American Bar Association
Directory of Law Governing Appointment of Counsel in State Civil Proceedings

Georgia

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# GEORGIA

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**DIRECTORY OF LAW GOVERNING APPOINTMENT OF COUNSEL IN STATE CIVIL PROCEEDINGS • GEORGIA • 2016**
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Preface

Important Information to Read Before Using This Directory

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

Terms of Use/Disclaimers

This Directory should not be construed as providing legal advice and the ABA makes no warranties concerning the information contained therein, which has been updated to reflect the law through June 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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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). In Poindexter v. FBI, the D.C. Court of Appeals observed:

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

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

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

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

Those subjected to guardianship proceedings have a right to counsel. Ga. Code Ann. § 29-4-11(c)(1)(D) (court must “inform the proposed ward of the proposed ward's right to independent legal counsel and that the court shall appoint counsel within two days of service unless the proposed ward indicates that he or she has retained counsel in that time frame”); 29-4-42(a) (in review of guardianship, “The court shall appoint legal counsel for the ward and may, in its discretion, appoint a guardian ad litem.”)

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

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

D. Sex Offender Proceedings

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

E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings

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

4. CHILD CUSTODY

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

State Statutes and Court Decisions Interpreting Statutes

For termination of parental rights (TPR) proceedings, parents have a right to counsel. Ga. Code Ann. §§ 15-11-262(j) (“A party other than a child shall be informed of his or her right to an attorney prior to the adjudication hearing and prior to any other hearing at which a party could be subjected to the loss of residual parental rights. A party other than a child shall be given an opportunity to: (1) Obtain and employ an attorney of the party’s own choice; (2) To obtain a court appointed attorney if the court determines that the party is an indigent person; 3) Waive the right to an attorney”), 15-11-281 (“The summons shall ... state that a party is entitled to an attorney in the proceedings and that the court will appoint an attorney if the party is an indigent person.”) But see In the Interest of J.I.H., 191 Ga. App. 848, 849 (1989) (court not required to appoint counsel when parent never applied for appointment of an attorney or tried to demonstrate indigence prior to hearing).

Recently, the Georgia Court of Appeals reversed its own precedent and held that parents denied their statutory right to counsel in termination proceedings do not have to demonstrate harmful error in order to obtain an automatic reversal. In re J.M.B., 296 Ga.App. 786, 790-91 (2009). In reaching this conclusion, the court held that “when the state is terminating a parent’s ‘fundamental and fiercely guarded right’ to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process.” Id. The court also relied on the Georgia Supreme Court’s mandate that TPR proceedings “should be attended only by the most stringent procedural safeguards.” Id. at 780 (quoting Sanchez v. Walker County Dept. of Family and Children Services, 237 Ga. 406, 411 (1976)). The court added that “to waive a right as fundamental as effective counsel, the trial court must, on the record, determine that the waiver is knowing, intelligent and voluntary.” Id (citation omitted). See also In re S.N.H., 685 S.E.2d 290 (Ga. Ct. App. Aug. 18, 2009) (noting that while parental termination proceedings are more civil than criminal in nature, parents are given some rights criminal defendants are given, such as appointment of counsel); In re D.R., 298 Ga. App. 774, 779 n.2 (2009).

Notably, while a superior court can transfer jurisdiction of custody of a child to the juvenile court, Ga. Code § 15-11-15(b) specifies that “the juvenile court shall proceed to handle

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1 It is unclear whether the parent in J.I.H. was ever informed as to her right to counsel; the court only notes that the parent never asked for counsel. If the parent’s failure to be informed of the right led to her failure to make a request, this ruling would probably be incorrect.
the matter in the same manner as though the action originated under this chapter in compliance with the order of the superior court, except that the parties shall not be entitled to obtain an appointed attorney through the juvenile court.”

Federal Statutes and Court Decisions Interpreting Statutes

The federal Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,\(^2\) provides:

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


State Court Decisions Based on Constitutional Due Process or Equal Protection Grounds

The Georgia Court of Appeals has said that with respect to a parent’s right to counsel in termination of parental rights cases, “[n]o state or federal constitutional right to counsel is involved because a parental termination action is a civil matter, not a criminal proceeding.” In Interest of A.M.R., 495 S.E.2d 615, 618 (Ga. Ct. App. 1998). A.M.R. relied on two cases, In the Interest of B.G., 484 S.E.2d 293 (Ga. App. 1997) and Bergmann v. McCullough, 461 S.E.2d 544 (Ga. Ct. App. 1995). However, Bergmann only dealt with whether the Sixth Amendment right to effective assistance of counsel extended to civil cases, 461 S.E.2d at 548, and B.G. only dealt with the standard of proof for TPR cases, not the right to counsel. 484 S.E.2d at 296.

In Interest of B.R.F., 788 S.E.2d 416 (Ga. 2015), the Supreme Court of Georgia Court of Appeals considered a situation where a parent is wrongfully denied her statutory right to appointment of counsel for filing the appeal of a termination of parental rights decision but

\(^2\) While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(b) states: “In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” These provisions, plus the fact that child welfare proceedings typically occur in state court, suggest that ICWA applies in state law proceedings.
such appeals are discretionary under state law. The parent in question attempted to file her own appeal but did it incorrectly, and by the time she secured counsel, the appeal filed was not timely. Prior Georgia law held that untimely appeals were only possible if a) the appeal was by right; and b) the appeal was filed late because of a constitutional violation. The BRF court held under that federal law (it did not analyze the Georgia Constitution), the right to counsel in termination cases is on a case-by-case basis and it was a matter for the trial court to determine whether this particular parent had a right to counsel. Absent such a decision, the Court of Appeals lacked jurisdiction to hear the matter. It therefore remanded the matter back to the trial court for such a determination. The court also “note[d] the possibility that an indigent parent’s statutory right to counsel should be construed as a statutory right to effective counsel at all stages of the proceeding, with a corresponding remedy if counsel is ineffective. As with the constitutional claim Mother has raised, however, any argument based on statutory ineffective assistance should be addressed first to the juvenile court.” Id at 300 n.15.

State Court Decisions Based on Court’s Inherent Authority

The Georgia Court of Appeals rebuffed policy arguments related to the inherent power of the court to appoint counsel that were presented during the appeal by a mother of a termination proceeding, asserting that “[i]t is fundamental that matters of public policy are entrusted to the General Assembly, not this court.” In the Interest of A.R.A.S., 629 S.E.2d 822, 825 (Ga. Ct. App. 2006).

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

While one Georgia Court of Appeals decision supports a right to counsel for a parent whose child is the subject of adoption proceedings, the statutory provision on which that decision relies by its terms does not apply to adoptions. Therefore, that decision is not reliable as a basis for a parent to assert a right to counsel in the adoption context.

Ga. Code Ann. § 15-11-262 provides:

(a) A child and any other party to a proceeding under this article shall have the right to an attorney at all stages of the proceedings under this article.

... 

(j) A party other than a child shall be informed of his or her right to an attorney prior to the adjudication hearing and prior to any other hearing at which a party could be subjected to the loss of residual parental rights. A party other than a child shall be given an opportunity ... (2) To obtain a court appointed attorney if
the court determines that the party is an indigent person, or (3) Waive the right to an attorney.

In *Dell v. Dell*, the Georgia Court of Appeals held that an indigent parent had a statutory right under § 15-11-262(a) to effective legal representation in termination proceedings brought by private parties where the purpose of the proceedings was to allow a third party to adopt her child. 748 S.E.2d 703, 708 (Ga. Ct. App. 2013) (citing *In the Interest of A.R.A.S.*, 629 S.E.2d 822 (2006), a state-initiated TPR case). But because § 15-11-262(a) applies only to “a proceeding under this article,” it is likely that the right does not exist in the adoption context, in which proceedings are governed by a different article (Title 19). Moreover, while subsection (j) refers to “any other hearing at which a party could be subjected to the loss of residual parental rights”, this likely would be understood as hearings pursuant to this particular article. Finally, in *Arrington v. Hand*, 388 S.E.2d 52 (Ga. App. 1989), the Georgia Court of Appeals held that an equally broad right for children in § 15-11-98(a) (the predecessor statute) did not extend to contested adoption proceedings. The court conceded that the provision facially applied to any proceeding involving termination of parental rights and that an contested adoption “relieves the natural parents of all parental rights and terminates all legal relationships between the adopted child and his natural parents”. Nonetheless, the court distinguished contested adoption proceedings from classic proceedings to terminate parental rights. This logic likely would extend to the right to counsel for parents as well.

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

**State Statutes and Court Decisions Interpreting Statutes**

As to the rights of children in deprivation proceedings, appointment used to be only for children that were “not represented” by one of the parent’s counsel, but in 2013 the legislature amended the code to say:

A child and any other party to a proceeding under this article shall have the right to an attorney at all stages of the proceedings under this article . . . . The court shall appoint an attorney for an alleged dependent child. The appointment shall be made as soon as practicable to ensure adequate representation of such child and, in any event, before the first court hearing that may substantially affect the interests of such child . . . . A child’s attorney owes to his or her client the duties imposed by the law of this state in an attorney-client relationship . . . . If an attorney has been appointed to represent a child in a prior proceeding under this chapter, the court, when possible, shall appoint the same attorney to represent such child in any subsequent proceeding . . . .

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3 § 15-11-6(b) specified that “[c]ounsel must be provided for a child not represented by the child’s parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them.”
appointed to represent a child in a dependency proceeding shall continue the representation in any subsequent appeals unless excused by the court.


Children in termination of parental rights (TPR) proceedings are automatically appointed an attorney. Ga. Code Ann. § 15-11-262(b). The statute specifies that “The appointment shall be made as soon as practicable to ensure adequate representation of such child and, in any event, before the first court hearing that may substantially affect the interests of such child.”

Federal Statutes and Court Decisions Interpreting Statutes

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

The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).”


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

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*While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(b) states: “In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” These provisions, plus the fact that child welfare proceedings typically occur in state court, suggest that ICWA applies in state law proceedings.*
litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings.”

42 U.S.C. § 5106a(b)(2).

State Court Decisions Based on Constitutional Due Process or Equal Protection Grounds

In Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), a federal court in Georgia noted that children have a statutory right to counsel in deprivation and termination of parental rights proceedings under Georgia law, but also went on to hold that children have the right to appointed counsel under the Georgia Constitution, Art. I, § 1, ¶ 1. The court reasoned that “children have fundamental liberty interests at stake in deprivation and TPR proceedings . . . includ[ing] a child’s interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit.” Id. at 1360. The court found that because a child’s fundamental liberty interests were at stake, there existed a significant risk of erroneous decisions, and the government functioned as parens patriae, it was in the state’s and child’s interest to appoint a child advocate attorney. Id. at 1360-61. The case affected only certain counties in the state (DeKalb, Fulton) that were the subject of the litigation.

Federal Court Decisions Based on Constitutional Due Process or Equal Protection Grounds

A 2005 federal court decision held that a child has a right to counsel under Georgia state constitutional principles in any deprivation case. Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (“Even if there were not a statutory right to counsel for children in deprivation cases and TPR proceedings, the Court concludes that such a right is guaranteed under the Due Process Clause of the Georgia Constitution, Art. I, § 1, ¶ 1.”).

D. Appointment of Counsel for Child—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

In Arrington v. Hand, 388 S.E.2d 52 (Ga. Ct. App. 1989), the Court of Appeals held that the statutory right to counsel for children in termination of parental rights (TPR) proceedings, as provided in Ga. Code Ann. § 15-11-98(a), does not extend to involuntary adoption proceedings. The court conceded that an involuntary adoption “relieves the natural parents of all parental rights and terminates all legal relationships between the adopted child and his
natural parents,” and also quoted the provision in § 15-11-85 (subsequently recodified as § 11-5-98(a)) stating that the right to counsel for children extended to any proceeding involving termination of parental rights. *Id.* at 53. Without attempting to distinguish the broad language of § 11-15-85, the court simply argued that counsel in involuntary adoptions was less necessary because the child would not be left at the end of the proceeding without parents, and that therefore the legislature must have intended to exclude such proceedings from the right to counsel. *Id.*

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Statutes and Court Decisions Interpreting Statutes

In cases of the commitment of the mentally ill, patients have the right to court-appointed counsel if they are unable to afford a lawyer. Ga. Code Ann. §§ 37-3-44(a) (emergency receiving facility; 37-3-81(a)(2) (involuntary inpatient); 37-3-83(e) & (h) (continued involuntary inpatient); 37-3-92(a) (involuntary outpatient); 37-3-150 (appeals); 37-4-110 (appeals).

State Court Decisions Based on Constitutional Due Process or Equal Protection Grounds

In *Adkins v. Adkins*, 248 S.E.2d 646, 646 (Ga. 1978), a pre-*Lassiter* case,6 the Georgia Supreme Court summarily dismissed a claim that indigent litigants are entitled to counsel in civil contempt cases. The court simply commented: “A contempt for failure to pay child support is a civil proceeding. Its primary purpose is to provide a remedy for the collection of child support by coercing compliance with such an order. *Argersinger* relates to criminal prosecutions and is not applicable here.” *Id.* at 647. The court apparently felt that the litigant’s ability to purge the contempt was unquestioned. See *id.* (commenting on the related issue that “a determinable rather than indefinite sentence was not error as long as the respondent may purge himself”). Then, in *Miller v. Deal*, 761 S.E.2d 274 (Ga. 2014), the Supreme Court of Georgia denied class certification in a case arguing for a right to counsel in all civil contempt cases brought by the state, holding (as part of its class certification decision) that the federal constitution does not guarantee counsel in all such cases. The court stated:

5 Ga. Code Ann. § 37-3-92 says that for outpatient proceedings, the court must serve “the same notices and information required by paragraphs (1) through (4) of subsection (a) of Code Section 37-3-81 ...The patient and representatives shall have the rights specified in those notices.” And 37-3-81(a)(2) provides the right to counsel.

We suppose that due process sometimes may require the appointment of counsel for an indigent parent in a civil contempt proceeding in which the parent is threatened with incarceration. And as in Gagnon, perhaps there is even a “presumptive” right to appointed counsel in some such proceedings if the parent is opposed by government lawyers. [Footnote: For this reason, trial courts should consider advising unrepresented parents in such proceedings that they may have a right to request counsel.] But even so, presumptions sometimes can be overcome, and whether any particular parent is entitled to a lawyer at government expense depends always, we think, on the particular and unique circumstances of his case, including the complexity of the case, as well as the extent to which alternative measures might be employed to ensure that the proceeding is fundamentally fair.

The court did, however, add that:

Generally speaking, to the extent that the Constitution affords a right to counsel at government expense, it affords a right that is not waived merely by a party unknowingly failing to insist upon a lawyer in a proceeding in which he is not even advised that he might request counsel. That certainly is true of the categorical right to counsel that is guaranteed to the accused in criminal prosecutions by the Sixth Amendment … It appears to be no less true of the more limited and conditional right to counsel that the courts have recognized in certain other proceedings as an incident of due process … to the extent that named plaintiffs or other class members have a constitutional right to appointed counsel, they do not waive that right simply by failing to insist upon counsel in proceedings in which no one advised them that they could ask for counsel.

B. Paternity Proceedings

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

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

State Statutes and Court Decisions Interpreting Statutes

Minors seeking abortions are granted the right to appointed counsel when trying to bypass parental notification. Georgia courts, in this instance, are statutorily required to notify the minor of their right to counsel, and provide them with counsel upon request. Ga. Code Ann. § 15-11-114(a).7

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7 This section is being moved to GA. Code Ann. § 15-11-684 as the result of HB 242 (2013).
D. Proceedings Involving Claims by and Against Prisoners

State Statutes and Court Decisions Interpreting Statutes

In 2003, Georgia established a public defender system in the Georgia Indigent Defense Act. Ga. Code Ann. §17-12-1. The statute created the Georgia Public Defender Standards Council, which is “responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter.” Id. Several situations are identified as falling within the chapter, including: a hearing on probation revocation in a superior court, or any direct appeal of such proceedings. Id. at §17-12-23.

State Court Decisions Based on Constitutional Due Process or Equal Protection Grounds

The Georgia Supreme Court has said there is no right to counsel in postconviction proceedings, seemingly based only on the fact that postconviction proceedings are civil in nature. See Gable v. State, 290 Ga. 81, 86 (2011) (“There is no constitutional right to counsel, much less the effective assistance of counsel, in filing or litigating a post-conviction extraordinary motion for new trial or a discretionary application to appeal the ruling on such a motion.”); Fullwood v. Sivley, 517 S.E.2d 511 (Ga. 1999).

The Georgia Supreme Court on several occasions has considered whether the indigent habeas petitioner has a constitutional right to court-appointed counsel. As early as 1959, the Georgia Supreme Court determined that habeas proceedings were civil matters, distinguishing between a proceeding to determine the legality of a case from the determination of an individual’s guilt or innocence. Goble v. Reece, 214 Ga. 697, 698–99 (1959). Several years later, the court reiterated that habeas proceedings were decidedly civil in nature, and thus did not fall into the state constitution’s provision of counsel for habeas petitioners. Croker v. Smith, 169 S.E.2d 787, 799 (Ga. 1969) (“A habeas corpus case is not a criminal prosecution.”).

As a result, the Georgia Supreme Court has said that it will not appoint counsel to represent indigent civil litigants absent express statutory or constitutional authority. State v. Davis, 269 S.E.2d 461, 462 (Ga. 1980) (“[W]e know of no statute, case, or constitutional provision which would permit a trial judge to appoint counsel to a habeas petitioner, to be paid out of state or county funds.”); Gibson v. Turpin, 270 Ga. 855 (1999)8 (finding no violation of

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8 This decision was eventually remanded in 2007, the denial of the habeas petition was overturned and the case was sent back for the lower court to decide if the defendant was procedurally barred from bringing the habeas petition. However, none of that subsequent history appears to affect the court’s pronouncements about the right to counsel.
due process by denying counsel in habeas proceedings and rejecting the argument that failure to provide counsel violates the Georgia Constitution’s mandate of meaningful access to court and fundamental fairness because “[m]eaningful access does not mean that a state must help inmates discover grievances, or litigate effectively when in court . . . [i]t is simply the right of an inmate to raise his claims and be heard . . . the existence of habeas corpus ‘does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way;’” also noting that all states providing counsel in habeas proceedings, except Mississippi, did so via statute rather than court decision). 9

State Court Decisions Based on State Constitutional Open Courts Provision

The state constitution sets forth Georgia’s open courts doctrine in its Bill of Rights, saying: “[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person’s own cause in any of the courts of this state.” Ga. Const. art. I, § I, ¶ XII. In the United States Supreme Court’s decision in Bounds v. Smith, 430 U.S. 817 (1977), 10 incarcerated petitioners claimed the correctional facility violated their right to access to the courts in that it did not provide them with legal research facilities. 430 U.S. at 817-18. The United States Supreme Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” Id. at 828.

However, the Georgia Supreme Court, when faced with a similar habeas petition, failed to recognize a constitutional entitlement to state-appointed habeas counsel as part of a defendant’s meaningful access to courts. See Gibson v. Turpin, 270 Ga. 855 (1999) (“Neither the federal nor Georgia Constitutions require the appointment of a lawyer for a death-row inmate to have meaningful access to the courts upon habeas corpus.”). The court in Gibson held that meaningful access, as established by the United States Supreme Court, reached only to the waiver of filing fee or access to prison libraries, but did not extend to helping defendants litigate effectively. Id.; see also Howard v. Sharpe, 266 Ga. 771 (1996) (holding that regulations and restrictions that bar adequate, effective, and meaningful access to courts violate the federal constitution). The Gibson court found that extending the Bounds decision would “stretch the right of meaningful access beyond its constitutional bounds.” Gibson, 270 Ga. at 858. In its analysis, the state supreme court continually invoked the fact that the federal

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9 See also Willis v. Price, 256 Ga. 767 (1987); McClure v. Hopperi, 234 Ga. 45, 50 (1975); Nolley v. Caldwell, 229 Ga. 441, 441 (1972) (holding that neither the Sixth Amendment nor the Georgia Constitution applies in habeas proceedings).

10 No cases could be located that exclusively analyzed the open courts provision in the Georgia Constitution; instead, the state supreme court seemed more concerned with construing Bounds than developing a right for meaningful access under the state constitution.
constitution did not encompass the right to habeas counsel under the Sixth Amendment. *Id.* at 857; *see also State v. Davis*, 246 Ga. 200 (Ga. 1980). The Georgia Supreme Court in *Davis* rejected a petitioner’s argument that meaningful access to court “required providing funds or appointing counsel to indigent habeas petitioners,” and declined “to extend the [Bounds] holding” in Georgia. 246 Ga. at 201; *but cf. Portis v. Evans*, 249 Ga. 396, 398 (1982) (holding that visitation by an attorney unable to provide adequate legal assistance is not meaningful access to courts under *Bounds*). The dissent in *Davis* noted that although there was not yet a constitutional recognition of the right to counsel in habeas proceedings, there was also nothing preventing a court from deciding, on a case-by-case basis, to appoint counsel when the court saw fit.

**State Court Decisions Based on Court’s Inherent Authority**

The Georgia Supreme Court recognized the state’s history of judicial deference to the legislature when, for example, declining to extend court-appointed counsel to habeas petitions. *Dutton v. Willis*, 223 Ga. 209 (1967). The state supreme court indicated that the right to counsel for civil litigants should come not from “judicial fiat,” but instead from the legislature. *Gibson v. Turpin*, 270 Ga. 855, 862 (1999).

**E. Proceedings Involving Foreclosure of Security Interest in Vehicle**

**State Court Decisions Based on Court’s Inherent Authority**

The Georgia Court of Appeals summarily dismissed the idea of the right to counsel in foreclosure of a security interest in a vehicle, stating only that “[a] trial court lacks authority to appoint counsel to represent an indigent civil litigant absent clear statutory or constitutional authority allowing appointed counsel to be compensated from state or county funds . . . [the appellant] fails to cite any statutory or constitutional authority requiring or permitting payment of appointed counsel from state or county funds under the circumstances here.” *Stegeman v. Heritage Bank*, 695 S.E.2d 340 (Ga. App. 2010). The court in *Stegeman* did not address *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981) or *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Id.*
**Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally**

**Federal Statutes and Court Decisions Interpreting Statutes**

The federal Servicemembers Civil Relief Act (SCRA), which applies to each state\(^{11}\) and to all civil proceedings (including custody),\(^ {12}\) provides:

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


Additionally, 50 App. U.S.C. § 3931(d)(1), which also applies to all civil proceedings (including custody),\(^ {13}\) specifies that a service member previously granted a stay may apply for an additional stay based on a continuing inability to appear, while § 3931(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 Based on Court’s Inherent Authority**

The Georgia legislature has at times noted that Georgia courts retain the power to appoint counsel as each court sees fit, even if the appointment is not based on a constitutional right to counsel. For instance:

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\(^{11}\) 50 App. U.S.C.A. § 3931(a) states, “This Act [sections 501 to 515 and 516 to 597b of this Appendix] applies to... (2) each of the States, including the political subdivisions thereof...”

\(^{12}\) 50 App. U.S.C. § 3931(a) states, “This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.”

\(^{13}\) 50 App. U.S.C. § 3932(a) applies to “any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section-- (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding.”
The judges of the superior courts, as officials charged with the duty of administering justice, have the inherent power to take action necessary to ‘efficiently and completely . . . discharge those duties . . . .’ This power includes the ability to appoint counsel to represent indigent defendants, as was statutorily recognized in 1979 by the enactment of the Georgia Indigent Defense Act.


The problem, however, comes in with respect to payment of such attorneys. In _Dekalb County v. Adams_, 529 S.E.2d 610 (Ga. 2000), the Georgia Supreme Court noted:

> [R]egardless of the worthiness of the cause, a trial court cannot appoint counsel to represent an indigent civil litigant absent a clear state constitutional or statutory authority providing for payment out of State or county funds. While courts have the inherent authority to take action necessary to discharge their duties efficiently and completely, we know of no statute, case, or constitutional provision which would permit a trial judge to appoint counsel to a [civil] petitioner, to be paid out of state or county funds.

_Id._ at 612 (citations omitted). 14 Furthermore, _Sacandy_ found that the state program at issue in that case (one that forcibly appointed attorneys to be co-counsel in criminal cases) “is unenforceable insofar as it authorizes the appointment of counsel without any sort of compensation . . . .” 262 Ga. at 12; 15 see also _Weiner v. Fulton County_, 148 S.E.2d 143 (Ga. Ct. App. 1966) (finding that uncompensated appointment of an attorney is an unconstitutional taking).

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14 Because of its holding on a court’s inability to appoint absent clear authority for payment, the _Adams_ court declined “[t]he petitioner’s] invitation to enter ‘the intense debate over whether the imposition on lawyers of an enforceable obligation to perform . . . legal services violates the equal protection and due process provisions of our state and federal constitutions . . . or is otherwise immoral or imprudent.’”

15 In the more distant past, the court seemed more receptive to the idea of courts appointing attorneys without pay. _See Elam v. Johnson_, 48 Ga. 348 (1873), a case involving compensation for a criminal attorney, in which the court stated that lawyers have a professional duty “[n]ever to reject, for considerations personal to himself, the cause of the defenseless or oppressed.”