiture Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In a civil action for forfeiture of currency allegedly acquired in a drug transaction, a California appellate court cited *Lassiter* in support of the principle that due process requires appointed counsel only in actions threatening a litigant’s physical liberty, but then evaluated the “exception to that general rule” as set forth in *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979) (discussed *supra* Part 5.B). *People v. \$30,000 U.S. Currency*, 41 Cal. Rptr. 2d 748, 752 (Ct. App. 1995). Upon comparing the defendant in *Salas* who faced possible incarceration and “other serious consequences” to the instant defendant whose interests were “merely financial,” the court “decline[d] to extend the right to counsel to an [indigent party in a civil] forfeiture proceeding.” *Id.* at 753. *See also In re Marriage of Campi*, 152 Cal.Rptr.3d 179, 188 (Cal. App. 2013) (in marriage dissolution case, court comments, “We . . . identify no due process right in this particular case, as no liberty interest of the parties was at stake.”)

I. Gang Injunction Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Iraheta v. Superior Court*, 83 Cal. Rptr. 2d 471 (Ct. App. 1999), a Court of Appeal considered the right of a defendant to counsel in a civil action for injunctive relief to abate the conduct of criminal street gangs as a public nuisance. The *Iraheta* court recognized that “the most critical factor in the *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), balancing test – [the presumption against counsel except where physical liberty is at stake] – is absent from the *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979) (discussed *supra* Part 5.B), balancing test,” yet refused to accept petitioners’ argument that, per *Salas*, due process under the California

Constitution does not require such a presumption. *Id.* at 475-76. Instead, the *Iraheta* court found:

The *Salas* decision mentioned the California Constitution only once in its prefatory remarks. In the remainder of its decision, the *Salas* court relied entirely on United States Supreme Court cases or on California cases construing the due process clause of the United States Constitution. At no time did the court in *Salas* suggest that it was departing from California's general rule of deference [to the federal Constitution].

Id. at 476. In a footnote, the Court of Appeal acknowledged that its reasoning contradicted that of another appellate court in *In re Jay*, 197 Cal. Rptr. 672 (Ct. App. 1983),¹⁷ but nonetheless concluded that “under either the California Constitution or the United States Constitution, the test set forth in *Lassiter* is to be applied in determining when due process of law compels appointment of counsel for an indigent person.” *Id.* at 476, n.2. Applying this test, the *Iraheta* court ultimately held that petitioners were not entitled to appointed counsel. *Id.* at 481. The California Supreme Court denied review of *Iraheta* and has never addressed whether it agrees with the interpretation of *Salas* by the *Iraheta* court or with the interpretation of the *In re Jay* court. Thus, it appears to remain an open question whether the *Lassiter* presumption applies to cases decided under the California Constitution.

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 state¹⁸ and to all civil proceedings (including custody),¹⁹ provides:

¹⁷ In *In re Jay*, 197 Cal. Rptr. 672 (Ct. App. 1983), the court expressly rejected the *Lassiter* presumption that appointed counsel is not required absent a threat to physical liberty:

In *Salas*, *supra*, the Court specifically rejected, as a matter of California law, the contention that appointed counsel is required only when imprisonment is imposed. California precedents do not give rise to such a presumption under the California Constitution and, indeed, hold just the opposite. We therefore evaluate the present case under the California Constitution, article I, section 7, and do not presume that appointed counsel is required only where physical liberty is at stake.

Id. at 679 (citations omitted). Applying the factors outlined in *Salas*, the Court of Appeal held that an indigent noncustodial parent accused of negligence has a due process right to appointed counsel in a stepparent adoption proceeding. *Id.* at 681.

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

¹⁹ 50 U.S.C.A. § 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.”

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 U.S.C.A. § 3931(b)(2).

Additionally, 50 U.S.C.A. § 3932(d)(1), which also applies to all civil proceedings (including custody),²⁰ 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 Court’s Inherent Authority

At one time, a Court of Appeal gave a fairly expansive view of the power to compensate appointed counsel:

a court today, faced with a request to compensate appointed counsel, finds itself in a different position from that in which a court sat in earlier years. For [earlier courts] to have ordered a fee for appointed counsel would have required the court itself to initiate and declare a policy of public compensation for appointed counsel before the Legislature had formulated a general policy in its favor. For a court today to award a fee to appointed counsel no longer requires the court to initiate a policy, for it is clear the Legislature has adopted a general policy in favor of compensation. The sole issue, therefore, is whether the general policy should be applied in the particular instance of a narcotic commitment proceeding and the county charged with the cost of the appointment.

Luke v. Los Angeles County, 74 Cal. Rptr. 771, 773 (Ct. App. 1969). However, since then, an exception appears to have been carved out with respect to prisoner cases. As noted by one California Court of Appeal, “[c]ourts do not have the power to require the expenditure of public funds to compensate appointed counsel for indigent prisoners in civil actions.” *Wantuch v. Davis*, 39 Cal. Rptr. 2d 47, 52 n.6 (Ct. App. 1995) (citations omitted); *see also County of Santa Clara v. Superior Court*, 5 Cal. Rptr. 2d 7, 12 (Ct. App. 1992) (noting inability to order payment for appointed counsel in child support contempt case but holding that “this proceeding was so clearly criminal in nature as to bring it within the statutory provision for public compensation of

²⁰ 50 U.S.C.A § 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.”

appointed counsel contained in Penal Code section 987.2”); *County of Fresno v. Superior Court*, 146 Cal. Rptr. 880, 882-884 (Ct. App. 1978) (noting absent statutory authority, appointed counsel for an indigent defendant has no right to compensation or costs by the public and that such denial does not violate any provision of the federal Constitution).

State Court Decisions Addressing Incorporation of English Common Law and Statutes

Shortly after California’s first constitutional convention in 1849 and the creation of its Constitution, California enacted a statute in 1850 that incorporated English common law as precedent for its courts. 1850 Cal. Stat. 290; Pol. Code § 4468. Now codified in the California Code, the incorporation provision states: “[t]he common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” Cal. Civ. Code § 22.2. On a case-by-case basis, California courts have interpreted this provision as incorporating into Californian law certain rights that existed under English common law as of 1850. Note that the incorporation of English common law includes English statutes as well. *Crouchman v. Superior Court*, 755 P.2d 1075, 1081 (Cal. 1988) (“[T]he common law of 1850 includes the written statutes enacted by Parliament.” (quotation marks omitted)).

For example, the California Supreme Court held in *Martin v. Superior Court*, 168 P. 135 (Cal. 1917), that California trial courts have an inherent power to permit indigent civil litigants to pursue an action *in forma pauperis* based upon English common law. *Id.* at 138. The *Martin* court based its holding on a finding that English common law was “controlling upon our section of the Code making that law the basis of our jurisprudence.” *Id.* (discussing 11 Hen VII). Furthermore, notwithstanding “the apparent mandatory character of a variety of statutes calling for the payment of litigation fees, California courts [have declared that they] retain a common law authority to dispense with such fees in the case of poor litigants.” *Conover v. Hall*, 11 Cal. 3d 842, 850-51 (1974) (holding that courts can waive statutory requirements of injunction bonds for indigent litigants). Under the same incorporation theory, the California Supreme Court held in *Ferguson v. Keays*, 4 Cal. 3d 649 (1971), that appellate courts have the authority to permit indigent civil litigants to seek appellate relief without the payment of the statutory filing fee. *Id.* at 652. To reach its holding in *Ferguson*, the court concluded that the English “common law courts possessed and exercised the power to permit indigents to appeal *in forma pauperis*,” *id.* at 654, and then found that no statutory provision “expressly denies to the appellate courts the power to waive those fees,” *id.* at 656.

The record of the California courts is murky with respect to the question of whether there is a right to counsel in California created by the incorporation of English common law. In *Hunt v. Hackett*, 111 Cal. Rptr. 456 (Ct. App. 1973), the appellant “argue[d] that there is a common law right in California to the appointment of counsel for an indigent in a civil case.” *Id.* at 457. The Court of Appeal acknowledged that the California Supreme Court had created a

right for indigent litigants to proceed without costs, including through the appeal, but that the high court had explicitly not addressed other kinds of costs (such as the right to counsel), and therefore “the right of access to the courts, which is afforded to indigents by the common law, has not been extended to include any right to court-appointed counsel.” *Id.* at 458. The Court of Appeal went on to focus on the civil nature of the instant action (which involved real estate), and relied on the civil/criminal distinction to justify its holding of a lack of a right to appointed counsel. *Id.* It then concluded that “no California statute or case law authorize[es] a trial court to furnish counsel at public expense in such a case, or require[es] a trial court to appoint counsel without compensation in such a case.” *Id.* Subsequent decisions have similarly centered on the court’s authority to compensate appointed counsel (or require counsel to work for free) rather than the right to appointed counsel.

In dictum, the California Supreme Court has observed that English common law included a right to counsel in civil cases for indigent litigants, noting a Henry VII statute from 1495. *Martin v. Superior Court*, 168 P. 135, 137 (Cal. 1917) (quoting William Blackstone, Commentaries 533 (William G. Hammond ed. 1890) (1778), and Walker Marshall, Law of Costs in All Suits and Proceedings in Courts of Common Law 347 (Crockford 1860), and referring to An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 1495, 11 Henry 7, c. 12). One lower court has likewise recognized, albeit in dicta, that this right existed under the common law. *In re Javier A.*, 206 Cal. Rptr. 386, 414 n.37 (Ct. App. 1984) (“[O]ne of [the] *in forma pauperis* rights enjoyed by Englishmen in 1850 was the appointment of free counsel for poor people in civil cases.”). Nonetheless, in practice, such a common law right has not been recognized in any California case.²¹

The theory of incorporation was one of several arguments that Justice Earl Johnson, Jr. articulated to justify a right to appointed counsel in civil actions in his dissent in *Quail v. Municipal Court*, 217 Cal. Rptr. 361, 364 (Ct. App. 1985), *review denied*.²² Justice Johnson observed that “[a]t the time Political Code section 4468 was adopted, 1850, English common law provided indigent civil litigants with a right to proceed *in forma pauperis*. Moreover, this English *in forma pauperis* right entitled indigent litigants to the assistance of appointed counsel without charge.” *Id.* at 365. He argued that “an inchoate common law right to counsel . . . has

²¹ A California Court of Appeal has suggested that the reason California law has not yet recognized a common law right to counsel in civil cases may be “because no California court has yet fully examined the English common law on this subject.” *In re Javier A.*, 206 Cal. Rptr. at 414 n.37 (considering whether juvenile had right to jury trial in juvenile proceedings). Such an assessment comports with the apparent avoidance of the issue in *Hunt v. Hackett*, 111 Cal. Rptr. 456.

²² See also *Baltayan v. Getemyan*, 110 Cal. Rptr. 2d 72, 81 (Ct. App. 2001) (Johnson, J., concurring) (“[A]t the time California became a state, English statutory law, judge-made law, and equity all gave indigent litigants a right to access the courts by waiving the required fees and costs. As a result, the Supreme Court ruled, California courts were bound to do the same. (From at least 1495 and onward the English common law likewise gave indigent litigants a right to appointment of free counsel to represent them, as well. But that issue was not before the *Martin* court [*Martin v. Superior Court*, *supra*], nor is it raised in this case.)” (footnote omitted)).

existed in California since 1850 and was implicitly recognized by the California Supreme Court in 1919 [in *Martin v. Superior Court*].” *Id.* In *Quail*, Justice Johnson also outlined the legal arguments supporting a right to counsel in civil cases under the Due Process and Equal Protection Clauses of the California Constitution. *Id.* at 367-70. The California Supreme Court, however, denied a petition for review of this case and has not pronounced on the matter since then. One California court has since avoided the issue, stating:

We acknowledge scholarly suggestions that an indigent litigant’s right to appointed counsel, and to have appointed counsel paid from public funds, should be declared for civil cases generally. *See, e.g., Quail v. Municipal Court* . . . , 217 Cal. Rptr. 361 [(1985) (Johnson, J., concurring in part and dissenting in part)] [But t]he facts of this case, and the holdings of other appellate courts in other cases, give us neither the occasion nor the freedom to consider so broad a proposition

Santa Clara v. Superior Court, 5 Cal. Rptr. 2d 7, 10 n.3 (Ct. App. 1992) (italicization added).