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

INDIANA

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## INDIANA

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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 mid-2017. The Directory does not seek to address all conceivable subsidiary issues in each jurisdiction, but some such issues were researched and addressed, including: notification of right to counsel; standards for waiver of right to counsel; standard of review on appeal for improper denial of counsel at trial; whether “counsel” for a child means a client-directed attorney or a “best interests” attorney/attorney ad litem; and federal court decisions finding a right to counsel. Similarly, the research did not exhaustively identify all law regarding the issue of compensation of appointed counsel in each jurisdiction, though discussion of such law does appear within some of the reports.

The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched. Users should conduct independent, jurisdiction-specific research both to confirm whether a case is published and to familiarize themselves with all rules relating to the citation and use of unpublished or unreported cases.

Acknowledgments

This Directory was a multi-year project of the ABA’s Standing Committee on Legal Aid and Indigent Defendants (SCLAID). We are indebted to our partner in this project, the National Coalition for a Civil Right to Counsel (NCCRC), for sharing the body of research that was adapted
to form the Directory’s reports. The *Acknowledgments*, at the Directory’s [home page](#), details additional specific contributions of the many individuals involved in this project.
Law Addressing Authorization or Requirement to Appoint Counsel in Specific Types of Civil Proceedings

1. SHELTER

Federal Statutes and Court Decisions Interpreting Statutes

The federal Fair Housing Act, contained within Title VIII of the Civil Rights Act of 1968, provides that “[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court...” 42 U.S.C. § 3613(a)(1)(A). Further, “[u]pon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may-- (1) appoint an attorney for such person....” 42 U.S.C. § 3613(b).

2. SUSTENANCE

State Statutes and Court Decisions Interpreting Statutes

An applicant for “township assistance” (previously called “poor relief”) who appeals the denial of benefits must be informed “of the availability of free legal counsel for the indigent.” Ind. Code § 12-20-15-6(b)(5). This likely means only providing the litigant a list of legal service organizations in the area.

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 not brought against the federal government. 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

Ind. Code § 12-10-3-22 guarantees counsel to indigent "endangered adults" (those who are physically or mentally incapacitated and threatened with battery, neglect, or exploitation) at hearings to determine whether they must receive protective services. For guardianship proceedings, Ind. Code § 29-3-5-1(c) specifies that, “[u]nless an alleged incapacitated person is already represented by counsel, the court may appoint an attorney to represent the incapacitated person.” Ind. Code § 29-3-8.5-1 states that “[a] court in a proceeding under this article may appoint a volunteer advocates for seniors program or a volunteer advocates for incapacitated adults program,” while Ind. Code § 29-3-8.5-7 adds that “[t]he court may appoint an attorney to represent a volunteer advocate for seniors or a volunteer advocate for incapacitated adults.”

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

Ind. Code § 12-26-2-5(c) provides judges with discretion to appoint counsel for involuntary treatment commitment and § 12-26-8-3 covers discretionary appointment for commitments of children. Ind. Code § 12-26-2-2(b)(4) broadly states that in certain mental health proceedings enumerated in the statute (90-day involuntary commitment, “regular
commitment,” discharge, and review of commitment) individuals have a right to be “represented by counsel.” One court construed the predecessor statute to § 12-26-2-2(b)(4) (which contained similar language about the right to be “represented by counsel”) to imply a right to appointed counsel. F. J. v. State, 411 N.E.2d 372, 384 (Ind. Ct. App. 1980) (“F.J. was at no time told she could have an attorney appointed for her, despite the language of [the statute] giving her the right to be represented by counsel.”).

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

In F. J. v. State, 411 N.E.2d 372 (Ind. App. 1980), a case regarding the right to counsel in civil commitment cases, the court quoted and relied on the language from Vitek v. Jones, 445 U.S. 480 (1980) (regarding due process right to counsel for inmate transferred to mental health facility) regarding the requirement of “[a]vailability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own”, even though Vitek's holding about counsel did not receive a majority of votes (the 5th vote recognized the need for a "qualified representative", but not necessarily counsel). In In re Marriage of Stariha, 509 N.E.2d 1117, 1119, 1987 Ind. App. LEXIS 2786, *5 (Ind. Ct. App. 1987), the court cited to F.J. as evidence that “it is a defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases which triggers the right to appointed counsel. To meet due process requirements, therefore, appointed counsel has been required in certain circumstances, regardless of whether the action is labeled criminal or civil.” Finally, in GPH v. Giles, 578 N.E.2d 729 (Ind. App. 1991), the court held that there was no due process right to appointed counsel at the preliminary hearing for a temporary commitment. In explaining this, the court seemed to reaffirm that there is in fact a constitutional right to counsel generally for civil commitment cases:

We deal with whether the trial court violated GPH's constitutional right to assistance of counsel when the court allowed GPH to appear at the preliminary hearing to determine probable cause without counsel ... In deciding whether the emergency detention statute unconstitutionally denies GPH of his right to assistance of counsel, we must determine whether a state, in carrying out its parens patriae role, may limit a mental patient's constitutional rights ... The state, in exercising its parens patriae role and for the finite period specified in the emergency detention statute, may limit an alleged mental patient's constitutional right to counsel.

**D. Sex Offender Proceedings**

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

State Statutes and Court Decisions Interpreting Statutes

Regarding quarantine, Ind. Code § 16-41-9-1.5(s) provides that “[t]he court shall appoint an attorney to represent an indigent individual in an action brought under this chapter or under IC 16-41-6 [testing for communicable disease]. If funds to pay for the court appointed attorney are not available from any other source, the state department may use the proceeds of a grant or loan to reimburse the county, state, or attorney for the costs of representation.”

4. CHILD CUSTODY

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

State Statutes and Court Decisions Interpreting Statutes

Indiana guarantees counsel to parents in abuse/neglect and termination of parental rights proceedings. Ind. Code § 31-34-4-6 (indigent parent accused of abuse/neglect has right to appointed counsel upon request); In re G.P., 4 N.E.3d 1158 (Ind. 2014) (clarifying that § 31-34-4-6 provides right to counsel for parents in abuse/neglect cases; § 31–32–4–3, which provides for discretionary appointment in CHINS cases, does not override § 31-34-4-6, but rather “give[s] the trial court discretion to appoint counsel, for example, to a parent who perhaps fails to meet the statutory requirements for being indigent but for whom appointed counsel might still be appropriate. Or a trial court could appoint counsel to serve as stand-by counsel for the parent who decides to proceed pro se”); Ind. Code §§ 31-35-1-12(7) (right to appointed counsel “throughout any proceedings to terminate the parent-child relationship against the will of the parents”), 31-32-4-1 (“[t]he following persons are entitled to be represented by counsel: . . . (2) [a] parent, in a proceeding to terminate the parent-child relationship . . . “), 31-32-4-3 (“If: (1) a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent the parent without a conflict of interest; and (2) the parent has not lawfully waived the parent’s right to counsel . . . the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time.”) The Indiana Supreme Court ruled in September 2010 that the right extends to appeals as a matter of statutory construction, reversing the Indiana Court of Appeals on that point. In re I.B., 933 N.E.2d 1264 (Ind. 2010). Ind. Code § 31-32-4-3(a) also provides for mandatory appointment of counsel if a parent in a termination proceeding does not have an attorney who may represent the parent without a conflict of interest and the parent has not waived right to counsel under Ind. Code § 31-32-5. Additionally, § 31-32-4-3 provides that the court “may appoint counsel” for parents in “any other proceeding.” Ind. Code § 31-32-4-3(b).
Federal Statutes and Court Decisions Interpreting Statutes

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

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. 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.”


State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In the Matter of E.P. and J.P. v. Marion County Office of Family and Children, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995), an indigent mother argued that she had a Fourteenth Amendment right to counsel in a CHINS case. Applying the U.S. Supreme Court’s decision in Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the court conceded the mother’s interests were substantial but held that the state’s interest in protecting the child was also “significant” (although it did not outweigh the interests of the mother). It then held that there was a risk of erroneous deprivation that would only increase if counsel was not present, but that “an erroneous CHINS adjudication has a far less disastrous impact on the parent-child relationship,” and therefore, CHINS cases did not outweigh the Lassiter presumption against counsel except where physical liberty is at stake. Id. at 1032.

A handful of other cases have addressed the Fourteenth Amendment right to counsel in the CHINS context and found no such right. See In re L.B., 889 N.E.2d 326 (Ind. Ct. App. 2008) (noting that legislature made counsel for parent mandatory in TPR proceeding, but stating that

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1 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.
legislature left it discretionary for other proceedings,\(^2\) which court equates to case-by-case test mandated by *Lassiter*; court finds no abuse of discretion in instant case); *In re M.M.*, 733 N.E.2d 6, 10 (Ind. Ct. App. 2000) ("unlike a termination proceeding, or a paternity proceeding, where an erroneous result obviously would be disastrous, an erroneous CHINS adjudication has a far less disastrous impact on the parent-child relationship. Even assuming without deciding that the risk of an erroneous CHINS adjudication is great when an indigent parent has no counsel to assist her through the various stages of the proceedings, we do not view the risk as outweighing the presumption against court-appointed counsel.")

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

**State Statutes and Court Decisions Interpreting Statutes**

In *In re McClure*, 549 N.E.2d 392 (Ind. App. 1990), the court of appeals extended the reach of § 31-35-1-12 to private adoptions, emphasizing that

While there is no express statutory provision requiring appointed counsel in adoption proceedings, an order granting a petition for adoption does indeed terminate a parent's rights . . . we must conclude the legislature impliedly intended that any proceeding that terminates a right so fundamental requires the right to counsel as contemplated by the termination statute. Such a right can not be washed away by a tide of indifference to legislative intent.


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

In *In re McClure*, 549 N.E.2d 392 (Ind. App. 1990), the court of appeals held that a particular non-consenting non-custodial parent had a right to counsel during private adoption proceedings pursuant to the Fourteenth Amendment, given the facts of the case. *See id.* at 394-95 (noting such right, "depend[s] upon factors such as the strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity."). The court pointed out that “[u]nlike the evidence presented in *Lassiter*, which demonstrated that the respondent-mother expressly declined to appear at a custody hearing and did not take the trouble to consult with her retained attorney after being notified of the proceedings, Forest took all possible necessary steps to prevent the termination of his parental rights of Benjamin.” *Id.* at 395. *See also In re Adoption of K.W.*, 21 N.E.3d 96 (Ind. App. 2014) (stating that “Father

\(^2\) The court seemingly ignored the existence of Ind. Code § 31-34-4-6.
argues that the trial court violated his due process rights by ignoring his request for appointed counsel to represent him in Grandparents' adoption proceeding. We agree”, but adding that legislature had provided a statutory right to counsel for parents, and relying on statute as evidence that the father’s right to counsel had been violated; Keen v. Marion County Dept. of Public Welfare, 523 N.E.2d 452, 455 (Ind. Ct. App. 1988) (in state-initiated termination of parental rights case, court cites to Lassiter for proposition that “[u]nlike the constitutional right to counsel in criminal proceedings, the due process clause does not mandate the right to counsel in all termination proceedings but is determined on a case by case basis;” court apparently does not address state constitution, finds that mother did not attempt to overcome Lassiter presumption and so only statutory right to counsel applies, holds that “the stringent requirements prescribed for criminal cases are not required,” and holds that mother waived her right to appointed counsel pursuant to this lighter standard).

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

State Statutes and Court Decisions Interpreting Statutes

Ind. Code § 31-32-4-2(b) provides that the court “may appoint counsel” for children in any juvenile proceedings.

Federal Statutes and Court Decisions Interpreting Statutes

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

The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.”


3 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.
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

In In re McClure, 549 N.E.2d 392 (Ind. App. 1990), the court of appeals extended the reach of § 31-35-1-12 to provide a right to counsel for parents in private adoption actions, emphasizing that

While there is no express statutory provision requiring appointed counsel in adoption proceedings, an order granting a petition for adoption does indeed terminate a parent's rights ... we must conclude the legislature impliedly intended that any proceeding that terminates a right so fundamental requires the right to counsel as contemplated by the termination statute. Such a right can not be washed away by a tide of indifference to legislative intent.

Id. at 394. See also Taylor v. Scott, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991) (reaffirming McClure); In re Adoption of G.W.B., 776 N.E.2d 952, 954 (Ind. Ct. App. 2002) (same). These rulings may mean that the discretionary power to appoint counsel for children in § 31-32-4-2 applies to adoption proceedings.

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection
In re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987), the court found a 14th Amendment right to counsel in cases involving contempt for failure to pay child support, due to the risk of incarceration, regardless of whether the plaintiff is the state or a private party. The court also concluded that there was sufficient state action so as to trigger constitutional guarantees. The court then quoted from a Connecticut case to state, “It is crystal clear that a person may not be incarcerated by the state without first being advised of his constitutional right to counsel, and, if indigent, without having counsel appointed to represent him, whether the contempt proceedings are initiated by a private person or the state.” Id (quoting Dube v. Lopes, 481 A.2d 1293 (Ct. 1984). The court then concluded, “Clearly then, under Lassiter and its federal and state progeny, an indigent defendant facing possible incarceration for contempt for failure to pay child support has a due process right to appointed counsel and a right to be informed of the same. Id at 1121. The Stariha holding about the right applying regardless of whether the plaintiff is the state was cited in Marks v. Tolliver, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005).

In Branum v. State, 822 N.E.2d 1102, 1104 (Ind. Ct. App. 2005), the court relied on Stariha for the right to counsel in privately initiated civil contempt cases, but it also stated:

Indiana has long recognized a person's right to have counsel appointed under such circumstances. As Chief Justice Shepard has observed, “more than a century before Gideon v. Wainwright was decided,” in Webb v. Baird, 6 Ind. 13, 15, 6 Ind. 11 (1854), our supreme court recognized an indigent defendant's right to an attorney at public expense. See Randall T. Shepard, Second Wind for the Indiana Bill of Rights, 22 IND. L. REV. 575, 578 (1989). In Webb, the court stated:

It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debared of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defence of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.

4 In Stariha, the court held, “It is difficult to imagine how the present case does not involve state action. Admittedly, Rebecca initiated this action as a private individual. However, the trial court found John in contempt for failure to pay child support pursuant to Rebecca’s motion and sentenced him to thirty days. Certainly, John's incarceration, depriving him of his physical liberty for thirty days, amounted to state action. The court enforced a contempt proceeding that was initiated privately .... Here, there is a definite nexus between Rebecca's complaint for failure to pay child support and the trial court’s finding of contempt and incarceration of John for the same activity.” 509 N.E.2d at 1122.
This reliance on *Webb* could be seen as an attempt to ground the right to counsel in the state constitution as well as the federal constitution, but the quote from *Webb* was made in the context of a criminal proceeding, so its applicability to civil contempt may be questionable.

Finally, in *Moore v. Moore*, 11 N.E.3d 980 (Ind. Ct. App. 2014), a case that came after *Turner v. Rogers*, 564 U.S. 431 (2011) (no right to appointed counsel under Fourteenth Amendment in civil contempt cases, at least where private party initiates contempt), the court, without mentioning Turner at all, relied on *Stariha* for the right to appointed counsel for child support contempt and *Marks* for the proposition that the right attaches even where a private person initiates the contempt.

### B. Paternity Proceedings

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

The Indiana Court of Appeals has found a right to counsel based on the Fourteenth Amendment in the paternity context. *Kennedy v. Wood*, 439 N.E.2d 1367, 1372 (Ind. Ct. App. 1982) (if paternity initiated by state due to mother receiving child support, court must inform respondent of right to appointed counsel under Fourteenth Amendment; court finds no direct liberty threat but notes potential financial obligations and criminal implications of putative father, interest of child in having accurate determination, and increased risk of erroneous deprivation due to the fact that “by intervening heavily on behalf of one side, the State has upset the balance of a traditionally private dispute;” while blood test simplifies the paternity process to some degree, “[a]n indigent defendant’s right to a free blood grouping test may be rendered meaningless without counsel to advise him of the right to demand such a test, to explain its significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence”). The court also concluded that there was sufficient state action in the case so as to trigger constitutional guarantees due to the fact that the mother was receiving public assistance.5

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

5 In *Wood*, the court held: “Because Wood’s child was a recipient of this public assistance, she was required under Indiana law to name the putative father and to cooperate with the welfare department in establishing paternity or risk the loss of her assistance … Thus, the prosecuting attorney filed the paternity action in Wood’s name and the State agency became the recipient of the monthly support payments to be made once judgment was entered … In addition, enforcement of this judgment has been made mandatory upon the State by federal regulations. … ‘State action’ obviously pervades this case; therefore, the constitutional obligation is considered within this context rather than the context of civil litigation between private parties.” *Id.* at 1369.
State Statutes and Court Decisions Interpreting Statutes

Ind. Code § 16-34-2-4(e) provides for mandatory appointed counsel for minors paid for by the county in cases seeking bypass of parental consent for abortion (unless the minor is already represented), including the appeal.

Federal Court Decisions Addressing Constitutional Due Process or Equal Protection

A prior version of the judicial bypass statute made the appointment of counsel for the minor discretionary. In Indiana Planned Parenthood Affiliates Ass’n, Inc. v. Pearson, 716 F.2d 1127 (7th Cir 1983), the Seventh Circuit held that the discretionary appointment statute violated due process. The court found that minors cannot afford to hire counsel and do not know how to hire counsel even if they can afford it, that private attorneys won't take judicial bypass cases because there is no financial incentive, and that the proceedings are not as simple as they might initially seem. Id. at 1137-38.

D. Proceedings to Determine Release of Mental Health Records

Ind. Code § 16-39-3-5 recognizes a right to appointed counsel for indigent mental hospital inpatients at hearings to determine the release of their mental health records for investigative purposes.

E. Marriage Dissolution/Divorce Proceedings

State Statutes and Court Decisions Interpreting Statutes

Ind. Code § 34-10-1-2 authorizes the discretionary appointment of counsel in civil proceedings under the following circumstances:

(b) If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court: (1) shall admit the applicant to prosecute or defend as an indigent person; and (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.

(c) The factors that a court may consider under subsection (b)(2) include the following: (1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense. (2) The applicant's ability to investigate and present the applicant's claims or
defenses without an attorney, given the type and complexity of the facts and legal issues in the action.

(d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following: (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application. (2) The applicant is unlikely to prevail on the applicant’s claim or defense.

Ind. Code §§ 34-10-1-2(b) - 2(d).

In interpreting Ind. Code § 34-10-1-2, the Indiana Court of Appeals found that if the type of proceeding in question is of a type that is often litigated by non-indigent persons without counsel, then even an indigent person has "sufficient means" to proceed without appointed counsel. *Sabo v. Sabo*, 812 N.E.2d 238, 242 (Ind. Ct. App. 2004). In *Sabo v. Sabo*, an incarcerated man's wife petitioned for dissolution of marriage, and was granted that dissolution as well as an award of $5,640.95 (the amount husband had appropriated from her trust fund) and legal expenses. Noting that a prisoner may not receive appointed counsel under section 34-10-1-2 unless a court determines he is "without sufficient means," the court in *Sabo* explained that "if an action is of the type that is often handled by persons who are not indigent without the presence or assistance of counsel, the [trial] court may find that even an indigent applicant has 'sufficient means' to proceed with appointed counsel." *Id.* at 244. Under this analysis, if a court determines that an action is commonly engaged in without counsel, it need not even approach the additional steps of determining indigence, or examining any "extraordinary" factors which might militate in favor of appointment. The court further explained that there is no "blanket [category] of cases in which counsel should never be appointed. Rather, the [trial] court should look to the particular issues presented in the action. . . ." *Id.* The *Sabo* court stated that, because “these types of dissolution proceedings are often handled by non-indigent persons without the assistance of counsel,” the court was not convinced that the applicant, without the presence of counsel, “lacked sufficient means to prosecute his action.” *Id.* at 245.

**F. Proceedings Involving Claims by and Against Prisoners**

**State Statutes and Court Decisions Interpreting Statutes**

Ind. Code § 34-10-1-2 authorizes the discretionary appointment of counsel in civil proceedings under the following circumstances:

(b) If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the
court: (1) shall admit the applicant to prosecute or defend as an indigent person; and (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.

(c) The factors that a court may consider under subsection (b)(2) include the following: (1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense. (2) The applicant's ability to investigate and present the applicant's claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.

(d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following: (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application. (2) The applicant is unlikely to prevail on the applicant's claim or defense.

Ind. Code §§ 34-10-1-2(b) - 2(d).

In *Murfitt v. Murfitt*, 809 N.E.2d 332, 334-35 (Ind. Ct. App. 2004), the Court of Appeals shed some light on what may qualify as an "exceptional circumstance" permitting the appointment of counsel as contemplated by section 34-10-1-2(b)(2). In *Murfitt*, a prisoner appealed pro se from the trial court's order distributing marital property to his wife upon the dissolution of their marriage, after the court first denied said prisoner's request for an alternative hearing method so that he could take part in the dissolution proceeding, and then denied further motions "for appointment of counsel as an indigent person," and for transport. *Id.* at 333. The Court of Appeals, in finding reversible error, leaned on the notion that under Article I section 12 of the Indiana Constitution, a prisoner is entitled to bring civil actions, and this includes the right to present one's claim to the trial court. *Id.* at 334.

The court implicitly suggested that where a court refuses to permit access to the courts by way of alternate forms of hearing (namely teleconference), the court may not also then use the restrictive language of section 34-10-1-2 to prevent that applicant's interests from being represented at all. It is important to note that the court did not state that the denial of counsel was a violation of section 34-10-1-2, but rather "that Mark's constitutional rights were violated," because "he was not given the opportunity to present evidence or challenge Vickie's credibility." *Id.* at 334-35. While it is clear the court took issue with the denial of both an alternative hearing method and counsel, it is unclear from the decision that the actual denial of counsel was an abuse of the court's discretion within the wording of section 34-10-1-2. *Id*

In *Smith v. Indiana Dept. of Correction*, 871 N.E.2d 975, 986-87 (Ind. Ct. App. 2007), the court interpreted the "likely to prevail" language of section 34-10-1-2. Smith, a prisoner,
appealed a trial court's judgment on the pleadings against his claims for negligence and violation of the cruel and unusual punishment provisions of the Indiana constitution, and claimed the trial court had erred in declining to appoint him counsel. *Smith*, 871 N.E.2d at 980-81. In his complaint, Smith alleged that illegal disciplinary methods were used against him, including mace and painful restraints. *Id.* at 981. The Department of Corrections filed a motion for judgment on the pleadings, which the trial court granted. *Id.* The Court of Appeals, considering the case on the merits, determined that these disciplinary methods did not rise to the level of "unnecessary rigor," both because the court determined that the level of harm was not particularly severe, and it was inflicted for a valid disciplinary reason. *Id.* at 984-85. The Court of Appeals then used its own decision that no violations had occurred to assert that Smith's claim was "unlikely to prevail," and that, therefore, the trial court had not abused its discretion in denying Smith's request for appointment of counsel. *Id.* at 986-87.
Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

State Statutes and Court Decisions Interpreting Statutes

Ind. Code § 34-10-1-2 authorizes the discretionary appointment of counsel in all civil proceedings under certain circumstances, as follows:

(a) This section may not be construed to prohibit a court from participating in a pro bono legal services program or other program that provides legal services to litigants: (1) without charge; or (2) at a reduced fee.

(b) If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court: (1) shall admit the applicant to prosecute or defend as an indigent person; and (2) may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.

(c) The factors that a court may consider under subsection (b)(2) include the following: (1) The likelihood of the applicant prevailing on the merits of the applicant's claim or defense. (2) The applicant's ability to investigate and present the applicant's claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.

(d) The court shall deny an application made under section 1 of this chapter if the court determines any of the following: (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application. (2) The applicant is unlikely to prevail on the applicant's claim or defense.

(e) All officers required to prosecute or defend the action shall do their duty in the case without taking any fee or reward from the indigent person.

(f) The reasonable attorney's fees and expenses of an attorney appointed to represent an applicant under section 1 of this chapter shall be paid from the money appropriated to the court: (1) appointing the attorney, if the action was not transferred to another county; or (2) from which the action was transferred, if the action was transferred to another county.
Ind. Code § 34-10-1-2.

Several cases interpret the term "sufficient means" used in Ind. Code § 34-10-1-2(b), holding that apparent indigence does not mean a party lacks "sufficient means" to secure representation. Rather, a court must examine a petitioner's means alongside the type of action before it. If the action is often litigated by non-indigent persons without counsel, then even an indigent person has "sufficient means" to proceed without appointed counsel. Sabo v. Sabo, 812 N.E.2d 238, 242 (Ind. Ct. App. 2004) (finding that, since marriage dissolution proceedings are often handled by non-indigent persons without the assistance of counsel, applicant did not lack sufficient means to proceed without counsel). In Maust v. Estate of Bair ex rel. Bair, 859 N.E.2d 779 (Ind. Ct. App. 2007), the court of appeals added that a trial court has no obligation under Ind. Code § 34-10-1-1 or Ind. Code § 34-10-1-2 to hold an indigency hearing.

A second set of cases, all ruling on requests by incarcerated persons for civil counsel, confirm that a court does not abuse its discretion in refusing to appoint counsel pursuant to Ind. Code § 34-10-1-2 where the court determines a claim is unlikely to succeed. Smith v. Indiana Dept. of Correction, 871 N.E.2d 975, 986-87 (Ind. Ct. App. 2007) (no abuse of discretion where trial court denied request for appointed counsel to assist prisoner in claims for negligence and violation of state constitutional cruel and unusual punishment provisions, based on determination by appeals court that no violations had occurred and, as a result, such claims were “unlikely to prevail”), discussed supra Part 5.F; Parks v. Madison County, 783 N.E.2d 711 (Ind. Ct. App. 2002). Similar reasoning prevents courts from appointing counsel on actions that rehash previously litigated claims. Parks v. State, 789 N.E.2d 40, 44 (Ind. Ct. App. 2003).

A final strain of section 34-10-1-2 cases holds that a court may not appoint counsel to an indigent litigant who has not made "diligent efforts" to retain her own counsel, as per the requirement of 34-10-1-2(d)(1). Smith v. Harris, 861 N.E.2d 384, 386 (Ind. Ct. App. 2007); Beard v. Dominguez, 847 N.E.2d 1054 (Ind. Ct. App. 2006). In Smith v. Harris, the court denied an application for counsel, in part, for lack of "diligent efforts" to obtain counsel. 861 N.E.2d at 386. The court made clear that it will not make the applicant's argument on her behalf, and that the affirmative showing of any effort whatsoever is necessary first, before a judge can begin to determine whether that effort is 'diligent' within the wording of the statute. Id. The applicant in Smith had failed to present any record at all of such efforts, so the Court upheld the trial court's refusal to appoint counsel. Id. Further complicating matters, the court of review admitted that it viewed the applicant with some measure of prejudice, having "recently been inundated with appeals from [him] . . .," three of which the court had dismissed upon a determination that they were "frivolous or one[s] upon which relief cannot be granted." Id. at 385. While the ruling does not explicitly define what may in fact constitute a diligent effort, it does reaffirm that the burden of production as to diligence in her effort is on the applicant.
As discussed supra Part 5.F, in *Murfitt v. Murfitt*, 809 N.E.2d 332, 334-35 (Ind. Ct. App. 2004), the Court of Appeals shed some light on what *may* qualify as an "exceptional circumstance" permitting the appointment of counsel as contemplated by section 34-10-1-2(b)(2).

**Federal Statutes and Court Decisions Interpreting Statutes**

The federal Servicemembers Civil Relief Act (SCRA), which applies to each state and to all civil proceedings (including custody), 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 U.S.C. § 3932(d)(1), which also applies to all civil proceedings (including custody), specifies that a servicemember previously granted a stay may apply for an additional stay based on a continuing inability to appear, while § 3932(d)(2) states: “If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.”

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

Indiana Trial Procedure Rule 60.5 states that Indiana courts can seek funds “necessary for the operation of the court or court-related functions.” In *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001), the Indiana Supreme Court relied in part on Rule 60.5 for its holding that Indiana courts have the authority “to appoint and require payment of such personnel as the functions of the court may require.” *Sholes v. Sholes*, 760 N.E.2d 156, 164 (Ind. 2001). The court made it

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6 50 U.S.C. § 3912(a) states, “This Act [50 U.S.C. §§ 3901 et seq.] applies to-- ...(2) each of the States, including the political subdivisions thereof…”

7 50 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.”

8 50 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.”
clear that in criminal cases, where counsel is constitutionally required, “courts would be required by the Constitution to exercise their power under Trial Rule 60.5 to direct payment of counsel,” even if the state were not already doing so. Where a right to counsel is not constitutionally based (such as appointments under Ind. Code § 34-10-1-2), the courts weighing the use of Rule 60.5 must balance other factors against the need for appointed counsel, such as “if any specific fiscal or other governmental interests [would be] severely and adversely affected by the payment” or if there are “overriding considerations that would prevent expenditure of public funds for appointed counsel.”

**State Court Decisions Addressing Court’s Inherent Authority**

In *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001), the court considered the question of compensation under an earlier version of Ind. Code § 34-10-1-2 that both required appointment of counsel in all civil cases and also specified that the appointed attorney was to work without being paid by the indigent person. The court noted that “Article I, Section 21 of the Indiana Constitution provides that ‘[n]o person’s particular services shall be demanded, without just compensation,’” and cited to *Board of Com’rs of Howard County v. Pollard*, 55 N.E. 87 (Ind. 1899), as support that it was unconstitutional to require attorneys to work for free. *Id.* at 162. The court noted that the Indiana Oath of Attorneys required attorneys to not reject the cases of the “defenseless or oppressed,” and that the Indiana Rules of Professional Conduct strongly urged pro bono work for the indigent. *Id.* at 163. However, the court nonetheless broke with *Pollard’s* optimism that the bar would voluntarily shoulder the entire load and realized it would have to draw funds from somewhere. The *Sholes* court then noted that while the language of the statute prohibited the attorney being paid by the indigent person, it did not prevent the attorney being paid by someone else. And it disagreed with *Pollard’s* conclusion that it lacked the inherent authority to draw the funds from the county. Citing from its prior case law, the court held that it had the authority and power "to appoint and require payment of such personnel as the functions of the court may require,” and observed that “[t]oday, the source of that power is found in Indiana Trial Rule 60.5,” which states that Indiana courts can seek funds “necessary for the operation of the court or court-related functions.” *Id.* at 164.