NEW HAMPSHIRE

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# NEW HAMPSHIRE

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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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confirm whether a case is published and to familiarize themselves with all rules relating to the citation and use of unpublished or unreported cases.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

A person has the “absolute and unconditional” right to legal counsel in a guardianship proceeding. N.H. Rev. Stat. Ann. § 464-A:6(I) (“The right to legal counsel for any person for whom a temporary guardian or guardianship of the person and estate, or person, or estate, is sought shall be absolute and unconditional.”). Additionally, the court “shall appoint counsel” if the proposed ward does not have his or her own counsel. Id. However, the proposed ward “shall be liable for attorney fees unless he or she is found indigent by the probate court.” § 464-A:6(II). In In re Guardianship of Eaton, the high court found that the language of § 464-A:43 (another part of the guardianship code) did not entitle the petitioner in a guardianship case to recoup attorney’s fees from the ward where the petitioner acts in good faith. 42 A.3d 799, 800-03 (N.H. 2012). The right to counsel in guardianship extends to the termination of guardianship proceeding. § 464-A:40(II)(c) (“Unless the motion is without merit, the court shall hold a hearing similar to that provided for in RSA 464-A:8 and RSA 464-A:9[.]”); In re Guardianship of Williams, 986 A.2d 559, 567 (N.H. 2009) (“At the termination hearing, conducted in a manner similar to that of the guardianship hearing and with the ward’s rights protected by counsel, the burden is on the guardian to prove that the grounds for the appointment of the guardian continue to exist, see RSA 464-A:40, II(c).”).

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

A person has the “absolute and unconditional” right to legal counsel in an involuntary civil commitment proceeding in probate court. N.H. Rev. Stat. Ann. § 135-C:22. “If the client or person sought to be admitted is unable to pay for counsel, the court shall appoint either a member of New Hampshire Legal Assistance, or its successor organization, or another attorney who shall be compensated at a rate as determined by the supreme court.” § 135-C:23.
State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *In re Richard A.* (involving right to counsel in appeal of commitment order where counsel considers appeal frivolous), the court held that a person subject to involuntary civil commitment is not entitled to the exact same due process safeguards as a criminal defendant due to the involuntary commitment proceeding’s focus on treatment rather than adjudication of guilt or innocence. 771 A.2d 572, 576-78 (N.H. 2001). The court also found substantial procedural safeguards in place with regards to the commitment proceedings, such as a high standard of proof, the degree of contemporaneous medical evidence required, procedures for Contesting the petition, and the ability of the facility administrator to release the detained person at any time without court approval. *Id.* at 577. And the court expressed concern about the “expenditure of substantial State resources” should it be required that trial counsel in commitment cases follow the criminal appeal standard, namely, filing the notice of appeal and “present[ing] the case as well as possible through subsequent proceedings.” *Id.* at 576, 578 (internal quotations omitted). In the end, the court struck a middle ground due to “the loss of liberty in this case,” requiring counsel in commitment cases to file the notice of appeal even when counsel feels the appeal to be frivolous, but not requiring counsel to go any further. *Id.* at 578.

D. Sex Offender Proceedings

State Statutes and Court Decisions Interpreting Statutes

For sexually violent predator civil commitments:

The right of a person sought to be committed as a sexually violent predator to legal counsel prior to and during any judicial hearing conducted under this chapter shall be absolute and unconditional. The right to legal counsel for any person sought to be committed during any judicial proceeding conducted under this chapter shall be waived only if the client or person sought to be committed makes an informed decision to do so. The person sought to be committed shall pay the costs of the legal services in connection with hearings held under this chapter. If the person sought to be committed is unable to pay for counsel, the court shall appoint counsel pursuant to RSA 604-A:2.


Federal Court Decisions Addressing Constitutional Due Process or Equal Protection
In *Sarzen v. Gaughan*, the First Circuit considered whether there is a federal due process right to counsel for proceedings relating to a determination that a person is sexually dangerous. 489 F.2d 1076, 1082-83 (1st Cir. 1973). The court first held that the right to counsel did not attach for the temporary 60-day commitment for “examination and diagnosis,” stating:

While counsel might be helpful, especially in the case of disturbed or badly educated inmates, we cannot say that counsel is constitutionally mandated for this purpose prior to the observational commitment of one serving sentence for a sex crime, provided there is a careful and conscientious effort to check out the historical data with the inmate and to see that it is accurate and complete. *Id.* at 1079, 1085 (footnote omitted). Additionally, the court reasoned that early on, the psychiatrist’s role is to be “relatively open and professionally detached,” and that “[b]efore the psychiatrists have rendered an adverse report, we are not persuaded that their role is so greatly at variance with the interests of the inmate as to require the state to assume the burden of appointing counsel for each person being examined or about to be examined.” *Id.* at 1085-86. However, once the psychiatrist filed a report finding the person to be sexually dangerous, “the psychiatrists’ role has changed. They have, in effect, become prosecutors; their benevolence has been compromised, . . . the inmate needs independent assistance, including that of counsel.” *Id.* at 1086 (internal citations and quotations omitted). The court added that appointing counsel at the final commitment hearing was insufficient. *Id.* at 1084-85. Notably, the court commented that: “Although the full panoply of criminal due process is not necessarily applicable to c. 123A proceedings, . . . we follow the Supreme Court’s directive in *In re Gault*, . . . not to allow the ‘civil’ label to deflect us from the fundamental interest at stake.” *Id.* at 1085 n. 15.

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.

F. Health Care Benefits

**State Statutes and Court Decisions Interpreting Statutes**

N.H. Rev. Stat. Ann. § 151-I:2(I)(a) permits a care facility to “petition the court for the appointment of a special Medicaid representative” where the patient has not paid the costs of care and the facility believes the patient would be eligible for Medicaid. Subsection (IV)(e) provides that in a hearing regarding whether to appoint such a representative:
Unless the person is represented by private counsel or makes a knowing, voluntary, and intelligent waiver, the court shall appoint counsel, the fees and costs for which shall be paid from the estate of the person or, upon a finding that the person is indigent, from the care facility; provided, however, that such fees and costs are reasonable and approved by the court and further provided that in no event shall the fees and costs of such counsel exceed $900 in the aggregate. The said fees and costs may also be paid by the care facility by agreement.

4. CHILD CUSTODY

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

State Statutes and Court Decisions Interpreting Statutes

New Hampshire by statute provides:

In any case of neglect or abuse brought pursuant to this chapter, the court shall appoint an attorney to represent an indigent parent alleged to have neglected or abused his or her child. In addition, the court may appoint an attorney to represent an indigent parent not alleged to have neglected or abused his or her child if the parent is a household member and such independent legal representation is necessary to protect the parent’s interest. The court shall not appoint an attorney to represent any other persons involved in a case brought under this chapter.


An indigent parent in a termination of parental rights hearing is entitled to appointed counsel. § 170-C:10 (“When termination of the parent-child relationship is sought, the parent shall be notified at the same time notice is given . . . of his right to counsel, and if counsel is requested and the parent is financially unable to employ counsel, counsel shall be provided by the court[.]”).

Federal Statutes and Court Decisions Interpreting Statutes

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

1 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
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 [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

In In re Guardianship of Brittany S., the court concluded that a mother did not have a
right to counsel during a hearing to terminate a guardian appointed for her child. 792 A.2d 384,
386 (N.H. 2002). The court first noted that the mother’s parental rights had already been
“curtailed” by the guardianship proceeding, and therefore, the hearing to terminate the
guardian did not involve “further deprivation of parental rights.” Id. The court then
distinguished the instant proceeding from a parental rights termination proceeding because the
guardianship appointment had a “finite life,” was subject to periodic review, and did not result
in a permanent deprivation of parental rights. Id. Moreover, the parent or the minor could
petition to terminate the guardianship at any time. Id. With regards to the risk of erroneous
deprivation, the court held that the informal nature of the proceedings (i.e., that the judge was
not bound by the rules of evidence and there was no jury) militated against the risk. Id. at 387.
Finally, the court rejected the petitioner’s argument that the cost to the state was minimal, and
commented that since the statute allowed any person to petition for termination of the
guardianship, the range of potential indigent litigants was large, and the costs potentially
“significant.” Id.²

In In re Shelby, the court considered whether stepparents were entitled to counsel for
abuse and neglect proceedings. 804 A.2d 435, 437-38 (N.H. 2002), different conclusion reached

² The court also rejected the petitioner’s argument that she was entitled to counsel in order to help her keep her
medical records private (she suffered from serious mental illness and was worried that disclosure of the records
would affect her therapy), holding that the state had a superior interest in determining whether the petitioner was
truly ready to resume parental responsibility and also that the petitioner could always seek in camera review of
her medical records. Id. at 386-87.
in part, In re C.M., 48 A.3d 942 (N.H. 2012). N.H. Rev. Stat. Ann. § 169-C:10(II)(a) only requires counsel for the natural and adoptive parents and expressly forbids the appointment of counsel in other circumstances. In what was a nonbinding plurality decision,\(^3\) the court found that the legislature had overstepped its constitutional bounds and that the statutory prohibition on the hiring of counsel for stepparents violated due process under the state constitution. \textit{Id.} at 440. The court also found that stepparents who are members of the household are categorically entitled to counsel in abuse and neglect proceedings. \textit{Id.} at 439.

The \textit{Shelby} court grounded its decision specifically on the variety of substantial interests at stake where such a stepparent lives in the same household as the child: “the stepparent-stepchild relationship, the marital relationship, the natural parent-child relationship, and the overall relationship and role that the stepparent plays in the family.” \textit{Id.} at 438.\(^4\) The court did not focus specifically on the parent’s relationship to the child, commenting instead that, “a natural parent’s role \textit{in the family life} is a fundamental liberty interest under Part I, Article 2 of the State Constitution.” \textit{Id.} at 437 (emphasis added). The court then commented repeatedly on the fact that a finding of abuse/neglect against a stepparent who lives with the child might lead the court to “order a household member to stay away from the family home,” which in turn would “harm, and in some cases irreparably damage, family and marital relationships.” \textit{Id.} And the court commented that, “an abuse and neglect proceeding, by its very nature, often tears a family apart and may seriously undermine any chance at rebuilding a healthy family environment.” \textit{Id.} at 438. The court also found that despite the more informal nature of the proceedings (i.e., the relaxed evidentiary standards), the risk of erroneous deprivation weighed

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\item According to the case summary, “BRODERICK, J., sat for oral argument but did not take part in the final vote; BROCK, C.J. concurred; DUGGAN, J., concurred in part and dissented in part.” \textit{Id.} at 440. Referring to the main opinion, the dissent commented that “a decision by a plurality of an appellate court has no precedential value,” although the dissent only cited cases from the U.S. Court of Appeals for the Eleventh Circuit, the Commonwealth Court of Pennsylvania, and the U.S. Supreme Court for this proposition. \textit{Id.} at 444. In \textit{C.M.}, another plurality court agreed that \textit{Shelby} was nonbinding precedent. See 48 A.3d at 946. This may be because in both \textit{Shelby} and \textit{C.M.}, only three justices voted out of the five, so the two votes in favor of counsel were less than a majority of the full court.

\item The court also noted that a person found guilty of neglect has a protected liberty interest because their name is placed in the central registry for the Division for Children, Youth & Families. \textit{Id.} at 437. But the court decided to “proceed with our analysis based only upon his interest in protecting his familial role and relationships ‘because it is significant and his other interest is no greater.’” \textit{Id.} (quoting \textit{Petition of Preisendorfer}, 719 A.2d 590, 592 (N.H. 1998)). Perhaps the most useful language from \textit{Shelby} is the application of the third prong and the court’s finding that the state had more interests at stake than just protecting the child. The court looked to the stated statutory goal of providing “effective judicial procedures . . . [that] recognize and enforce the constitutional and other rights of the parties and assures them a fair hearing,” and held that this militated in favor of finding the right to counsel. \textit{Id.} at 438-39 (quoting § 169-C:2(III)(c) (alteration in original)). In this light, the court referred to the state’s financial interests as “legitimate” (citing to \textit{Lassiter v. Department of Social Services}, 452 U.S. 18 (1981), for this terminology), \textit{Id.} at 439.
\end{enumerate}
\end{footnotesize}
in favor of granting the right to counsel, due to (a) the low “preponderance of evidence” standard; (b) the fact that complex medical and psychological testimony would sometimes be introduced (and the court quoted *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) for this proposition); and (c) the accused stepparent’s risk of having information in the proceeding used against them in a subsequent criminal trial, a danger that was not present (by virtue of a separate statute) for natural parents. *Id.*

After *Shelby*, the court took up the issue again in *C.M.* This time, a different plurality of the court held that under the New Hampshire Constitution, counsel was not required for parents in all dependency proceedings. 48 A.3d at 949. The court relied on the use of relaxed rules of evidence and the fact that the case was heard by a judge and not a jury to find that the risk of erroneous deprivation was not so high as to always require counsel. *Id.* at 948. The court also found that at the dependency stage, the state’s interests were still aligned with the parents in terms of trying to maintain the parent-child relationship. *Id.* at 949.

In *In re Father 2006-360*, the high court held that a non-custodial father not accused of neglect did not have a state constitutional right to legal counsel where the child had been adjudicated dependent based on the mother’s neglect. 921 A.2d 409, 413 (N.H. 2007). Applying the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), factors, the court downplayed the

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5 The court also relied on the fact that the “New Hampshire Legislature . . . [has] consistently expanded the rights and duties of stepparents,” even though the legislature clearly indicated its intent in section 169-C:10(III)(a) (via the counsel appointment prohibition clause) to not extend the right to anyone other than natural or adoptive parents. *Id.* at 439 (internal quotation and citation omitted). The dissent in *Shelby* agreed that the prohibition clause violated due process but not that stepparents were entitled to counsel in all cases. *Id.* at 442-43. The dissent felt that *Brittany S.* controlled, arguing that the state’s interest, the procedural safeguards, and the fundamental interest were the same in this case (the majority did not distinguish *Brittany S.*). *Id.* at 440. However, the dissent appears to have missed the way in which the majority opinion implicitly distinguished *Brittany S.*; it essentially combined the right to parent, the right to maintain a relationship with one’s spouse (which would be affected by a “keep away” order) and the right to be part of a “household” into a combined right that was superior to the mere right to parent. For this reason, the dissent’s fear that the plurality decision would naturally extend to other similar proceedings does not seem to be well founded. The dissent also relied on *Lassiter* and the absence of decisions in other jurisdictions holding that stepparents have a right to counsel, and postulated that the expansion of counsel would result in “significant” (as opposed to “legitimate”) costs. *Id.* at 442-43. The dissent argued that there was no legal precedent to elevating a stepparent’s relationship with a child to the same constitutional level as that of a natural parent, commenting that, “if an emotional attachment is determinative, there is no principled basis for distinguishing stepparents from grandparents, siblings and other live-in relatives.” *Id.* at 441. The dissent noted that *Troxel v. Granville*, 530 U.S. 57 (2000) (statute entitled grandparents to petition at any time for visitation of child violated natural parent’s right to privacy) implicitly put the rights of natural parents above those of other family members, and the dissent felt that the stepparent’s interests that truly mattered in this case were his relationship to his natural child (the petitioner had his own child as well as a stepchild) and to his wife. *Id.* at 441-42.
father’s protected property interest of being held liable for expenses due to the mother’s adjudication, as it found this interest to be “less compelling.” Id. at 412. The court distinguished Shelby on the grounds that “[a]lthough [the unaccused parent] does face potential exposure to parental reimbursement expenses, a protected property interest, he or she does not share the same interests of preserving a marital relationship or a family dynamic that a parent living in the household would have.” Id. This statement reinforces the idea that Shelby is limited to its particular factual situation. Moving on to the second prong, the court found that the informal nature of the proceedings (i.e., the judge not being bound by the rules of evidence) and the fact that the unaccused parent could request a full custody proceeding weighed against erroneous deprivation. Id. The court also expressed concern about the “substantial fiscal as well as administrative burdens upon the State” should all noncustodial, unaccused parents receive the right to counsel. Id. at 413.

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

N.H. Rev. Stat. Ann. § 170-B:13(I)(a) states that the petitioner in an adoption must pay the reasonable legal fees of the birth parents. Section 170-B:9(I) elaborates:

Any parent surrendering parental rights shall be represented by legal counsel who is not representing an intended adoptive parent or the agency, unless such representation is waived with approval of the court for good cause shown. This paragraph is not intended, however, to create a right to counsel to be provided by the state where the surrendering parent is indigent. Instead, this paragraph is intended to make clear that the petitioning party to the adoption shall provide the surrendering parent with legal counsel consistent with RSA 170-B:13, I [the provision on reasonable fees] unless waived by the court for good cause shown.

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

State Statutes and Court Decisions Interpreting Statutes

In proceedings involving neglect or abuse, the court is required to first “appoint a Court Appointed Special Advocate (CASA) or other approved program guardian ad litem for the child.” N.H. Rev. Stat. Ann. § 169-C:10(I). The court may then appoint an attorney for a child if “a CASA or other approved program guardian ad litem is unavailable for appointment[,]” Id. The court may also appoint an attorney to represent the interests of a child “where the child’s expressed interests conflict with the recommendation for dispositional orders of the guardian ad litem[.]” § 169-C:10(I)(a). If the court appoints an attorney as counsel for a child, the attorney’s scope
of representation “may include counsel and investigative, expert and other services, including process to compel the attendance of witnesses, as may be necessary to protect the rights of the child.” § 169-C:10(II)(b).

It is unclear whether § 169-C:10 extends to termination of parental rights. On the one hand, § 169-C:10 applies to all Child Protection Act proceedings, and the Act mentions termination of parental rights. See § 169-C:24-a (describing situations where a termination petition is required). On the other hand, while parents and children are given a right to counsel in abuse/neglect proceedings in Chapter 169, the chapter giving parents a right to counsel in termination of parental rights cases (Chapter 170-C) makes no mention of representation of children.

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 [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.


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 . . . an assurance in the form

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6 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.
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

No law could be located regarding the appointment of counsel for children in privately initiated child custody proceedings.

5. MISCELLANEOUS

A. Civil Contempt Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Duval v. Duval, the court declined to extend the Sixth Amendment right to counsel to a civil contempt hearing where the defendant faced imprisonment for failure to comply with a court order to pay child support. 322 A.2d 1, 3 (N.H. 1974). The defendant argued “that it would be improper to distinguish a civil proceeding from a criminal proceeding where the outcome of either may result in imprisonment.” Id. However, the court differentiated between a civil contempt case and a criminal contempt case, noting how in a civil contempt case, the action arises from a private wrong that harms the plaintiff due to the defendant’s “failure to comply with a court order,” whereas, in a criminal contempt case, the action arises from a criminal or public wrong that interfered with the “court’s process or dignity.” Id. Additionally, the court’s power to impose sanctions, like imprisonment, was used for different purposes in the two settings: in a civil contempt case, sanctions are used as a “method of coercing the defendant into compliance,” whereas, in a criminal contempt case, sanctions are “punitive, rather than remedial in nature.” Id. Drawing on these distinctions, the court found that “it is apparent that the sixth amendment right to counsel . . . is inapplicable to a civil contempt action because that right is confined to criminal proceedings.” Id. The Duval court also looked
to the New Hampshire Constitution’s right to counsel provision and found that it is “not controlling because the record of the 1964 constitutional convention makes clear that the term ‘offense’ refers to public, not private wrongs.” Id.

The Duval court stated that “if there is a right to counsel in a civil contempt action, its source must be found in the due process clause of the fourteenth amendment.” Id. The court acknowledged the following:

In some nonsupport contempt cases, which are not routine in nature, there may be issues of sufficient complexity so as to require the defendant to be assisted by counsel for a competent presentation of their merits. Questions such as whether the defendant had a reasonable opportunity to present his case in prior proceedings or whether he has available certain defenses such as res judicata or the statute of limitations could baffle and confuse persons who are inexperienced in the law, and it would be unfair to deny such persons the benefit of counsel if they were unable to retain a lawyer because of their financial condition.

Id. at 4. Thus, the court held that although a right of counsel in civil contempt proceedings was not established as a matter of law, “the trial court may in its discretion appoint counsel to assist an indigent defendant to present his case in a complicated nonsupport contempt hearing.” Id. This approach is likely consistent with Turner v. Rogers, which holds that the Fourteenth Amendment does not require right to counsel in civil contempt hearings, at least not where the opponent is not the state, the opponent is also unrepresented, and the matter is not “unusually complex.” 564 U.S. 431, 449 (2011).

Similarly, in Sheedy v. Merrimack Cnty. Super. Ct., the court found that the New Hampshire Constitution does not guarantee an automatic right to counsel in all civil contempt proceedings. 509 A.2d 144, 147 (N.H. 1986). In its analysis and in looking closely into Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the court took an even more conservative approach than Lassiter, holding that it did not agree there should be a presumption in favor of appointment whenever physical liberty is threatened and that such language in Lassiter suggesting as much was mere dictum. Id.

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B. Paternity Proceedings

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

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

State Statutes and Court Decisions Interpreting Statutes

New Hampshire has a requirement that a minor seeking to have an abortion notify her parents prior to obtaining the procedure. N.H. Rev. Stat. Ann. § 132:33(I). The state provides a judicial proceeding where a minor can bypass the parental notification requirement upon demonstrating that either she is “mature and capable of giving informed consent to the proposed abortion” or that “the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests.” § 132:34(II). The statute specifies that in such proceedings, the court may appoint a guardian ad litem for the minor, but in addition, “[t]he court shall . . . advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.” Id.

D. Traffic Court Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *State v. Cook*, the court found that the indigent defendant was not entitled to appointed counsel either at a motor vehicle conviction hearing or at a motor vehicle habitual offender hearing. 481 A.2d 823, 827 (N.H. 1984). The court relied on the heavy financial burden imposed by hundreds of thousands of motor vehicle violation hearings, the simplicity of both types of hearings, and the remoteness of danger of collateral use of original convictions for later incarceration. Id. at 826-27. The court cited to *Lassiter, v. Department of Social Services*, 452 U.S. 18 (1981) and acknowledged, however, there might be individual cases warranting counsel due to the complexity of that particular hearing. Id. at 829.

E. Juvenile Delinquency, Status Offenses, or Child In Need of Services Proceedings

State Statutes and Court Decisions Interpreting Statutes

New Hampshire has recognized that “certain behaviors occurring within a family or school environment indicate that a child is experiencing serious difficulties and is in need of
services and corrective action in order to protect the child from the irreversibility of certain choices[].” N.H. Rev. Stat. Ann. § 169-D:1(l). A “child in need of services” is defined as:

a child under the age of 18:

(a) Who is subject to compulsory school attendance, and who is habitually, willfully, and without good and sufficient cause truant from school;

(b) Who habitually runs away from home, or who repeatedly disregards the reasonable and lawful commands of his or her parents, guardian, or custodian and places himself or herself or others in unsafe circumstances;

(c) Who has exhibited willful repeated or habitual conduct constituting offenses which would be violations under the criminal code of this state if committed by an adult or, if committed by a person 16 years of age or older, would be violations under the motor vehicle code of this state; or

(d) With a diagnosis of severe emotional, cognitive, or other mental health issues who engages in aggressive, fire setting, or sexualized behaviors that pose a danger to the child or others and who is otherwise unable or ineligible to receive services under RSA 169-B or RSA 169-C; and

(e) Is expressly found to be in need of care, guidance, counseling, discipline, supervision, treatment, or rehabilitation.

§ 169-D:2(II).\(^8\) In Children in Need of Services (CHINS) proceedings, a child is entitled to appointed counsel. § 169-D:12(I) (“[T]he court shall appoint counsel for the child at the time of the initial appearance.”).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The New Hampshire Supreme Court in In re Kotey M. declined to find a constitutional right to counsel for children in Children in Need of Services (CHINS) proceedings, but relied on the fact that the juvenile in the case had not sufficiently briefed the court on this issue. 965 A.2d 1146, 1148 (N.H. 2009). A “child in need of services” is defined by N.H. Rev. Stat. Ann. § 169-D:2(II).\(^9\)

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\(^8\) RSA § 169-B covers delinquent children, and RSA § 169-C is the Child Protection Act.

\(^9\) See supra § 5.E.
F. Failure to Pay Fees and Fines

State Statutes and Court Decisions Interpreting Statutes


Prior to conducting an ability to pay or ability to perform final hearing, the court shall: . . . Inform the defendant that he or she is entitled to counsel for the final hearing in which incarceration is a possible outcome and, if the defendant cannot afford one, the court will appoint one[.]

§ 604-A:2-f(II)(c).
Law Addressing Authorization or Requirement to Appoint Counsel in Civil Proceedings Generally

Federal Statutes and Court Decisions Interpreting Statutes

As part of the federal Servicemembers Civil Relief Act (SCRA), which applies to each state, 10 50 U.S.C. § 3931 applies to all civil proceedings (including custody) 11 and 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.

§ 3931(b)(2).

Additionally, § 3932, which also applies to all civil proceedings (including custody), 12 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.”

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10 50 U.S.C. § 3912(a)(2) states: “This chapter applies to . . . each of the States, including the political subdivisions thereof[.]”
11 Subsection 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 Section 3932 “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.” § 3932(a).