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

KANSAS

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**KANSAS**

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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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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 . . . appoint an attorney for such person[.]” 42 U.S.C. § 3613(b)(1).

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 Sys., 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. Circuit observed:

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

A. Domestic Violence Protection Order Proceedings

State Statutes and Court Decisions Interpreting Statutes

Although Kan. Stat. Ann. § 60-3106 says that in protection from abuse (domestic violence) proceedings, “the court shall advise the parties of the right to be represented by counsel,” there is no mention of appointment of counsel for those unable to afford it.

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

The Kansas Probate Code requires courts to appoint counsel to represent the subject of a petition to appoint a guardian or conservator, Kan. Stat. Ann. §§ 59-3063(a)(3), 59-3077(c)(3), and grants courts the discretion to appoint counsel to represent the ward or conservatee in connection with certain related proceedings, §§ 59-3080 to -3082, -3084 to -3088. Notably, the statutes do not require indigency as a prerequisite to appointment. See, e.g., §§ 59-3063(a)(3), -3080 to -3088 (conservatorship proceedings). The court also has discretion to appoint counsel for a termination of guardianship. § 59-3091(f)(1).

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

Persons seeking to commit another person for mental illness, and the proposed patient have the right to representation at a hearing on any request for a temporary custody order pending trial on the petition for involuntary commitment. Kan. Stat. Ann. § 59-2959(b) -(c). Additionally, both parties have the right to representation at trial upon the petition for involuntary commitment. § 59-2965(e). Persons seeking to commit another for alcohol or drug dependency and the proposed patient both have a right to counsel, §§ 59-29b59(b)-(c) (temporary custody order), 59-29b65(e) (trial on the petition for involuntary commitment). For both the mental illness and alcohol/drug dependency commitment procedures, if the petitioner is not represented by counsel, it is the county or district attorney who represents the petitioner. §§ 59-2959(c), 59-29b59(c). In contrast, the proposed patient is represented by “an attorney.” §§ 59-2959(b), 59-29b59(b).
Additionally, persons subject to commitment to a state security hospital pursuant to § 22-3428 or commitment for treatment of a mental illness pursuant to § 59-2965 are entitled to the assistance of counsel at every stage of a habeas corpus proceeding brought by such person, subject to all of the provisions of § 22-4503. If a court determines that the defendant or other person subject to § 22-4503(a) is unable to employ counsel, the court must appoint counsel to represent the defendant. § 22-4503(c).¹

Notably, some of these statutes do not require indigency as a prerequisite to appointment. See, e.g., §§ 59-2959 (civil commitment for mental illness), 59-29b59 (civil commitment based on alcohol or drug dependency).

D. Sex Offender Proceedings

State Statutes and Court Decisions Interpreting Statutes

In all stages of proceedings to civilly commit a person as a sexually violent predator under the Kansas Sexually Violent Predators Act (KSVPA), Kan. Stat. Ann. § 59-29a01 et seq., all such persons “shall be entitled to the assistance of counsel . . . and if the person is indigent, the court shall appoint counsel to assist such person.” § 59-29a06(b). However, the Kansas Supreme Court has stated:

[T]he conclusion that K.S.A. 59–29a06(b) establishes a statutory right to counsel is diminished by K.S.A. 59–29a06(e), which follows up the recitation of that requirement by stating “[t]he provisions of this section are not jurisdictional, and failure to comply with such provisions in no way prevents the attorney general from proceeding against a person otherwise subject to the [KSVPA].” (Emphasis added.) Arguably, this language could be read to mean that the failure to comply with the statute regarding assistance of counsel is not a barrier to proceeding against a person under the KSVPA. If so, the provision for counsel in subsection (b) is made less certain by the subsequent subsection (e) in the same statute.

_In re Ontiberos_, 287 P.3d 855, 863-65 (Kan. 2012) (finding constitutional right to counsel in sexually violent predator confinement proceedings owing to problems with statutory right).

As of June 2017, the KSVPA was amended, bringing three changes to the right to counsel.² First, while a committed person has always had “a right to have an attorney represent the person” at the annual review hearing to show probable cause for entitlement to transitional

¹ This habeas right to counsel apparently does not extend to commitments related to alcohol/substance abuse.

release, Kan. Stat. Ann. § 59-29a08(e) (emphasis added), this simply appears to mean that an individual’s *private* (i.e., non-appointed) attorney cannot be *prevented* from representing the individual at the hearing. Following the amendment, however, a new subsection of the transitional release statute now provides that “[f]or the purposes of this section, if the person is indigent and without counsel, the court shall *appoint* counsel to assist such person,” § 59-29a08(l) (emphasis added).\(^3\) Second, whereas the statute previously stated that, upon showing probable cause, a person was “entitled to the benefit of all constitutional protections” at the transitional release hearing “that were afforded . . . pursuant to” § 59-29a06, this has now been clarified to state that a person is “entitled to the assistance of counsel.” § 59-29a08(g). Third, during transitional release, a committed person has the right to appointed counsel to show probable cause for entitlement to conditional release, see § 59-29a18(j), and a right to counsel at the conditional release hearing. § 59-29a18(g).

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

In *Merryfield v. State*, the Kansas Court of Appeals held that the failure to provide appointed counsel for persons challenging the quality of their treatment under the Kansas Sexual Predator Treatment Program was a violation of both due process and equal protection, where such claims are “not subject to summary dismissal.” 241 P.3d 573, 578 (Kan. Ct. App. 2010). The petitioner had brought a habeas corpus petition alleging that the facility in which he had been confined for over a decade did not provide constitutionally adequate care, and challenged the training of the staff and some of their methods. *Id.* at 579-76. The court commented that ordinarily there is not a right to counsel in habeas proceedings because such proceedings are civil (intended for treatment, not punishment) and are usually a collateral attack on a proceeding (the original criminal trial) at which the defendant had a right to counsel. *Id.* at 579. The sexual predator treatment confinement, however, was not related to the petitioner’s original conviction but rather was for treatment, and therefore his habeas petition was not a collateral attack. *Id.* But even beyond that, he was not challenging the fact that he was confined (thus distinguishing his case from *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency)), but rather the conditions of such confinement, which made his claim all the more unique. *Id.*

The court relied on the strength of the petitioner’s liberty interest as well as cases from other state and federal courts in order to find a due process right to counsel in such

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\(^3\) See *In re Zishka*, 343 P.3d 558 (Kan. App. 2015) (reversing sexually violent person commitment review hearing decision where person was not appointed counsel). But Cf. *Johnson v. Bruffett*, 394 P.3d 154 (Kan. Ct. App. May 12, 2017) (per curiam) (unpublished) (stating that committed individual did not have statutory right to counsel under KSVPA for claim that hospital staff improperly seized individual’s property because such claim “is not the kind of proceeding that would be resolved under the provisions of the KSVPA, as it does not have bearing on the determination that [the individual] is a sexually violent predator or on his continuing mental condition under the annual review process.”).
proceedings. *Id.* It stated that the petitioner “contends—with sufficient basis to warrant an evidentiary hearing—that the treatment provided to him is so ineffective that it could never give him the help he would need to regain his freedom” and that such a person “must be entitled to the assistance of counsel in the resolution of such substantial claims.” *Id.* It also held that even under a rational basis analysis, the statutory scheme flunked equal protection, given that Kansas provided counsel to other civilly committed individuals. *Id.* at 580. The court explained that while the state had sufficient reasons for treating sexually violent people differently from other civil committees in terms of treatment approach, it did not have a sufficient reason for treating them differently in terms of provision of counsel. *Id.* It concluded that “[t]here is no rational basis for making it fundamentally more difficult for those committed to the sexual predator treatment program to seek court redress for unconstitutional conduct—including conduct that suggests the constitutionality of the entire program may be questioned—than other civilly committed individuals or inmates.” *Id.*

Applying Merryfield, the Court of Appeals held that a confined person had a constitutional right to counsel in a challenge to search and seizure of his property because his claims survived summary dismissal. *Johnson v. Bruffett*, 394 P.3d 154 (Kan. App. May 12 2017). The court examined whether summary dismissal had occurred in the instant case and explained that “[T]he court based its ruling not just on the pleadings filed, but on the evidence and testimony presented at the telephone hearing. In doing so, the court made credibility findings. For all of these reasons, we necessarily conclude that the court’s ruling was not a summary dismissal. As such, Johnson was legally entitled to have counsel represent him at the January 8, 2015, hearing.” The court then reversed and remanded for further proceedings.

Kansas courts also have considered the constitutional right to counsel for sexually violent predator confinement proceedings. In *In re Ontiberos*, the court of appeals stated that “one of the significant characteristics of actions under the Kansas Sexually Violent Predator Act is that they are civil in nature. . . . Therefore, respondents resisting commitment do not have a constitutional right to counsel but do have a statutory right.” 247 P.3d 686, 689 (Kan. Ct. App. 2011) (emphasis in original) (citation omitted). However, on appeal, the Kansas Supreme Court reversed and found a constitutional right. 287 P.3d at 865. The high court stated that the Court of Appeals had erred in relying on prior precedent related to the right to counsel in collateral attacks on criminal judgments, because in such proceedings the defendants had a Sixth Amendment right to counsel in the original criminal proceeding, whereas the sexually violent predator proceeding was an original proceeding. *Id.* at 863-64. The court then applied the Mathews v. Eldridge, 424 U.S. 319 (1976), test, and while it acknowledged the Supreme Court’s decision in *Turner v. Rogers*, 564 U.S. 431 (2011), it found more applicability in *Vitek v. Jones*, 445 U.S. 480 (1980) (finding that prisoner transferred involuntarily to mental health facility had right to “independent assistance”). *Id.* at 864. It then looked at the interest at stake as compared to *Vitek*:
It is difficult to conceive of a stronger liberty interest because Ontiberos’ confinement has the potential of being indefinite and it includes participation in a sex offender treatment program while committed to state custody. Ontiberos’ interest is certainly greater than the prisoner’s interest in Vitek because Ontiberos would be free from state custody were it not for the KSVPA proceeding, whereas Vitek would have been transferred back to prison.

Id. at 865. The court then found that the risk of error was lower because of several procedural protections, but pointed out that Turner emphasized the importance of whether the state is a party and/or represented by counsel, as is the case in the sexually violent person proceedings. Id. Finally, the court concluded that “[t]he burden of providing counsel is small when compared to the substantial liberty issue at risk here.” Id. The court added that along with the right to counsel came a right to effective assistance of counsel. Id.

E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings

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

4. CHILD CUSTODY

A. Appointment of Counsel for Parent—State Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

Kansas guarantees appointed counsel to indigent parents who request counsel “at any stage” of proceedings under the code related to children in need of care. See Kan. Stat. Ann. § 38-2205(b). While “child in need of care/assistance/services” proceedings in many jurisdictions are focused on unruly or uncontrollable children, the “child in need of care” code section is the Kansas code section that addresses abuse/neglect, § 38-2202(d), and it provides a right to counsel in such cases. § 38-2205(a). Because termination of parental rights cases happen under the same code section, parents have a right to counsel in such proceedings as well. In re T.M.C., 988 P.2d 241, 243 (Kan. Ct. App. 1999) (referring to § 38-1505, the predecessor statute). See also § 38-2267(d) (“Prior to a hearing on a petition, a motion requesting termination of parental rights, the court shall appoint an attorney to represent any parent who fails to appear and may award a reasonable fee to the attorney for services . . . “). The relevant statute also requires courts to appoint counsel, regardless of indigency or a request, for any parent who is a

minor or who is mentally ill or disabled in a child in need of care case. See § 38-2205(b)-(c). The court has discretion to appoint counsel for “interested parties” to these proceedings as well. § 38-2205(c) (incorporating § 38-2241, which defines “interested parties”).

Section 38-2205 requires that the court, at the first hearing in connection with a proceeding, distribute a pamphlet to the parents informing them of their rights in connection with all proceedings under the applicable statutes. However, in one case under former § 38-1505, a father’s request for an attorney on the day of trial, together with his request for a continuance, was denied because the father had previously dismissed his court-appointed attorney and elected to proceed pro se. See In re J.A.H., 172 P.3d 1, 8 (Kan. 2007) (adding, however, that “[i]f a statutory right has been violated, the trial court’s use of discretion is limited. Under these circumstances there is a greater need for articulation by the trial judge of the reasons for his or her ‘discretionary’ decision.”). On the other hand, in In Interest of S.R.H., the Court of Appeals commented that “[t]he right of an indigent parent to be represented by counsel in a hearing to determine whether the parent’s minor child shall be adjudicated a child in need of care is not dependent upon a request by the parent to be represented by counsel. While the statute speaks in terms of a desire, it also speaks in terms of waiver on the record or in writing.” 809 P.2d 1, 5 (Kan. Ct. App. 1991), abrogated on other grounds by J.A.H., 172 P.3d 1. While the S.R.H. court was addressing an earlier version of the statute, the current version also refers to waiver of counsel, suggesting the conflict between the need to request and the waiver standard may still exist. The S.R.H. court also suggested that “we do not think that the constitutional rights of due process of this natural mother depend entirely upon her request for counsel,” 809 P.2d at 3, meaning that even if a parent fails to meet the statutory requirement of a request, the right to counsel might still attach on a constitutional basis. However, that portion of the holding may have been abrogated by J.A.H., which suggested the statute had nullified the need for any fact-specific analysis. 172 P.3d at 7.

Kansas courts have interpreted these statutory provisions, whether they expressly provide for appointed counsel on appeal or not, as encompassing such a right. See In Interest of Brehm, 594 P.2d 269, 270 (Kan. Ct. App. 1979) (in termination of parental rights case, “absent a statutory provision to the contrary and absent limitation by the appointing authority, the responsibilities and duties of court-appointed counsel continue until final resolution of the cause for which assigned. Such occurs only after judgment has been rendered, the availability of an appeal has been exhausted, and the time for any rehearing or final review has passed.”).

Federal Statutes and Court Decisions Interpreting Statutes

The federal Indian Child Welfare Act (ICWA), which governs child welfare proceedings in
state court,\(^5\) 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 [25 U.S.C. §] 13.


State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *In re Cooper*, the Kansas Supreme Court held that due process requires appointment of counsel for indigent parents when termination of parental rights are at stake, although not when only temporary severances of custody are at issue. 631 P.2d 632, 640-41 (Kan. 1981), *superseded by statute*, Kan. Stat. Ann. § 38-2205, *as recognized in J.A.H.*, 172 P.3d 1. Writing just after *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) was decided, the *Cooper* court adopted a multi-factor test for child custody cases, making appointment of counsel contingent upon the seriousness of the state’s allegations, the length of anticipated separation the parents might face, the presence or absence of parental consent to state assistance, the presence or absence of disputed facts, and the parents’ ability to cope with relevant documents and to question the State's witnesses at the hearing. 631 P.2d at 640. In light of those factors, the court concluded that due process does not always require the assistance of counsel when only the temporary removal of children is at issue. *Id.* at 641. But the court held that due process does require the appointment of counsel for indigent parents in child in need of care proceedings “whenever the parent, unable to present his or her case properly, faces a substantial possibility of loss of custody and permanent severance of parental rights or of prolonged separation from the child.” *Id.* at 640-41.

The *Cooper* opinion does not make it clear whether the court was addressing the federal or state constitution’s due process clause. However, the overall tenor of the opinion’s discussion of the due process issue suggests that the court was interpreting both the federal and state constitutions (an odd approach given that *Lassiter* made it clear that due process

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\(^5\) While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) contemplates that state law may not provide for appointment of counsel. Additionally, subsection (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.
does not require counsel for all termination cases). For example, the majority opinion referred to the state and federal constitutions together when it stated “the fact the legislature failed to provide for appointment of counsel for the parent in a ‘deprived child’ hearing does not foreclose a need for such an appointment under the due process requirements of the Constitutions.” Id. at 635. The court also stated that “[v]irtually all jurisdictions including Kansas recognize the parents’ rights of custody and control of their children are liberty interests protected by the Fourteenth Amendment Due Process Clause,” and “[i]n interpreting the due process clause of the Constitution, the United States Supreme Court has established that certain interests cannot be foreclosed without meeting certain procedural safeguards. A determination of the safeguards necessary to afford constitutional due process must be evaluated in the light of the nature of the proceeding and of the interests affected.” Id. at 638-39. It is worth noting, though, that there are no direct references to the Kansas Constitution in the opinion. Moreover, the court relied heavily on a number of pre-Lassiter decisions from the state and federal courts. See id. (citing cases).

After the Kansas legislature provided a statutory right to counsel in 1982 in “child in need of care” cases, see Kan. Stat. Ann. § 38-2205(b), the next time the state supreme court addressed the issue of whether counsel should be appointed in such cases, the court declared that it was no longer necessary to consider the Cooper factors in determining whether the constitutional right to counsel had been denied and stated that it would limit its analysis to the statutory right. See J.A.H., 172 P.3d at 7.

State Court Decisions Addressing Court’s Inherent Authority

The Kansas Court of Appeals held that there is “inherent authority in courts to provide for counsel in order to provide a fair and impartial hearing of matters involved in the severance of parental rights.” In re Brehm, 594 P.2d 269, 271 (Kan. Ct. App. 1979).

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

Kansas has a statute that requires a court to appoint counsel in non-stepparent adoption proceedings to represent any father whose identity or whereabouts are unknown,

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6 At the time Cooper was decided, what later were termed “child in need of care” proceedings were called “deprived child” proceedings.
Kan. Stat. Ann. § 59-2136(c), and any indigent father (or mother) who appears and asserts parental rights, § 59-2136(h)(1). There is also a right to counsel for minor parents prior to voluntary relinquishment in an adoption proceeding, where if unrepresented by independent legal counsel, “the petitioner or child placing agency shall provide independent legal counsel to the minor parent at such petitioner’s or child placing agency’s sole expense.” § 59-2115. These statutes are silent on the matter of informing the subjects of their rights in regards to these proceedings, and also some lack clear indication on who is to pay for appointed counsel. The Kansas Court of Appeals has construed the adoption and other statutes to hold that the trial court can require the prospective adoptive parents to pay for the appointed counsel of the natural parents. In re Adoption of D.S.D., 19 P.3d 204, 206 (Kan. Ct. App. 2001).

In In re Application to Adopt H.B.S.C., the court found a right to counsel for a putative father in an appeal of a stepparent adoption notwithstanding the lack of specific legislative language. 12 P.3d 916, 921-22 (Kan. Ct. App. 2000). The court quoted extensively from In re Brehm, 594 P.2d 269, 270-271 (Kan. Ct. App. 1979)(finding statutory right to counsel in appeals of termination of parental rights cases notwithstanding any clear statutory authority), and stated that the strong due process rights of parents identified in Brehm justified a similar statutory construction for appellate counsel in adoption cases.

State Court Rules and Court Decisions Interpreting Court Rules

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7 In stepparent adoptions, however, the court may, rather than must, appoint counsel for an absent or unknown father. § 59-2136(c). Notably, the state allows private parties to file for “child in need of care” (CINC) proceedings, in which there is a right to counsel as per § 38-2205. In terms of private adoptions, § 59-2136 covers the only situations in which consent for an adoption is not required, and those situations mostly involve a putative father. An adoption can proceed if the mother consents and the father is shown to have neglected the child for a period of time, but if the father appears for the hearing and asserts parental rights, he is entitled to counsel under § 59-2136(h)(1). Section 38-2233(b) allows private individuals to file a CINC petition, and parents have a statutory right to court-appointed counsel in such proceedings under § 38-2205(b).

8 While § 59-2136(h)(1) speaks in terms of the rights of the father, subsection (b) states that “[i]nsofar as practicable, the provisions of this section applicable to the father also shall apply to the mother” and vice versa.

9 In Matter of the Adoption of N.A.P., the court stated that “[§ 59-2115] on its face only requires independent legal counsel immediately prior to and at the time consent is executed. The legislature intended that the minor birth parent be afforded legal counsel to advise as to the consequences of executing a consent to adoption. It was not intended that the minor be provided legal representation for the adoption proceeding to follow. If the legislature would have intended full-blown legal representation for a minor, it would have said so.” 930 P.2d 609, 614 (Kan. Ct. App. 1996).
A court rule provides that “[a]n appellate court may award attorney fees for services on appeal in a case in which the district court had authority to award attorney fees.” Kan. Sup. Ct. R. 7.07(b)(1). The Kansas Supreme Court has said in the context of an adoption proceeding that where the trial court ordered the prospective adoptive parents to pay for the natural parents’ appointed counsel at trial, such prospective parents can be required to pay for the natural parents’ appellate counsel as well. In re J.M.D., 260 P.3d 1196, 1209 (Kan. 2011). However, the Supreme Court affirmed the decision of the Court of Appeals to reduce the hourly rate of appointed counsel to a rate commensurate with attorneys in criminal cases. Id.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Application to Adopt H.B.S.C., 12 P.3d 916, 920 (Kan. App. 2000), in finding a statutory right to counsel for a putative father in an appeal of a stepparent adoption notwithstanding a lack of specific legislative language, the court, quoting In re Brehm, 594 P.2d 269, 270 (Kan. Ct. App. 1979), observed, “there is no doubt that the relationship of natural parent and child is a fundamental right of which neither may be deprived without due process of law as guaranteed by the Constitution of the United States and the Kansas Bill of Rights. Nor can there be any doubt that, in such case, the right to counsel, either retained or appointed, is essential to due process.”

The Kansas Court of Appeals has said, “[t]here is no constitutional right of grandparents to counsel or to effective counsel in visitation rights proceedings.” In re T.A., 38 P.3d 140, 144 (Kan. Ct. App. 2001).

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

State Statutes and Court Decisions Interpreting Statutes

Children in abuse/neglect and termination of parental rights proceedings have the right only to a guardian ad litem (who must be an attorney) unless the guardian ad litem or the child requests a second attorney to represent the child’s wishes, at which point the court can appoint one for “good cause shown.” Kan. Stat. Ann. § 38-2205(a).

The Kansas courts have interpreted this statute, whether it expressly provides for appointed counsel on appeal or not, as encompassing such a right. See In re Brehm, 594 P.2d 269, 270-271 (Kan. Ct. App. 1979) (in termination of parental rights case, “absent a statutory provision to the contrary and absent limitation by the appointing authority, the responsibilities and duties of court-appointed counsel continue until final resolution of the cause for which assigned. Such occurs only after judgment has been rendered, the availability of an appeal has been exhausted, and the time for any rehearing or final review has passed.”).
Federal Statutes and Court Decisions Interpreting Statutes

The ICWA 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 [25 U.S.C. §] 13.


The federal Child Abuse Prevention and Treatment Act 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 . . . 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 . . . 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 . . .


State Court Rules and Court Decisions Interpreting Court Rules

The Kansas Supreme Court’s Guidelines for Guardians Ad Litem\(^\text{10}\) specify that, “[i]f the child disagrees with the guardian ad litem’s recommendations, the guardian ad litem must inform the court of the disagreement. The court may, on good cause shown, appoint an attorney to represent the child’s expressed wishes. If the court appoints an attorney for the child, that individual serves in addition to the guardian ad litem. The attorney must allow the

child and the guardian *ad litem* to communicate with one another but may require such communications to occur in the attorney’s presence.”

**D. Appointment of Counsel for Child—Privately Initiated Proceedings**

Kan. Stat. Ann. § 59-3065 covers guardianship or conservatorship of a minor, and subsection (b)(3) specifies that the court *may* issue:

> [a]n order appointing an attorney to represent the minor. The court shall give preference, in the appointment of the attorney, to any attorney who has represented the minor in other matters if the court has knowledge of that prior representation, or to an attorney whom the minor, if 14 years of age or older, has requested. Any appointment made by the court shall terminate upon a final determination of the petition and any appeal therefrom, unless the court continues the appointment by further order. Thereafter, an attorney may be appointed by the court if requested, in writing, by the guardian, conservator or minor, if 14 years of age or older, or upon the court’s own motion.

Courts also have discretion to appoint counsel for the minor in some ancillary guardianship and conservatorship proceedings, including restoration to capacity and termination of guardianship. §§ 59-3077(c)(3), 3080 to 3091.

**5. MISCELLANEOUS**

**A. Civil Contempt Proceedings**

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

In *Johnson v. Johnson*, the Court of Appeals reversed and remanded the order incarcerating a civil contemnor who had not been appointed counsel in a case involving the failure to pay child support. 721 P.2d 290, 294 (Kan. Ct. App. 1986). The court’s opinion was partially based on the Tenth Circuit’s ruling in *Walker v. McLain*, finding that “due process does require, at a minimum, that an indigent defendant threatened with incarceration for civil contempt for nonsupport, who can establish indigency under the normal standards for appointment of counsel in a criminal case, be appointed counsel to assist him in his defense.” *Id.* at 294 (quoting 768 F.2d 1181, 1185 (10th Cir. 1985)). Thus, its ruling appeared to be based partially on the federal constitution. Because of this, this case would likely be limited by *Turner v. Rogers* (Fourteenth Amendment does not require right to counsel in civil contempt, at least where opponent is neither the state nor represented and matter is not “especially complex”), at least with respect to cases within *Turner’s* purview.
B. Paternity Proceedings

State Statutes and Court Decisions Interpreting Statutes


If the petitioner is not represented by counsel, the petitioner in an action to determine paternity may apply for services from: (1) The court trustee of the judicial district in which the action is brought, if the office of court trustee has been established in the county; or (2) the department of social and rehabilitation services or its contractor, if the action is brought pursuant to part D of title IV of the federal social security act (42 U.S.C. § 651 et seq.), as amended. At the request of a petitioner in an action to determine paternity, the county or district attorney of the county in which the action is brought shall proceed on the petitioner’s behalf if the petitioner is not represented by counsel, the action is not brought pursuant to part D of title IV of the federal social security act (42 U.S.C. § 651 et seq.), as amended, and there is no court trustee in the county.

Subsection (b) adds that the court “court shall appoint a guardian ad litem to represent the minor child if the court finds that the interests of the child and the interests of the petitioner differ. In any other case, the court may appoint such a guardian ad litem.” Finally, subsection (c) states that the court “shall appoint counsel for any other party to the action who is financially unable to obtain counsel.”

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

State Statutes and Court Decisions Interpreting Statutes

Kan. Stat. Ann. § 65-6705(b) states that in judicial proceedings where a minor seeks waiver of the parental notification requirement to have an abortion, “[t]he court shall provide a court-appointed counsel to represent the minor at no cost to the minor.”

D. Proceedings Involving Claims by or Against Prisoners

State Statutes and Court Decisions Interpreting Statutes

Courts have discretion to appoint counsel for an indigent prisoner convicted of first-degree murder or rape who petitions for DNA testing of biological evidence held by the state. See Kan. Stat. Ann. § 21-2512(e). In State v. Cheeks, the court found that § 21-2512 violated the equal protection clause of the Fourteenth Amendment because it denied those convicted of
second-degree murder the ability to petition for DNA testing, and expanded the statute’s
coverage (including the discretion to appoint counsel) to include “individuals convicted of
second-degree murder and sentenced before the effective date of the KSGA to the maximum
penalty of 15 years to life imprisonment.” 310 P.3d 346, 354-56 (Kan. 2013). Indigent prisoners
seeking habeas corpus relief from extradition are entitled to counsel. See § 22-4503(a). More
broadly, courts must appoint counsel for any indigent prisoner petitioning for habeas corpus
relief when the petition “presents substantial questions of law or triable issues of fact.” See §
22-4506(a)-(b).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Brown v. State, the court expressly stated that there is no due process right to
counsel for habeas corpus proceedings because “they are civil, not criminal, actions.” 101 P.3d
1201, 1203 (Kan. 2004).

State Court Decisions Addressing State Constitution’s Open Courts Provision

Kansas does not recognize an independent right of access to the courts. See Bonin v.
Vannaman, 929 P.2d 754, 770 (Kan. 1996). Despite the absence of any independent right, the
Kansas Supreme Court has recognized an “open courts” principle derived from § 18 of the
Kansas Bill of Rights, which recognizes and guarantees the right to due process. Id. In the case
of State ex rel. Stephan v. O’Keefe, the Kansas Supreme Court found that the “open courts”
principle, which “creates no new rights but merely is declaratory of our fundamental
principles,” does not entitle indigent prisoners to appointed counsel in civil suits. 686 P.2d 171,
178 (Kan. 1984). The court further stated that “[t]he right to be heard does not insure an
indigent or indigent prisoner litigant the right to an attorney to prosecute or defend his civil
cause.” Id.

E. Driver’s License Revocation Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In the context of a proceeding to suspend a driver’s license, the petitioner raised an
ineffective assistance of counsel claim, and the Kansas Court of Appeals stated: “The right to
counsel does not apply to civil or administrative proceedings.” Kim v. Kan. Dep’t of Revenue,
916 P.2d 47, 49 (Kan. Ct. App. 1996). The court in Kim, though, relied entirely upon a state
supreme court case in a criminal matter that asserted only that the Sixth Amendment does not
apply to civil proceedings, not that there is never a civil right to counsel. Id. (citing State v.
Standish v. Dep’t of Revenue, Motor Vehicle Div., discussed and distinguished in Bristor, held in the context of a civil driver’s license revocation proceeding that there was no constitutional right to consult counsel prior to taking a blood alcohol test. 683 P.2d 1276, 1281 (Kan. 1984). 12

11 See also State v. Boos, 659 P.2d 224, 227-28 (Kan. 1983). In that case, the Kansas Supreme Court held that the habitual traffic law violator proceeding was a civil, and not a criminal, matter and that evidence of the defendant’s past convictions used as the basis for the action could not be attacked based on defendant’s lack of counsel in one or more of those proceedings. Id. at 230-31. The court held that “[t]he action . . . is a civil action and the constitutional guarantees as applied in criminal proceedings are not applicable to the same extent in such a civil case.” Id. at 231.

12 Bristor itself has been superseded by statutory amendments requiring that persons arrested for driving under the influence be given written and oral notice of their statutory rights, including the right to counsel. See State v. Kelly, 786 P.2d 623, 628 (Kan. Ct. App. 1990).
Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

Federal Statutes and Court Decisions Interpreting Statutes

The federal Servicemembers Civil Relief Act (SCRA), which applies to each state\textsuperscript{13} and to all civil proceedings (including custody),\textsuperscript{14} provides:

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

50 U.S.C. § 3931(b)(2).\textsuperscript{15}

Additionally, § 3932(d)(1), which also applies to all civil proceedings (including custody),\textsuperscript{16} specifies that a service member previously granted a stay may apply for an additional stay based on a continuing inability to appear, while subsection (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

A court rule provides that “[a]n appellate court may award attorney fees for services on appeal in a case in which the district court had authority to award attorney fees.” Kan. Sup. Ct. R. 7.07(b)(1). The Kansas Supreme Court has said in the context of an adoption proceeding that where the trial court ordered the prospective adoptive parents to pay for the natural parents’

\textsuperscript{13} 50 U.S.C. § 3912(a) states that the provisions of the SCRA “appl[y] to . . . each of the States, including the political subdivisions thereof.”

\textsuperscript{14} 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.”

\textsuperscript{15} Proposed legislation (2017 CONG US S 646) revises 50 U.S.C.A. 3931(b)(2) to read, “(2) Appointment of attorney to represent defendant in military service. - (A) In general. If in action covered by this section it appears that the defendant is in military service, the court shall not enter a judgment until after the court appoints an attorney to represent the defendant…”

\textsuperscript{16} 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 . . . is in military service or is within 90 days after termination of or release from military service; and . . . has received notice of the action or proceeding.”
appointed counsel at trial, such prospective parents can be required to pay for the natural parents’ appellate counsel as well. In re J.M.D., 260 P.3d 1196, 1209 (Kan. 2011). However, the Supreme Court affirmed the decision of the Court of Appeals to reduce the hourly rate of appointed counsel to a rate commensurate with attorneys in criminal cases. Id.

State Court Decisions Addressing State Constitution’s Open Courts Provision

Kansas does not recognize an independent right of access to the courts. See Bonin v. Vannaman, 929 P.2d 754, 770 (Kan. 1996). Despite the absence of any independent right, the Kansas Supreme Court has recognized an “open courts” principle derived from § 18 of the Kansas Bill of Rights, which recognizes and guarantees the right to due process. Id. The “open courts” principle was first recognized in State ex rel. Stephan v. O’Keefe, 686 P.2d 171 (Kan. 1984). While noting that access to the courts is “one of the most sacred and essential constitutional guarantees,” the Kansas Supreme Court has stated that the “open courts” principle “creates no new rights but merely is declaratory of our fundamental principles.” 686 P.2d at 178. In other words, the “open courts” principle is merely an element of the due process right not to have access to the courts unduly restricted. See Bonin, 929 P.2d at 770 (“Kansas does not recognize a separate right to an open court, independent of the recognized right to due process.”). The doctrine has no substance apart from § 18 of the Kansas Bill of Rights. See id.

Accordingly, in Stephan, the Kansas Supreme Court found that the “open courts” principle does not entitle indigent prisoners to appointed counsel in civil suits. 686 P.2d at 178. The court stated:

When does an individual have a right to be represented by an attorney? An individual whose life or liberty is threatened by a criminal charge, felony, or misdemeanor has a constitutional right to be represented by an attorney. . . . When an individual’s property or claim is at stake in a civil action, that individual is entitled to have an attorney represent his cause – but only if he can afford to hire one or there is a special law or statute that provides for the appointment of an attorney to represent an indigent claimant or defendant.

Id. at 177 (emphasis added). The court further stated that “[t]he right to be heard does not insure an indigent or indigent prisoner litigant the right to an attorney to prosecute or defend his civil cause.” Id. at 178.

Notably, there is no reported case squarely addressing how the “open courts” doctrine would apply in a civil suit filed by a non-prisoner plaintiff who seeks appointment of counsel. The language of Stephan, however, indicates that the “open courts” principle affords no greater
rights to non-prisoner plaintiffs. *Id.* at 177 ("The indigent prisoner is treated the same as any individual of society not imprisoned who is unable to afford the services of an attorney to prosecute or defend his cause.").