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

MONTANA

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American Bar Association
Standing Committee on Legal Aid and Indigent Defendants
321 N. Clark Street
Chicago, IL  60610
Phone: 312-988-5765; FAX: 312-988-5483
http://www.americanbar.org/groups/legal_aid_indigent_defendants.html

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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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

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

In proceedings for disability guardianships and conservatorships, “[t]he allegedly incapacitated person may have counsel of the person’s own choice,” which presumably refers to private counsel, “or the court may, in the interest of justice,” direct the state public defender’s office “to assign counsel pursuant to the Montana Public Defender Act” (MPDA). See Mont. Code Ann. § 72-5-315(2). See also § 47-1-104(4)(b)(vii) (implementing provision of MPDA). In proceedings to appoint a successor guardian or terminate incapacity, “the court shall follow the same procedures to safeguard the rights of the ward that apply to . . . appointment of a guardian.” See § 72-5-325(3). These rights presumably include the discretionary appointment of counsel provided by § 72-5-315(2).

An individual who is subject to a guardian’s petition for involuntary mental health treatment “is entitled to the assignment of counsel, in accordance with the provisions of the” MPDA. See § 72-5-322(2). See also § 47-1-104(4)(b)(viii) (implementing provision of MPDA). In addition, the individual is entitled to “all the other rights guaranteed . . . under [§§] 53-21-114, 53-21-115, 53-21-119, and 53-21-120.” § 72-5-322(2). Section 53-21-115 entitles an individual to all rights “guaranteed by the constitution of the United States and of [Montana], by the laws of [Montana], or by” the mental illness treatment statutes. Moreover, § 53-21-119(1) provides that “[t]he right to counsel may not be waived.”

The court also has discretion to appoint a public defender for an “eligible” litigant in an appeal of any proceeding where counsel may be appointed pursuant to the MPDA. See § 47-1-104(4)(c). The MPDA does not appear to define the term “eligible,” but the Act does contain a section concerning “eligibility,” which provides that eligibility requires a finding of indigence. See generally § 47-1-111. Thus, it appears that a showing of indigence is required for appointment of counsel in all appeals, even if appointment in the initial proceeding did not require such a showing.
C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

In proceedings for the involuntary “commitment, recommitment, or emergency commitment” of a developmentally disabled individual to a residential facility, “the court shall” direct the state public defender’s office to appoint counsel for the individual pursuant to the MPDA. *See* Mont. Code Ann. § 53-20-112(3). *See also* § 47-1-104(4)(b)(v) (implementing provision of MPDA). Upon request, the court shall also direct the state public defender’s office to appoint counsel for the parents or guardian, if determined to be indigent pursuant to MPDA eligibility rules. *See* § 53-20-112(3). *See also* § 47-1-104(4)(a)(vii) (implementing provision of MPDA). *See generally* § 47-1-111 (MPDA eligibility rules).

The MPDA gives the court discretion to appoint a public defender, pursuant to § 53-21-116, for an indigent person subject to proceedings for involuntary commitment for mental health treatment. *See* § 47-1-104(4)(a)(viii). However, § 53-21-116 in turn provides that “If the person is indigent or if in the court’s discretion assignment of counsel is in the best interest of justice, the judge *shall* order the office of state public defender, provided for in [section 1], to immediately assign counsel to represent the person at either the hearing or the trial, or both” (emphasis added). “The right to counsel may not be waived.” § 53-21-119(1).

In proceedings to commit or recommit a person for involuntary alcoholism treatment, “[t]he court shall inform the person . . . of the person’s right to . . . have assigned counsel pursuant to the [MPDA], if the person wants the assistance of counsel and is unable to obtain private counsel.” *See* § 53-24-302(9). *See also* § 47-1-104(4)(a)(ix) (permitting appointment for an indigent person “as provided in” § 53-24-302). Further, “[i]f the court believes that the person needs the assistance of counsel, the court shall . . . assign counsel . . . regardless of the person’s wishes.” § 53-24-302(9).

The court also has discretion to appoint a public defender for an eligible litigant in an appeal of any of the above proceedings. *See supra* § 3.B.

*In re Mental Health of K.G.F.*, 29 P.3d 485 (Mont. 2001), the court held that there is a due process right to effective assistance of counsel so as to effectuate the statutory right to appointed counsel, although *K.G.F.*’s rejection of the *Strickland* standard was overruled in *In re J.S.*, 401 P.3d 197 (Mont. 2017).
In *Matter of Simons*, the court considered a denial of counsel in a case involving involuntary civil commitment for mental health reasons. 698 P.2d 850, 850-51 (Mont. 1985). The court noted the existence of a statutory right to counsel for such proceedings, then commented that the statute “gives a person against whom a petition for involuntary commitment has been filed all rights guaranteed by the constitutions of the United States and of the state of Montana, including . . . the right to counsel.” *Id.* at 851 (citing Mont. Code Ann. § 53-21-115). The Court also held that the failure to provide an attorney “is a violation of both [the] statutory and constitutional rights of due process.” *Id.*\(^1\) Then, in *In re J.S.*, 401 P.3d 197 (Mont. 2017), the court stated that “We affirm [*In re Mental Health of K.G.F.*, 29 P.3d 485 (Mont. 2001) to the extent it recognized ... a right to counsel premised upon the federal Due Process Clause and Montana's right of due process contained in Article II, Section 17.”

D. **Sex Offender Proceedings**

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

E. **Involuntary Quarantine, Inoculation, or Sterilization Proceedings**

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

4. **CHILD CUSTODY**

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

State Statutes and Court Decisions Interpreting Statutes

In abuse/neglect and termination proceedings:

(1) Any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition.
(2) Except as provided in subsections (3) through (5), the court shall immediately appoint the office of state public defender to assign counsel for:

\(^1\) The court also held that a purported waiver of the right to counsel by an individual’s guardian was invalid, because the right may not be waived in involuntary commitment proceedings for mental health treatment. *See id.* (citing § 53-21-119(1) ("The right to counsel may not be waived.")).
(a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding pursuant to 41-3-422, pending a determination of eligibility pursuant to 47-1-111; 

... 

(c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.

Mont. Code Ann. § 41-3-425. See also §§ 47-1-104(4)(a)(iii) (implementing provision of MPDA); 47-1-104(4)(b)(i) (same). Subsection (5), added in 2017, states that, except as provided in the ICWA, the court may not appoint counsel for a putative father until the father “is successfully served notice of a petition” and “makes a request to the court in writing.” See § 41-3-425(5). See also §§ 41-3-422(7) (“If personal service cannot be made upon the . . . parent, guardian, or other person or agency having legal custody, the court shall” appoint counsel “immediately provide for the appointment or assignment of an attorney as provided for in 41-3-425 to represent the unavailable party when, in the opinion of the court, the interests of justice require. If personal service cannot be made upon a putative father, the court may not provide for the appointment . . . of counsel . . . unless, in the opinion of the court, the interests of justice require counsel to be appointed or assigned.”); 41-3-432(3) (at contested show cause hearing, “[t]he parent, guardian, or other person may be represented by legal counsel and may be appointed or assigned counsel as provided for in 41-3-425.”).

The court also has discretion to appoint a public defender for an eligible litigant in an appeal of an abuse and neglect proceeding. See supra § 3.B.

Federal Statutes and Court Decisions Interpreting Statutes

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

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. . . . Where State law makes no provision for appointment of counsel in

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2 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.
such proceedings, the court shall promptly notify the Secretary [of the Interior] 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

With regard to abuse/neglect proceedings, the court has taken several different stances as to appointment of counsel for parents. In Matter of M.D.Y.R., the Montana Supreme Court held that, as a matter of due process:

Where indigent parents are involved in dependency proceedings, the District Court shall make a judicial decision in each case as to whether such parents are entitled to counsel appointed by the court whenever the indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or prolonged separation from the child.

582 P.2d 758, 765 (Mont. 1978). ³ However, in Matter of T.C., the court, relying on Matter of A.B., differentiated between permanent custody hearings and temporary custody hearings, holding that “due process does not require appointment of counsel for the mother prior to the award of temporary custody of the children to the State.” See 784 P.2d 392, 396 (Mont. 1989) (citing 780 P.2d 622, 625 (Mont. 1989)). ⁴ Subsequently, in In re A.M., the court acknowledged its decision in Matter of A.S.A., discussed infra, which found a state constitutional right to counsel in termination proceedings, but then pointed out: “To date, this Court has not extended this right to a pre-termination proceeding where the focal issue before the court is a determination of whether a child is a youth in need of care.” 22 P.3d 185, 195 (Mont. 2001) (citing 852 P.2d 127, 130 (Mont. 1993)). In support, the court cited Matter of D.S., which found

³ Given that the court relied on Ninth Circuit law, the ruling was likely based only on the federal constitution. See id. at 764 (“Since Montana is within the area of jurisdiction of the United States Court of Appeals for the Ninth Circuit, and since it is appropriate that state rules respecting due process principles be in harmony with the federal rules on the same subject, in the same area, we hold the rule in Cleaver v. Wilcox . . . applies in this jurisdiction[.]” (citing 499 F.2d 940, 945 (9th Cir. 1974))).

⁴ In A.B., the court concluded: “In child protective proceedings culminating in the termination of parental rights, due process of law requires only that the parents have counsel prior to the permanent custody hearings.” 780 P.2d at 625 (emphasis added). The court relied upon Matter of M.F., which in turn relied on Lassiter. Id. (citing 653 P.2d 1205 (1982)).
that there was no requirement to provide counsel at either a temporary investigative authority proceeding or a temporary custody hearing. *Id.* (citing 833 P.2d 1090, 1093 (Mont. 1992)). Finally, the court took a middle ground approach in *In re A.F.-C.*, where it stated: “[W]e have not held that appointment of counsel is always ‘inappropriate’ or otherwise precluded during earlier stages of child protective proceedings.” 37 P.3d 724, 730 (Mont. 2001). The court stated that the determination of whether counsel is required in dependency proceedings that “precede termination proceedings . . . must be determined in view of all of the circumstances.” *Id.* at 731 (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33 (1981)). The court then found that the mother at issue, who was also a minor and an abused/neglected youth herself, was entitled to appointed counsel for the dependency proceedings of her child. *Id.* at 731-32.

Montana courts applying the case-by-case standard for dependency cases have generally found no right to counsel. In *Matter of M.F.*, a mother argued that the trial court erred in failing to appoint counsel for her when the state agency filed for “temporary investigative authority.” 653 P.2d 1205, 1208 (Mont. 1982). The Montana Supreme Court held that the trial court did not err, noting that, in the circumstances:

although the parent’s interests are strong, the State’s interest is not weak nor were the risks of error at a peak. . . . However, counsel was appointed for the mother on December 8, 1980. The hearings on the petition for permanent custody were held on December 29, 1980, April 10, 1981 and April 15, 1981. We feel the appointment of counsel prior to these hearings did accommodate the mother’s right to due process.

*Id.* at 1209. In *Matter of A.B.*, the court held that “the appointment of counsel [for a father] at the inception of [a child dependency proceeding] was [not] necessary or mandatory” where “[t]he father had the benefit of appointed counsel almost one full year prior to the termination of his parental rights,” and “[e]very effort was made to provide legal assistance at appropriate times and several times it was necessary to locate the parents, parents who showed little or no interest in their child[.]” 780 P.2d 622, 625 (Mont. 1989).

In *Matter of Adoption of K.L.J.K.*, the Montana Supreme Court utilized *Lassiter v. Dep’t of Soc. Servs.* while analyzing a father’s due process challenge to the denial of appointed counsel in a termination of parental rights proceeding. 730 P.2d 1135, 1137 (Mont. 1986) (citing 452 U.S. 18 (1981)). The court’s opinion made no mention of whether federal due process or due process rights under the Montana Constitution were being considered:

[T]here is no constitutional or statutory requirement that an indigent party be provided with court-appointed counsel in a civil proceeding. The Court has reviewed the cases cited by [the father] in support of his request for court-appointed counsel and finds that
each involves a situation where the State is seeking to terminate parental rights pursuant to criminal statutes. They are not civil matters.

Id. The cases cited by the father were from other jurisdictions, all involving state-brought, involuntary terminations of parental rights.5

In Matter of A.S.A., the Montana Supreme Court held that due process rights afforded by the Montana Constitution required appointment of counsel to an indigent mother facing the loss of her parental rights. 852 P.2d 127, 130 (Mont. 1993). First, the court noted that the mother had a “fundamental liberty interest . . . in the care, custody, and management” of her child. Id. at 129 (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)). The court then observed that:

Article II, § 17, of the Montana Constitution requires that “[n]o person shall be deprived of life, liberty, or property without due process of law.” When the state seeks to terminate a parent’s liberty interest in the care and custody of her child, due process requires that the parent not be placed in an unfair disadvantage during the termination proceedings. Fairness requires that a parent, like the State, be represented by counsel at parental termination proceedings. Without representation, a parent would not have an equal opportunity to present evidence and scrutinize the State’s evidence.

Id. Having rejected the reasoning of the Lassiter majority, the court explained that special considerations apply to indigent parties, citing Justice Blackmun’s dissent in Lassiter:

The potential for unfairness is especially likely when an indigent parent is involved. Indigent parents often have a limited education and are unfamiliar with legal proceedings. If an indigent parent is unrepresented at the termination proceedings, the risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.

Id. (citing 452 U.S. at 47 (Blackmun, J., dissenting)).

5 The father’s appellate briefs cited cases from Ohio (State ex rel. Heller v. Miller, 399 N.E.2d 66 (Ohio 1980) (right to counsel under U.S. and Ohio constitutions in actions initiated by the state for permanent, involuntary termination of parental rights)); Massachusetts (Dept’ of Pub. Welfare v. J.K.B, 393 N.E.2d 406 (Mass. 1979) (right to counsel for indigent parents in contested proceeding to terminate parental rights)); and Oklahoma (Matter of Chad S., 580 P.2d 983 (Okla. 1978) (federal constitutional right to counsel for indigent parents in dependency proceeding where termination of parental rights is at stake)).
The holding of A.S.A. has been confirmed in a number of subsequent decisions. See, e.g., In re Custody of M.W., 23 P.3d 206, 210 (Mont. 2001) (“We have previously held that fundamental fairness requires that a parent be represented by counsel at proceedings to terminate parental rights in order to ‘have an equal opportunity to present evidence and scrutinize the State’s evidence.’” (quoting 852 P.2d at 129)).

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

Adoptive parents “may” pay “[r]easonable adoption fees,” including “legal fees incurred for services on behalf” of the birth parent(s), see Mont. Code Ann. § 42-7-101(1)(i), but it is unclear whether this is strictly voluntary for the adoptive parents or whether the court can order it. See also § 42-7-102(2) (describing certain limitations on payment of legal fees).

Further:

In a direct parental placement adoption, a relinquishment and consent to adopt executed by a parent who is a minor is not valid unless the minor parent has been advised by an attorney who does not represent the prospective adoptive parent. Legal fees charged by the minor parent’s attorney are an allowable expense that may be paid by prospective adoptive parents under 42-7-101, subject to the limitations in 42-7-102. § 42-2-405(2). Subsection (3) adds: “If in the court’s discretion it is in the best interest of justice, the court may order the office of state public defender, provided for in 47-1-201, to assign counsel to represent the minor parent.” In In re Adoption of A.L.O., the court invalidated a relinquishment by a minor who had misrepresented her age as being older and thus had not been provided counsel in the relinquishment proceedings. 132 P.3d 543, 544 (Mont. 2006). The court held:

Mother testified that she had difficulty understanding the paperwork related to the adoption, as it all looked the same to her. Mother also claims that [Father’s sister] and [her daughter’s] grandmother . . . called Mother once a day to encourage her to sign the papers, promising Mother that she would be able to visit with [her daughter] whenever she desired; Mother testified that she would not have given her daughter up for adoption if she had known that she would not be allowed to see [her] any time she wanted. The foregoing demonstrates the importance of § 42-2-405(2), . . . that is, the statute protects minors from making uninformed legal decisions. We hold that the District Court correctly concluded that it had no authority to order relinquishment of Mother’s parental rights when she had no legal representation as mandated by § 42-2-405(2)[.]
State Court Rules and Court Decisions Interpreting Court Rules

In In re Marriage of Kessler, the court held that there was no right to appointed counsel under Montana Rule of Civil Procedure 17(c) for a husband in a divorce proceeding who had already been provided with a guardian ad litem pursuant to the rule on the basis of incompetency. 251 P.3d 147, 150-51 (Mont. 2011). However, the court’s reasoning was particular to the facts of the case:

[Rule] 17(c) does not require that an attorney be appointed in addition to a guardian ad litem. . . . [The husband] did not request that an attorney be provided to him during pretrial or at trial. He did not indicate to the District Court that he could not proceed without court-appointed counsel. He did not indicate that he could not afford an attorney. [The husband] cites In re Marriage of Rolfe, but that case has no application here. The Court specifically limited that case’s applicability to court-appointed representation of a child in a custody dispute arising out of a divorce. . . . The District Court did not incorrectly allow [him] to represent himself pro se after having appointed . . . his guardian ad litem. The District Court also did not fail to “make such other order” as proper for [the husband’s] protection.

Id. (quoting Mont. R. Civ. P. 17(c); citations omitted).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The high court held in In re Adoption of A.W.S. that the guarantee of counsel in termination of parental rights cases, but not private adoptions, violated the state constitution’s equal protection clause. 339 P.3d 414, 420 (Mont. 2014). The court recognized that “the fundamental right to parent is equally imperiled whether the proceedings are brought by the State or by a private party,” and found the state’s involvement to be sufficient for state action purposes. Id. at 417-18. The court also observed that:

6 At the time Kessler was decided, it appears that Rule 17(c) required “the appointment of a guardian ad litem for an incompetent person or ‘such other order as [the court] deems proper for the protection’ of the incompetent person.” Id. at 150 (quoting Mont. R. Civ. P. 17(c)). The current version of Rule 17(c) provides that a court must appoint a guardian ad litem “or issue another appropriate order,” but this does not appear to differ substantively from the version at issue in Kessler.
Although Mother did not request counsel formally, we have recognized that pro se litigants are not required to use specific words when requesting counsel. . . . In this case, where Mother was not advised of any right to counsel, she preserved the issue when she explained that she represented herself only because she did not have the money to employ an attorney.

Id. at 418 (citations omitted).

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

State Statutes and Court Decisions Interpreting Statutes

In an abuse and neglect proceeding:

(2) Except as provided in subsections (3) through (5), the court shall immediately appoint the office of state public defender to assign counsel for:

. . .

(b) any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is not appointed for the child or youth; and

(c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.  

(3) When appropriate, the court may appoint the office of state public defender to assign counsel for any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is appointed for the child or youth. Mont. Code Ann. § 41-3-425. See also § 47-1-104(4)(b)(i) (implementing provision of MPDA).

The court also has discretion to appoint a public defender for an eligible litigant in an appeal of an abuse and neglect proceeding. See supra § 3.B.

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

7 Regardless of whether children are considered a “party” to such proceedings, ICWA in turn provides that 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.”

8 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
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 [of the Interior], 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 . . . shall contain . . . 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[.]


D. Appointment of Counsel for Child—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

In McDowell v. McDowell, the Montana Supreme Court interpreted Mont. Code Ann. § 40-4-205, which at the time provided a discretionary appointment of counsel process for children in divorce cases “with respect to the child’s support, parenting, and parental contact” (at present, the statute says the court can appoint a guardian ad litem in such situations, and

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 guardian ad litem “may be an attorney”). 868 P.2d 1250, 1255 (Mont. 1994). McDowell held that because the requirement, stated in Matter of Guardianship of Gullette, that the judge appoint independent counsel for the child or state why it is unnecessary “extends beyond the statutory requirements of [section] 40–4–205, . . . we expressly overrule the holding in Gullette.” Id.

For guardianship of a minor, “[i]f, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, the court may order the office of state public defender . . . to assign counsel . . . to represent the minor.” § 72-5-225(3).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Montana Supreme Court has taken several different stances with respect to appointment of independent counsel for children in custody cases. In Matter of Guardianship of Gullette, the Montana Supreme Court considered whether children in custody disputes were entitled to independent counsel as a matter of due process under the Montana Constitution. 566 P.2d 396, 396 (Mont. 1977), overruled by McDowell v. McDowell, 868 P.2d 1250 (Mont. 1994). The Court first commented that “[u]nder the 1972 Montana Constitution, the pertinent provisions heretofore quoted, it would be a violation of the child’s rights to change its custody where custody is in dispute, without counsel.” However, it then held that “where custody is in serious dispute, the court shall appoint independent counsel for the child or make a finding stating the reasons that such appointment was unnecessary.” Id. at 400. The court relied upon the Oregon Supreme Court’s decision in Matter of D., which had reversed its own prior precedent of requiring independent counsel in every case and replaced it with the test adopted by the Montana Supreme Court. Id. (citing 547 P.2d 175, 180 (Or. 1976)). The Montana Supreme Court concluded:

Where, as here, the appointment of counsel to represent the children is necessary, it must be done. The power to appoint counsel can be necessarily implied from the power of the court to grant custody. In all such cases the district judge shall appoint the county attorney to represent the interest of the child or children. If a conflict arises where the county attorney is representing the welfare department, then other counsel must be provided.

Id. However, subsequent decisions cast Gullette into serious doubt and eventually overruled its holding. First, in Matter of J.J.S., the high court described Gullette as a case that “interpreted”

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9 566 P.2d 396 (Mont. 1977). Gullette is discussed infra.
former Mont. Code Ann. § 10-1310(12). See 577 P.2d 378, 380 (Mont. 1978). In other words, the court characterized *Gullette* as solely a statutory interpretation case, not a constitutional one. Then, in *McDowell* (discussed supra), without mentioning the concept of due process in any way, the court stated that, because *Gullette*’s requirement that the judge appoint independent counsel for the child or state why it is unnecessary “extends beyond the statutory requirements of § 40-4-205, . . . we expressly overrule the holding in *Gullette.*” See 868 P.2d at 1255. In other words, *McDowell*, like *J.J.S*, treated *Gullette* as solely a statutory interpretation case.

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *In re Marriage of Prescott*, the Montana Supreme Court suggested (but never directly held) that an indigent defendant in a civil contempt proceeding—where a defendant actually faces the threat of confinement—does not enjoy a due process right to appointed counsel. See 856 P.2d 229, 231-32 (Mont. 1993). After noting that the defendant was not indigent, the court stated that the due process right to counsel “has generally been held to mean that one charged with contempt of court is entitled to a *reasonable opportunity to employ counsel* in contempt proceedings.” *Id.* (citations and quotations omitted; emphasis added). The court then found that the defendant had been provided a reasonable time to find counsel. The concurring opinion appeared to believe that the majority opinion’s statement about the right to counsel only encompassing a reasonable opportunity to employ counsel was meant to apply even to indigent parties, and argued that under existing federal constitutional decisions, indigent litigants should be entitled to appointed counsel:

Specifically, I disagree with the part of the majority opinion which either holds or implies that an indigent person cited for contempt has only the right to “employ counsel,” and no right to court-appointed counsel. To grant a right to counsel to a person cited for contempt, but to deny court-appointed counsel for someone who cannot otherwise afford to employ counsel, is to render the right meaningless.

*Id.* at 233 (Trieweiler, J., concurring).

B. Paternity Proceedings
State Statutes and Court Decisions Interpreting Statutes

In proceedings to determine parentage, “[a]t the pretrial hearing and in further proceedings, any party may be represented by counsel. The court shall order the office of state public defender . . . to assign counsel for a party who is financially unable to obtain counsel.” See Mont. Code Ann. § 40-6-119(1). See also § 47-1-104(4)(a)(ii) (implementing provision of MPDA).

The court also has discretion to appoint a public defender for an eligible litigant in an appeal of a proceeding to determine parentage. See supra § 3.B.

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

State Statutes and Court Decisions Interpreting Statutes

In proceedings for a minor to bypass parental consent for an abortion, “[t]he youth court shall advise the minor of the right to assigned counsel and shall order the office of state public defender . . . to assign counsel upon request.”10 See Mont. Code Ann. § 50-20-509(2). See also § 47-1-104(4)(b)(iv) (implementing provision of MPDA).

The court also has discretion to appoint a public defender for an eligible litigant in an appeal of a judicial bypass proceeding. See supra § 3.B.

D. Proceedings Involving Claims by and Against Prisoners

State Statutes and Court Decisions Interpreting Statutes

In proceedings for post-conviction relief, “[i]f the death sentence has not been imposed and a hearing is required or if the interests of justice require, the court shall order the office of state public defender . . . to assign counsel for a petitioner who qualifies for the assignment of

10 A Montana court found that the prior notification requirement in section 50–20–212(2)(a) violated the Montana Constitution’s Equal Protection Clause and privacy protection. Wicklund v. State, No. ADV-97-671 1998 Mont. Dist. LEXIS 227 (Mont. 1st Jud. Dist. Ct. Feb. 13, 1998) (enjoining enforcement of statute requiring physician to notify minor’s parent 48 hours before performing abortion for minor because restriction unconstitutionally burdened minors’ fundamental rights and was not justified by asserted interest in protecting vulnerable youth). H.B. 627 created a new notification requirement that was virtually identical to the original, and it was approved by the voters via referendum (LR-120) in November 2012. Subsequently, the legislature repealed the notice provision and replaced it with the consent provision.
counsel under Title 46, chapter 8, part 1, and the Montana Public Defender Act, Title 47, chapter 1.” See Mont. Code Ann. § 46-21-201(2); § 46-21-201 (“An appointment of counsel made in the interests of justice, as provided in 46-21-201(2), may be made only when extraordinary circumstances exist.”). See also § 47-1-104(4)(a)(v) (implementing provision of MPDA).

Additionally, all indigent parties in habeas corpus proceedings are eligible for appointed counsel. See § 47-1-104(4)(a)(vi).

The court also has discretion to appoint a public defender for an eligible litigant in an appeal of any of the above proceedings. See supra § 3.B.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Montana Supreme Court has said that the right to counsel in postconviction relief hearings is not a constitutional right, but rather a statutory right. Office of State Pub. Def. v. Mont. Eighteenth Judicial Dist. Court, 255 P.3d 107, 109 (Mont. 2011) (citing State v. Bromgard, 948 P.2d 182, 185 (Mont. 1997)).

E. Grand Jury Proceedings

State Statutes and Court Decisions Interpreting Statutes

For a witness in a criminal grand jury proceeding, “[t]he witness has the right to have counsel present at all times. If the witness does not have funds to obtain counsel, the judge or justice shall order the office of state public defender . . . to assign counsel.” Mont. Code Ann. § 46-4-304(1). See also § 47-1-104(4)(a)(x) (implementing provision of MPDA).

The court also has discretion to appoint a public defender for an eligible litigant in an appeal of a grand jury proceeding. See supra § 3.B.

F. Proceedings Involving a Minor Charged With Traffic Offenses

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In State ex rel. Maier v. City Court of Billings, the Montana Supreme Court held that a minor charged with a traffic offense, even if indigent, had no fundamental right to appointed counsel under either the Sixth or Fourteenth Amendment, because such offenses were not punishable by confinement. See 662 P.2d 276, 281 (Mont. 1983) (“Since a minor may not be
held in any detention facility or jail by reason of a traffic violation, nor for nonpayment of a fine resulting therefrom, the minor is not entitled to counsel as a fundamental right.” (citing Lassiter, 452 U.S. at 25)).

G. Proceedings Involving Claims of Negligence

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The Montana Supreme Court has suggested that an indigent defendant has no right to appointed counsel in a negligence case, at least in a situation where the defendant had already consented to the withdrawal of retained counsel and elected to self-represent. See Stewart v. Rice, 296 P.3d 1174, 1179 (Mont. 2013). The court relied on U.S. and Montana Supreme Court decisions that had interpreted the federal constitution. See id. (stating that “[defendant] asserts that he was entitled to court-appointed counsel. There is no absolute right to counsel in civil proceedings, however, particularly where a defendant’s deprivation of liberty is not at stake”, and citing Turner v. Rogers, 564 U.S. 431, 444-46 (2011); In re Marriage of Prescott, 856 P.2d 229, 232 (Mont. 1993)).

11 Prescott is discussed supra Part 5.A.
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{12} and to all civil proceedings (including custody),\textsuperscript{13} 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, § 3932(d)(1), which also applies to all civil proceedings (including custody),\textsuperscript{14} 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 Decisions Addressing Court’s Inherent Authority

The Montana Constitution contains an express separation of powers provision:

The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

\textsuperscript{12} 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{13} 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{14} 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.”
Mont. Const. art. III, § 1. As discussed supra Part 4.A, coupled with the Montana Supreme Court’s constitutionally provided rulemaking authority, art. VII, § 2, cl. 3, the separation of powers provision provides the Montana judiciary with authority to “interpret the constitution and to protect individual rights set forth in the constitution[.]” State v. Finley, 915 P.2d 208, 213 (Mont. 1996), abrogated on other grounds by State v. Gallagher, 19 P.3d 817 (Mont. 2001). The court has also said:

The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods. . . . When . . . these methods fail and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not until then does occasion arise for the exercise of the inherent power.

State v. Sullivan, 137 P. 392, 395 (Mont. 1913). Additionally, Mont. Code Ann. § 3-1-111(8) empowers a court to “amend and control its process and orders so as to make them conformable to law and justice.”