# NORTH CAROLINA

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

The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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to confirm whether a case is published and to familiarize themselves with all rules relating to the citation and use of unpublished or unreported cases.

Acknowledgments

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

1. SHELTER

Federal Statutes and Court Decisions Interpreting Statutes

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

2. SUSTENANCE

Federal Statutes and Court Decisions Interpreting Statutes

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination. While nearly all Title VII claims are brought in federal court, the U.S. Supreme Court has specified that state courts have concurrent jurisdiction with federal courts for Title VII claims. *Yellow Freight System Inc. v. Donnelly*, 494 U.S. 820, 826 (1990).

Title VII provides that “[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant....” 42 U.S.C. 2000e-5(f)(1). In *Poindexter v. FBI*, the D.C. Court of Appeals observed:

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

3. SAFETY AND/OR HEALTH

A. Domestic Violence Protection Order Proceedings

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

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

Proceedings determining whether an indigent individual is incompetent—meaning that they do not have “sufficient capacity . . . to make or communicate important decisions concerning [their] person, family, or property,” and, in the case of an adult, “to manage [their] own affairs” N.C. Gen. Stat. § 35A-1101(7), (8)—give rise to some form of representation. N.C. Gen. Stat. § 7A-451(a)(13) mentions “entitlement” to counsel in such proceedings, while N.C. Gen. Stat. § 35A-1107(a) clarifies that “[t]he respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains his own counsel, in which event the guardian ad litem may be discharged.”

If a guardian seeks sterilization of their ward, N.C. Gen. Stat. § 35A-1245(c) provides that “If the ward is unable to comprehend the nature of the proposed procedure and its consequences and is unable to provide an informed consent, the clerk shall appoint an attorney to represent the ward in accordance with rules adopted by the Office of Indigent Defense Services.” At a hearing on a motion for restoration of a ward to competency, “the ward shall be entitled to be represented by counsel or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services if the ward is indigent and not represented by counsel.” N.C. Gen. Stat. § 35A-1130 (c). Counsel also must be appointed in “[a] proceeding for the provision of protective services” involving “abused, neglected, or exploited disabled adults.” N.C. Gen. Stat. § 7A-451(a)(11).

N.C. Gen. Stat. § 7A-451(b) specifies that, in the above situations, “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and also

1 A determination of incompetency is a precursor to the establishment of a guardianship. It appears that North Carolina provides counsel for the incompetency determination, and once such determination is made, no further counsel is provided for subsequent proceedings. See N.C. Gen. Stat. § 35A-1217 (in guardianship proceeding, “The clerk shall appoint a guardian ad litem to represent a ward in a proceeding under this Subchapter if the ward has been adjudicated incompetent under Subchapter I and the clerk determines that the ward’s interests are not adequately represented ...Nothing herein shall affect the ward’s right to retain counsel of his or her own choice.”)
“entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical stages.

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

An indigent person is entitled to counsel in a proceeding for inpatient involuntary commitment for either mental health or substance abuse. N.C. Gen. Stat. § 7A-451(a)(6). N.C. Gen. Stat. § 7A-451(b) specifies that “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and “entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical. See also N.C. Gen. Stat. § 122C-270, which states:

(a) In a superior court district or set of districts as defined in G.S. 7A-41.1 in which a State facility for the mentally ill is located, the Commission on Indigent Defense Services shall appoint an attorney licensed to practice in North Carolina as special counsel for indigent respondents who are mentally ill. These special counsel shall serve at the pleasure of the Commission, may not privately practice law, and shall receive annual compensation within the salary range for assistant public defenders as fixed by the Office of Indigent Defense Services. The special counsel shall represent all indigent respondents at all hearings, rehearings, and supplemental hearings held at the State facility. Special counsel shall determine indigency in accordance with G.S. 7A-450(a). Indigency is subject to redetermination by the presiding judge. If the respondent appeals, counsel for the appeal shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services.

... 

(d) At hearings held in counties other than those designated in subsection (a) of this section, counsel for indigent respondents shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services.

(e) If the respondent is committed to a non-State 24-hour facility, assigned counsel remains responsible for the respondent’s representation at the trial level until discharged by order of district court, until the respondent is unconditionally discharged from the facility, or until the respondent voluntarily admits himself or herself to the facility. If the respondent is transferred to a State facility for the mentally ill, assigned counsel is discharged. If the respondent appeals, counsel for the appeal shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services.
For substance abuse commitments, § 122C-286 specifies that “If the respondent is indigent within the meaning of G.S. 7A-450, counsel shall be appointed to represent the respondent in accordance with rules adopted by the Office of Indigent Defense Services.”

For juveniles, counsel must be appointed within 48 hours of admittance “to a 24-hour facility wherein his freedom of movement will be restricted,” N.C. Gen. Stat. § 122C-224.1. A juvenile is also entitled to counsel when a hearing is held which might result in “commitment to an institution.” N.C. Gen. Stat. § 7A-451(a)(8), and such “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process.” N.C. Gen. Stat. § 7A-451(b).

For outpatient treatment, N.C. Gen. Stat. § 122C-267(d) specifies: “At the hearing to determine the necessity and appropriateness of outpatient commitment, the respondent need not, but may, be represented by counsel. However, if the court determines that the legal or factual issues raised are of such complexity that the assistance of counsel is necessary for an adequate presentation of the merits or that the respondent is unable to speak for himself, the court may continue the case for not more than five days and order the appointment of counsel for an indigent respondent. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services.” Additionally, NC Gen. Stat. § 7A-451.1 provides that the State shall pay counsel fees for persons appointed under NC Gen. Stat. § 122C-267(d) to represent an individual in outpatient commitment proceedings.

For juveniles, counsel must be appointed within 48 hours of admittance “to a 24-hour facility wherein his freedom of movement will be restricted,” N.C. Gen. Stat. § 122C-224.1. A juvenile is also entitled to counsel when a hearing is held which might result in “commitment to an institution.” N.C. Gen. Stat. § 7A-451(a)(8), and such “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process.” N.C. Gen. Stat. § 7A-451(b).

D. Sex Offender Proceedings

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

E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings

State Statutes and Court Decisions Interpreting Statutes

Counsel must be provided in cases where indigent individuals have been quarantined due to contamination by a biological, nuclear, or chemical agent, and a proceeding is held
“involving limitation on freedom of movement or access.” N.C. Gen. Stat. § 7A-451(a)(17); N.C. Gen. Stat. § 130A-475(b); N.C. Gen. Stat. § 130A-145(d). N.C. Gen. Stat. § 7A-451(b) specifies that “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and “entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical stages. *Id.*

4. CHILD CUSTODY

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

State Statutes and Court Decisions Interpreting Statutes

Appointment of counsel is mandated for indigent persons in an action where “a juvenile [is] alleged to be abused, neglected, or dependent,” and in “[a]n action brought pursuant to Article 11 of Chapter 7B of the General Statutes [the abuse/neglect section of the code] to terminate an indigent person’s parental rights.” N.C. Gen. Stat. § 7A-451(a)(12), (15); see also N.C. Gen. Stat. § 7B-602 (“In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right.”). In addition, counsel must be provided to indigent parents in any proceeding to terminate parental rights where the appointment of a guardian ad litem is required pursuant to N.C. Gen. Stat. § 7B-1101, which essentially means any case where the parent is under age eighteen and unmarried or unemancipated, or where “there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest.” N.C. Gen. Stat. §§ 7A-451(a)(14), 7B-1101.1(b)-(c).

N.C. Gen. Stat. § 7B-1101.1 specifies that, with regard to proceedings to terminate parental rights in the abuse/neglect context, “the parent has the right to counsel, and to appointed counsel in the case of indigency, unless the parent waives the right” and, unless the respondent parent already has counsel, a provisional counsel will be appointed by the clerk until it is determined the parent does not qualify for that counsel.

N.C. Gen. Stat. § 7A-451(b) specifies that “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and “entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical stages. *Id.*
N.C. Gen. Stat. 7B-1103 provides that the following persons may file a petition to terminate parental rights in juvenile court under the abuse/neglect process: 1) either parent seeking to terminate the rights of the other parent; 2) a judicially-appointed guardian of the juvenile; 3) a county social services department with judicially-mandated custody; (4) a county social services department where the child has been placed for adoption; 5) any person the juvenile has resided with in the prior two years; 6) the guardian ad litem; and 7) a person who has filed a petition for adoption. The fact that a parent consents to adoption does not eliminate the right to counsel, where the request for consent to adopt stemmed from an abuse/neglect proceeding. In the Matter of Maynard, 448 S.E.2d 871, 873 (N.C. Ct. App. 1994).

Federal Statutes and Court Decisions Interpreting Statutes

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

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


State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Clark, 281 S.E.2d 47 (N.C. 1981), the North Carolina Supreme Court rejected the claim that due process required the appointment of counsel for all parents in termination of parental rights proceedings. In its decision, issued the same year as Lassiter, the court examined the statute governing termination of parental rights that was in place at the time, one that did not provide a right to counsel. The court found the Lassiter ruling “persuasive” and held that “the failure of our Act (prior to the recent amendment) to require the appointment of counsel for an indigent parent . . . in all cases did not make the Act

2 While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(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.
constitutionally defective under the Constitution of North Carolina.” *Id.* at 53. The court of appeals later avoided the question of the right to counsel in dependency cases. *In re Bikman*, 2003 N.C. App. LEXIS 1844 (N.C. Ct. App. 2003) (“As parents thus have a statutory right to counsel in juvenile abuse, neglect, and dependency cases under North Carolina law, the constitutional analysis relied on in the briefs of petitioner and the guardian ad litem for respondent’s children is of no consequence to the outcome of this case.”).

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

**State Statutes and Court Decisions Interpreting Statutes**

The court has discretionary authority to appoint counsel for a parent or alleged parent in an adoption proceeding who is either unknown or has unknown whereabouts. N.C. Gen. Stat. § 48-2-201.

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

**State Statutes and Court Decisions Interpreting Statutes**

N.C. Gen. Stat. § 7B-601 (specifically covering abuse/neglect proceedings) specifies that children receive a guardian ad litem unless the GAL appointed is not an attorney, at which point “an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding.” Additionally, the statute specifies that “[t]he appointment shall terminate when the permanent plan has been achieved for the juvenile and approved by the court,” meaning the appointment would apply to the termination of parental rights proceeding. *Id.*

The court has the discretionary power to appoint counsel if there is a conflict of interest that prevents a local program, such as a guardian ad litem program, from representing a juvenile purported to be abused, neglected, or dependent. N.C. Gen. Stat. § 7B-1202.

**Federal Statutes and Court Decisions Interpreting Statutes**

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

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


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

A State plan submitted under paragraph (1) shall contain a description of the activities that the State will carry out using amounts received under the grant to achieve the objectives of this subchapter, including— ...(B) an assurance in the form of a certification by the Governor of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes— ... (xiii) provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings.”

42 U.S.C. § 5106a(b)(2).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Clark, 281 S.E.2d 47 (N.C. 1981), the North Carolina Supreme Court rejected the claim that due process required the appointment of counsel for all children in termination of parental rights proceedings. In its decision, issued the same year as Lassiter, the court examined the statute governing termination of parental rights that was in place at the time,

3 While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(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.
one that did not provide a right to counsel. The court found the Lassiter ruling “persuasive” and held that “the failure of our Act (prior to the recent amendment) to require the appointment of counsel for . . . the minor child in all cases did not make the Act constitutionally defective under the Constitution of North Carolina.” Id. at 53. However, the Clark court did state that, in situations where the child lacks a GAL who is an attorney, the court should address the situation on a case-by-case basis; but “whenever the respondent-parent is represented by counsel, appointed or retained, we believe that fundamental fairness requires that the minor child be represented by counsel.” Id. The court of appeals later avoided the question of the right to counsel in dependency cases. In re Bikman, 2003 N.C. App. Lexis 1844 (N.C. Ct. App. 2003) (unpublished) (“As parents thus have a statutory right to counsel in juvenile abuse, neglect, and dependency cases under North Carolina law, the constitutional analysis relied on in the briefs of petitioner and the guardian ad litem for respondent's children is of no consequence to the outcome of this case.”).

D. Appointment of Counsel for Child—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

N.C. Gen. Stat. § 48-2-201(b) states, “The court on its own motion may appoint an attorney or a guardian ad litem to represent the interests of the adoptee in a contested proceeding brought under this Chapter.”

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Statutes and Court Decisions Interpreting Statutes

While N.C. Gen. Stat. § 7A-451(a)(1) provides a right to counsel in “[a]ny case in which imprisonment or a fine of five hundred dollars ... is likely to be adjudged,” this broad provision does not include civil contempt cases because the statute only applies to criminal cases, according to the North Carolina Supreme Court. Jolly v. Wright, 265 S.E.2d 135, 139 (N.C. 1980), overruled on other grounds, McBride v. McBride, 431 S.E.2d 14 (N.C. 1993).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

Prior to the U.S. Supreme Court’s decision in Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the North Carolina Supreme Court in Jolly v. Wright, 265 S.E.2d 135, 138 (N.C. 1980), rejected an indigent defendant’s contention that he was entitled to appointed counsel in a civil contempt hearing for failure to pay child support. The court held that neither
the federal Due Process Clause nor the “Law of the Land” Clause\(^4\) required the automatic appointment of counsel, despite the fact that the hearing could result in imprisonment for the defendant. \textit{Id.} at 143. The court noted that nonsupport civil contempt cases generally are not complex, and therefore, counsel is not automatically mandated. \textit{Id.} Instead, due process would be satisfied when the court evaluated “the necessity of counsel on a case-by-case basis,” and awarded counsel only when “necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness.” \textit{Id.} \(^5\)

\textit{After Lassiter,} the North Carolina Supreme Court revisited and at least partially overruled \textit{Jolly,} finding that appointment of counsel for indigent defendants was in fact required in a civil contempt case for failure to pay child support, if the case could result in a loss of liberty for the defendant. \textit{McBride v. McBride,} 431 S.E.2d 14, 19-20 (N.C. 1993). The North Carolina Supreme Court cited \textit{Lassiter} for the proposition that the important question to consider was whether loss of liberty was at stake, stating:

When a truly indigent defendant is jailed pursuant to a civil contempt order which calls upon him to do that which he cannot do—to pay child support arrearage which he is unable to pay—the deprivation of his physical liberty is no less than that of a criminal defendant who is incarcerated upon conviction of a criminal offense.

\(^4\) With respect to due process, Article I, section 19 of the North Carolina Constitution states, “[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.” N.C. Const. art I, §19.\(^4\) Known as the “Law of the Land” Clause, this constitutional provision guarantees a litigant “in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree.” \textit{Shepherd v. Shepherd,} 159 S.E.2d 357, 361 (N.C. 1968). “Where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it.” \textit{Id.} The phrase “law of the land,” as used in the constitutional provision, is interchangeable with “due process of law.” \textit{Eason v. Spence,} 61 S.E.2d 717, 721 (N.C. 1950). Yet, the North Carolina Supreme Court interprets the “Law of the Land” Clause independently, and is not bound by the U.S. Supreme Court’s interpretation of the Due Process Clause in the U.S. Constitution. \textit{See, e.g., Dep’t of Transp. v. Rowe,} 549 S.E.2d 203, 209 (N.C. 2001) (citing \textit{McNeill v. Harnett County,} 398 S.E.2d 475, 481 (1990) (“Decisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution... do not control an interpretation by this Court of the law of the land clause of our state Constitution, they are [only] persuasive authority.”) (citation and internal quotation marks omitted).

\(^5\) Although the court noted that the Defendant asserted a constitutional entitlement to appointed counsel relying on “the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Law of the Land provisions in Article I, Section 19 of the North Carolina Constitution,” the court’s analysis exclusively focused on the federal Constitution. \textit{Id.} at 138, 141 (“The constitutional sources of an indigent person’s right to appointed counsel are the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment”). The lower court had, however, “concluded as a matter of law that there is no constitutional mandate, state or federal, requiring court appointed counsel in every civil contempt case for nonpayment of child support....” \textit{Id.} at 138.
Id. at 19. Therefore, the court ruled, “[a]t the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated.” Id. If a North Carolina court finds that the defendant may be incarcerated, that the defendant is indigent, and that the defendant wishes counsel, then the court held that counsel must be appointed under the federal constitution. Id.6

The U.S. Supreme Court’s ruling in *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011) (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”) may have a negative impact on the *McBride* decision. The *McBride* court relied on a belief that there was a federal constitutional presumption in favor of counsel when physical liberty is threatened, but *Turner* put that idea to rest. And given that no independent state ground was provided, the *McBride* decision is of questionable precedential value, at least for cases within *Turner*’s purview. Subsequent to *Turner*, in *Young v. Young*, 736 S.E.2d 538 (N.C. App. 2012), the Court of Appeals cited both *Turner* and *McBride* but gave little indication of what it would do on civil contempt cases generally because it found that the defendant had failed to meet his burden of proving that he was indigent. The *Young* court did say, though, that “[c]ontrary to Plaintiff’s assertion, *Turner* does not stand for the proposition that counsel is not required only when the opposing party is also unrepresented; rather it finds both that in such a scenario, counsel is not required if there are appropriate safeguards in place, and that counsel is not ‘automatically require[d]’ in all civil contempt hearings for child support from indigent litigants.” Id at 544. Then, in *Tyll v. Berry*, 758 S.E.2d 411 (N.C. App. 2014), the Court of Appeals cited *Turner* for the proposition that “In civil contempt proceedings, the question whether an indigent, alleged contemnor is entitled to counsel under the Due Process Clause of the Fourteenth Amendment to the United States Constitution is a determination made on a case-by-case basis.” While the court cited *McBride* elsewhere, it did not mention *McBride*’s holding that counsel is required in all contempt cases. Several months later, in *D’Alessandro v. D’Alessandro*, 762 S.E.2d 329, 332

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6 In *McBride*, it appears that the North Carolina Supreme Court was applying federal constitutional law in determining that the case before it required the appointment of counsel. See id. at 19 (“In light of the Supreme Court’s opinion in *Lassiter*, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnor[s] may not be incarcerated for failure to pay child support arrearages. To the extent that our decision in *Jolly v. Wright*, 265 S.E.2d 135 (N.C. 1980), is inconsistent with this holding, that decision is overruled.”). Additionally, it is worth noting that *McBride* held the trial court must find that the defendant wishes counsel, and does not specify that the court must ask the defendant if he/she wishes counsel. In *Daugherty v. Daugherty*, 302 S.E.2d 664 (N.C. App. 1983), after applying the case-by-case test in effect under *Jolly* at the time, the court stated, “even if the proceeding had been more complex and defendant needed the assistance of counsel in connection with it, under the circumstances that existed here, the judge’s failure to raise and answer the ability to employ counsel question on his own initiative would not have been error, in our opinion. Since the defendant’s earnings were somewhat above the poverty level and he had been before the court on several prior occasions because of his delinquencies in making the payments, the judge had a right to assume, we think, that if the defendant thought he was eligible for the court’s assistance in obtaining counsel and wanted it, that he would inform the court accordingly.” It is unclear whether this part of the *Daugherty* holding is still good law.
the Court of Appeals quoted McBride as authoritatively establishing a right to counsel, did not mention Turner or Tyll, and held, “Where a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues.” Then, in Wilson v. Guinyard, 801 S.E.2d 700, 704 (N.C. App. 2017), the court acknowledged the holdings in McBride and D’Alessandro as providing a right to counsel in civil contempt proceedings for nonsupport, as well as its holding in Tyll that came to the opposite conclusion. It then avoided the issue by concluding, “Here, Defendant was held in civil contempt for his failure to comply with provisions of the custody order regarding the exchange time for weekend visitations. Defendant has the ability to comply with the purge conditions as imposed and the instant case presents no ‘unusually complex issues of law or fact which would necessitate the appointment of counsel.’”

B. Paternity Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Wake County v. Townes, 293 S.E.2d 95 (N.C. 1982), a paternity determination case, the North Carolina Supreme Court recognized that “a related threat of actual imprisonment, based partially upon a prior determination of paternity, may arise in subsequent criminal or civil enforcement proceedings if such becomes necessary to secure a defendant-father’s support obligation to his child,” but held that such an uncertain “web of possibilities” was too removed and therefore did not trigger an automatic right to counsel. Id. at 98 (emphasis in original).7 The court implied some cases not involving deprivation of liberty might nevertheless require the appointment of counsel, id., and that to determine whether such a defendant had a right to counsel, the trial court should evaluate “the vital interests at stake on both sides” and determine “the degree of actual complexity involved in the given case and the corresponding nature of defendant’s peculiar problems, if any, in presenting his own defense without appointed legal assistance.” Id. at 100.

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

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7 Note that in its ruling in Wake County, the North Carolina Supreme Court overruled the Court of Appeals, which had found an absolute right to counsel in paternity cases based on the multitude of different interests at stake. See Wake County v. Townes, 281 S.E.2d 765, 767 (N.C. Ct. App. 1981). Townes primarily relied on the federal constitution, but stated that the North Carolina Supreme Court had “previously noted that the Law of the Land Clause in Art. I, § 19, of the North Carolina Constitution encompasses concepts similar to, and not broader than, federal due process.” Townes, 293 S.E.2d at n. 1.
State Statutes and Court Decisions Interpreting Statutes

Counsel is provided upon request in proceedings “involving consent for an abortion on an unemancipated minor.” N.C. Gen. Stat. § 7A-451(a)(16); see also § 90-21.8(c) (in proceedings to bypass parental consent for minor to have abortion, “[t]he court shall advise her that she has a right to appointed counsel, and counsel shall be provided upon her request in accordance with rules adopted by the Office of Indigent Defense Services.”). N.C. Gen. Stat. § 7A-451(b) specifies that “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and “entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical stages.

D. Proceedings Involving Authorization of Marriage of a Minor

State Statutes and Court Decisions Interpreting Statutes

N.C. Gen. Stat. § 51-2.1(a)-(b) provides that a guardian ad litem, who must be an attorney, must be appointed when a female between the ages of 14 and 16 is pregnant or has given birth and seeks judicial authorization to marry the putative father of her child, or where a male between the ages of 14 and 16 seeks to marry the mother or expectant mother of his child.

E. Proceedings Involving Claims by or Against Prisoners

State Statutes and Court Decisions Interpreting Statutes

An indigent person is entitled to counsel in “a hearing on a petition for a writ of habeas corpus,” “a hearing for revocation of probation,” and “a hearing in which extradition to another state is sought.” N.C. Gen. Stat. § 7A-451(a)(2), (4), (5).

N.C. Gen. Stat. § 7A-451(a)(9) states that an indigent person may be provided counsel “at a hearing for revocation of parole” in accordance with the provisions in N.C. Gen. Stat. § 148-62.1. That provision provides counsel at state expense on a case-by-case basis where the Post-Release Supervision and Parole Commission determines fundamental fairness requires appointment of counsel and “(1) [t]he parolee or post-release supervisee claims not to have committed the alleged violation of the parole or post-release supervision conditions; or (2) [t]he parolee or post-release supervisee claims there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, even if the violation is a matter of public record or is uncontested, and that the reasons are complex or otherwise difficult to
develop or present; or (3) [t]he parolee or post-release supervisee is incapable of speaking effectively for himself.” N.C. Gen. Stat. § 148-62.1.

N.C. Gen. Stat. § 7A-451(b) specifies that, in the above situations, “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and “entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical stages.

F. Execution of a Judgment Against a Person or Civil Arrest

State Statutes and Court Decisions Interpreting Statutes

Indigents are entitled to counsel “in any case of execution against the person under Chapter 1, Article 28 of the General Statutes.” N.C. Gen. Stat. § 7A-451(a)(7). N.C. Gen. Stat. § 7A-451(b) specifies that “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and “entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical stages.

G. Civil Arrest and Bail Proceedings

State Statutes and Court Decisions Interpreting Statutes

Indigents are entitled to counsel “in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes.” N.C. Gen. Stat. § 7A-451(a)(7). N.C. Gen. Stat. § 7A-451(b) specifies that “entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process” and “entitlement continues through any critical stage of the action or proceeding.” This statutory provision also lists a number of situations that are definitively considered critical stages.

H. Non-Testimonial Identification Procedures

State Statutes and Court Decisions Interpreting Statutes

Counsel must be provided in cases in which a person is subject to “a nontestimonial identification procedure.” N.C. Gen. Stat. § 15A-279(d).
I. Material Witness Ordered to Attend Criminal Proceeding

State Statutes and Court Decisions Interpreting Statutes

Counsel must be provided in cases in which a judge has issued an order requiring a material witness to attend a criminal proceeding. N.C. Gen. Stat. § 15A-803(d).

J. Juvenile Delinquency or Child in Need of Supervision Proceedings

State Statutes and Court Decisions Interpreting Statutes

N.C. Gen. Stat. § 7B-2000(a) states that "[a] juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. Counsel for the juvenile shall be appointed in accordance with the rules adopted by the Office of Indigent Defense Services, unless counsel is retained for the juvenile, in any proceeding in which the juvenile is alleged to be (i) delinquent or (ii) in contempt of court when alleged or adjudicated to be undisciplined." N.C. Gen Stat. § 7B-2000(b) states that “[a]ll juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency.” Although this provision relates to juvenile delinquency, it would likely be considered persuasive for other North Carolina statutes providing counsel for children if indigency is a requirement.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Walker, 191 S.E.2d 702 (N.C. 1972), the North Carolina Supreme Court rejected the right to counsel for “undisciplined child” proceedings. After first determining that the “undisciplined child” statute in place at the time did not allow for detention of the child (meaning that the N.C. Stat § 7A-451 and Gault rights to counsel would not apply, as both are triggered by loss of liberty), the court rejected the argument that “such a hearing is a critical stage in the juvenile process since it subjects the child to the risk of probation and since a violation of probation means that the child is Delinquent and subject to commitment.” Id. at 708. The court refused to apply the “critical stage” analysis from the criminal law context to undisciplined child proceedings, holding: “Whatever may be the proper classification for a juvenile proceeding in which the child is alleged to be undisciplined, it certainly is not a criminal prosecution within the meaning of the Sixth Amendment which guarantees the assistance of counsel in all criminal prosecutions.” Id. The court also pointed out that

The fact that a child initially has been found to be undisciplined and placed on probation is merely incidental to a later petition and motion alleging delinquency based on violation of the terms of probation. The initial finding can never legally result in commitment to an institution in which the juvenile's freedom is curtailed. It is only the
latter petition and motion, and the finding that the child is a Delinquent child by reason of its conduct since the initial hearing, they may result in the child's commitment.

_Id_ at 709. Additionally, the court rejected the argument that the statutory scheme violated equal protection by subjecting juveniles to potential incarceration for non-criminal offenses when adults are only incarcerated for actual offenses, finding that the purpose of the juvenile statutes is protection rather than punishment and that adults and children are not similarly situated for purposes of equal protection analysis. _Id._ at 709-710. The court also rejected the argument that it is a violation of equal protection to refuse counsel for undisciplined children while providing it to delinquent children, holding: “The one may need protection while the other needs correction.” _Id._ at 710.

**K. Petitions for Return of Seized Property**

**State Statutes and Court Decisions Interpreting Statutes**

Counsel may be provided for “unknown or unapprehended defendants,” or for “defendants willfully absent from the jurisdiction,” when a law enforcement officer has seized property from them and the lawful owner petitions a court for the property’s return. N.C. Gen. Stat. § 15-11.1(b).

**L. Proceedings Involving Child Support**

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

In _King v. King_, 547 S.E.2d 846, 847 (N.C. Ct. App. 2001), the defendant appealed an order denying her motion for modification of child support on the grounds that she had been denied the right to have counsel appointed. _Id._ The North Carolina Court of Appeals rejected the contention that failure to appoint counsel violated due process, as the defendant’s liberty interest was not at stake in the child support modification hearing. _Id._ at 847, 849 ("Where this liberty interest is not at stake, there is a presumption that the defendant is not entitled to counsel.") (citing _McBride v. McBride_, 334 N.C. 124, 127 (1993)). The court stated first that there was a presumption against appointment of counsel when a liberty interest is not involved, then later stated that in order to establish a right to counsel as a matter of due process, indigent litigants must demonstrate that (1) they are indigent and (2) their liberty interest is at stake. _Id._ at 847.

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8 The court spoke about “due process” generally, and did not specifically mention the “Law of the Land” Clause. Nonetheless, it relied on _McBride_, which in turn relied on _Lassiter_.

ABA DIRECTORY OF LAW GOVERNING APPOINTMENT OF COUNSEL IN STATE CIVIL PROCEEDINGS • NORTH CAROLINA • 2017 17
M. Marriage Dissolution/Divorce Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *McIntosh v. McIntosh*, the court held that because “there is no liberty interest at stake in an equitable distribution trial . . . there is no constitutional right to counsel” and cited *King v. King*, 547 S.E.2d 846, 847 (N.C. Ct. App. 2001), discussed supra Part 5.L, for the proposition that “due process requires appointed counsel only where an individual ‘cannot afford counsel on his own and where the litigant may lose his physical liberty if he loses the litigation.’” 646 S.E.2d 820, 824 (N.C. Ct. App. 2007) (quoting *King*, 547 S.E.2d at 847)). In *Dillard v. Dillard*, 2014 WL 6432999, *7* (N.C. App. 2014) (unpublished), the court held that “[a] civil action seeking absolute divorce does not fall within the narrow category of cases triggering a right to counsel at the state’s expense.” *Id.* (quoting *Lassiter*, which held that “the constitutional requirement that counsel be provided to indigent defendants is limited to narrow categories of cases where a defendant could be deprived of his physical liberty”).

N. Claims Brought Pursuant to 42 U.S.C. § 1983

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Loren v. Jackson*, 291 S.E.2d 310, 313 (N.C. Ct. App. 1982), the North Carolina Court of Appeals held that there was no federal due process right to counsel for a claim brought by an indigent plaintiff pursuant to 42 U.S.C. § 1983. In construing the Fourteenth Amendment to the U.S. Constitution, the court cited both North Carolina law and *Lassiter* in holding that “[n]o procedural due process, and particularly no right to appointed counsel, inures to plaintiff in the present case where his action is a civil action initiated by him against private individuals, and where his action is one in which the State is not even a party, much less the initiator of proceedings to deprive an individual of his physical liberty.” *Id.* The key issue in *Loren* was the absence of state action to potentially trigger a due process right to counsel, which was not at issue in *Lassiter*.

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9 *McIntosh* is not clear about which constitution is being applied, but the citation to *King* suggests it is the federal constitution. See supra note 14.
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 and to all civil proceedings (including custody), provides:

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


Additionally, 50 App. U.S.C. § 3932(d)(1), which also applies to all civil proceedings (including custody), specifies that a service member previously granted a stay may apply for an additional stay based on a continuing inability to appear, while § 3932(d)(2) states: “If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.”

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10 50 App. U.S.C.A. § 3912(a) states, “This Chapter applies to-- ...(2) each of the States, including the political subdivisions thereof...”
11 50 App. U.S.C. § 3931(a) states, “This section applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance.”
12 50 App. U.S.C. § 3932(a) applies to “any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing an application under this section-- (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding.”