NEW JERSEY

Table of Contents

Preface.................................................................................................................................................. 1

Law Addressing Authorization or Requirement to Appoint Counsel in Specific Types of Civil Proceedings. 2

1. SHELTER..................................................................................................................................... 2
   Federal Statutes and Court Decisions Interpreting Statutes......................................................... 2

2. SUSTENANCE.............................................................................................................................. 2
   Federal Statutes and Court Decisions Interpreting Statutes......................................................... 2

3. SAFETY AND/OR HEALTH ........................................................................................................ 3
   A. Domestic Violence Protection Order Proceedings................................................................. 3
      State Court Decisions Addressing Constitutional Due Process or Equal Protection ............ 3
   B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings............................. 4
      State Statutes and Court Decisions Interpreting Statutes......................................................... 4
      State Court Rules and Court Decisions Interpreting Court Rules.......................................... 4
   C. Civil Commitment or Involuntary Mental Health Treatment Proceedings........................ 4
      State Statutes and Court Decisions Interpreting Statutes......................................................... 5
      State Court Decisions Addressing Constitutional Due Process or Equal Protection .......... 5
   D. Sex Offender Proceedings...................................................................................................... 5
      State Statutes and Court Decisions Interpreting Statutes......................................................... 5
      State Court Decisions Addressing Constitutional Due Process or Equal Protection .......... 5
   E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings........................................ 6
      State Statutes and Court Decisions Interpreting Statutes......................................................... 6
      State Court Decisions Addressing Constitutional Due Process or Equal Protection .......... 7

4. CHILD CUSTODY........................................................................................................................... 7
   A. Appointment of Counsel for Parent—State-Initiated Proceedings......................................... 7
      State Statutes and Court Decisions Interpreting Statutes......................................................... 7
      Federal Statutes and Court Decisions Interpreting Statutes..................................................... 8
      State Court Decisions Addressing Constitutional Due Process or Equal Protection .......... 8
      State Court Decisions Addressing Court’s Inherent Authority.............................................. 9
   B. Appointment of Counsel for Parent—Privately Initiated Proceedings................................ 11
      State Statutes and Court Decisions Interpreting Statutes......................................................... 11
   C. Appointment of Counsel for Child—State-Initiated Proceedings......................................... 11
      State Statutes and Court Decisions Interpreting Statutes......................................................... 11
      Federal Statutes and Court Decisions Interpreting Statutes..................................................... 11
      State Court Decisions Addressing Constitutional Due Process or Equal Protection .......... 11
   D. Appointment of Counsel for Child—Privately Initiated Proceedings................................ 13
      State Court Rules and Court Decisions Interpreting Court Rules.......................................... 13
      State Court Decisions Addressing Constitutional Due Process or Equal Protection .......... 13

5. MISCELLANEOUS......................................................................................................................... 13
   A. Civil Contempt Proceedings.................................................................................................. 13
      State Court Rules and Court Decisions Interpreting Court Rules.......................................... 13
      State Court Decisions Addressing Constitutional Due Process or Equal Protection .......... 14
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 2012. 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

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In J.L. v. G.D. 29 A.3d 752 (N.J. Super. Ch. 2010), a chancery court in New Jersey found that a minor plaintiff in a domestic violence (DV) restraining order case was entitled to a guardian ad litem (GAL) pursuant to various New Jersey court rules (since she was a party to the proceedings and the New Jersey Court rules authorized such a GAL), but then added that where such a minor plaintiff was opposed by an adult defendant represented by counsel (privately retained, in this case), the GAL should be a licensed attorney. The minor plaintiff was 17 years old and had been dating the defendant, who was 20 years old. The court, which raised the issue of counsel sua sponte, based its actions on its general parens patriae power of the court and on its perception that while the court rules permitted the minor's parents to serve as the minor's GAL, the parents would not have the training to effectively represent her in her case against a party defended by counsel (and also the parents hadn't appeared with the minor at the DV hearing).

However, in In D.N. v. K.M., 61 A.3d 150 (N.J. Super. A.D. 2013), a New Jersey Court of Appeals found there is no due process right to counsel for either plaintiffs or defendants in domestic violence protection order proceedings. The litigant seeking counsel (who was both a plaintiff and defendant, since there were cross motions for protective orders filed) argued that such proceedings entailed a "consequence of magnitude," which is the test the New Jersey Supreme Court uses to determine whether counsel must be appointed. The court of appeals noted that the NJ Supreme Court has previously declared a right to counsel in various kinds of civil proceedings, such as loss of driving privileges,1 civil contempt, guardianship proceedings involving termination of parental rights, sex offender proceedings, and civil commitment. It conceded that some of these did not involve a deprivation of physical liberty, and that the DV law was created to protect against the threat of very serious harm to both adults and children. It noted too that the law did not contemplate incarceration in the protective order proceeding itself, although it did allow the court to modify parenting time, prohibit use of a residence, and impose fines of up to $500.

The D.N. court then concluded, "[t]he Act does not pit the power of the State against the defendant. Rather, a putative victim of domestic violence presents evidence to the court and seeks available relief, not unlike many other remedial statutes designed to protect a specific class of plaintiffs from the wrongful conduct of another." Id at *8. It also held that the purpose of the Act was "curative," not "punitive". Id. It rejected the contention that victims

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1 See State v. Moran, 997 A.2d 210, 219 (N.J. 2010), discussed supra Part 5.H.
were entitled to appointed counsel by stating: "The Legislature did not intend to invoke the power of the State to prosecute civil requests for restraining orders. In any event, the Act allows law enforcement authorities, faced with probable cause to do so, to arrest and file a criminal complaint against a perpetrator, based upon the same conduct undergirding a plaintiff’s civil complaint for the entry of an FRO." Id. Although the case was appealed, the New Jersey Supreme Court denied review on the grounds that the mother had not raised the question of appointment of counsel at trial. D.N. v. K.M., 83 A.3d 825 (N.J. 2014).

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

For a person whom a court has determined, because of physical or mental limitations or incapacity due to old age, requires a conservator to handle his/her financial affairs, "the court shall have the right to appoint counsel for the proposed conservatee if it believes that counsel is necessary to adequately protect the interests of the conservatee." N. J. Stat. Ann. § 3B:13A-3.

In guardianship establishment proceedings for an incapacitated individual, N.J. Stat. Ann. § 3B:12-24.1 requires the appointment of counsel “if the incapacitated person is not represented.” According to N.J. Stat. Ann. § 30:4-165.14, “[t]he court shall appoint the Public Defender to serve as counsel for persons who do not have an attorney and over whom guardianship is sought pursuant to ... (C. 30:4-165.4 et al.) if the petition seeks only guardianship of the person, to the extent that funds are available for this purpose. If the Public Defender is unable to perform this service, the court shall appoint an attorney licensed by the State of New Jersey and in good standing. No attorney's fee is payable for the rendering of this service by the private attorney.” Guardianship review proceedings do not have the same right to appointed counsel, as N.J. Stat. Ann. § 3B:12-28 (which addresses review proceedings) makes no mention of appointment.

State Court Rules and Court Decisions Interpreting Court Rules

In guardianship establishment proceedings for an incapacitated individual, N.J. R. 4:86-4(b) requires the appointment of counsel. The compensation of an appointed counsel may be fixed by the court to be paid out of the estate of the alleged incapacitated person or in such other manner as the court shall direct. N.J. R. 4:86-4(e) (2011). Guardianship review proceedings do not have the same right to appointed counsel, as N.J. R. 4:86-7 (which addresses review proceedings) makes no mention of appointment.

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

\footnote{The 2008 amendment deleted “mentally” preceding “incapacitated” throughout the rule.}
State Statutes and Court Decisions Interpreting Statutes

N. J. Stat. Ann. § 30:4-27.1, declares a state responsibility to provide care to mentally ill individuals. The statute allows for both voluntary and involuntary commitment of individuals who are mentally ill or are mentally disabled. See N. J. Stat. Ann. § 30:4-24. The statute recognizes the severe limitations on personal freedom imposed by involuntary commitment and requires that the state provide clear standards and procedural safeguards to ensure that only individuals who are “dangerous to themselves, to others or to property, are involuntarily committed.” N. J. Stat. § 30:4-27.1. Included in those safeguards is the right to appointed counsel for indigent individuals who are facing confinement under this section of title 30. N.J. Stat. Ann. § 30:4-27.14. It also includes short-term confinements. N. J. Stat. Ann. § 30:4-27.11(c). The statute provides that a patient admitted to a short-term care or psychiatric facility or special psychiatric hospital either on a voluntary or involuntary basis, or assigned to an outpatient treatment provider, has the right to counsel and if indigent, the right to be provided with an attorney paid for by the appropriate government agency. Id. The statute, however, is not clear whether counsel must be requested or the court will automatically appoint counsel for indigent individuals. Additionally, patients have a right to counsel at any proceeding relating to subjecting the patient to “experimental research, shock treatment, [or] psychosurgery....” N. J. Stat. Ann. § 30:4-24.2(d)(2). If a patient cannot afford counsel, the court shall appoint an attorney not less than 10 days before the hearing, and the appointed attorney shall be entitled to a reasonable fee to be determined by the court and paid by the county from which the patient was admitted. Id. The patient shall also have the “right to counsel” (it does not specifically say appointed counsel) in all placement review proceedings. N.J. R. 4:74-7(h)(2).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In McCorkle v. Smith, 242 A.2d 861, 865 (N.J. Super. Ct. App. Div. 1968), the appeals court held that “[i]t would have comported more with fundamental fairness to have assigned an attorney to act on Smith’s behalf ... [i]n our view, counsel should be provided in every judicial commitment proceeding; this is the proper practice and one that should be pursued.” The “fundamental fairness” language suggests that McCorkle is a pronouncement on due process rights, although the court did not make it clear whether it was relying on the state or federal constitution. Subsequently, in Matter of S.L., 462 A.2d 1252 (N.J. 1983), the New Jersey Supreme Court found a federal constitutional right to counsel in civil commitment, relying upon Vitek v. Jones, 445 U.S. 480 (1980) (defining prisoner’s rights during involuntary transfer to a mental health facility) as well as other federal cases.

D. Sex Offender Proceedings

State Statutes and Court Decisions Interpreting Statutes
The Sexually Violent Predators Act (SVPA) allows for the indefinite civil confinement of individuals deemed sexual predators. The statute covers individuals who have been “convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense, or [have] been charged with a sexually violent offense but found to be incompetent to stand trial.” N. J. Stat. Ann. § 30:4-27.26. Although hearings under the SVPA are non-jury civil proceedings, there is an affirmative right to counsel including the appointment of counsel for indigent individuals. N. J. Stat. Ann. § 30:4-27.31. It is unclear if a request for counsel must be made.

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

In *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), the New Jersey Supreme Court held that due process and fundamental fairness under the state constitution guaranteed a right to counsel for convicted sex offenders at Megan's Law tier classification hearings.

In *Civil Commitment of D.L.*, 797 A.2d 166 (N.J. Super. Ct. App. Div. 2002), the court held that an indigent sex offender committed under the New Jersey Sexually Violent Predator Act (SVPA) has a right to appointed counsel on appeal under the due process clause of the federal constitution. The SVPA statute provides for the appointment of counsel at commitment hearings, but is “silent regarding the appointment of counsel on appeal.” *Id.* at 170 (referencing N.J. Stat. Ann. § 30:4-27.31a (West 2011)). The court determined that indigents appealing involuntary commitment under the SVPA were entitled the same due process rights as defendants appealing a conviction because an important liberty interest was at stake: the loss of physical freedom. *Id.* at 173-74. It relied on *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), for the idea that “it is the deprivation of personal freedom, not merely the prosecution itself, that triggers the right to counsel.” *Id.* at 172. In addition, the court found that the liberty interest at stake for SPVA offenders in these civil commitment proceedings may be greater because it also included a social stigma and an indefinite confinement. *Id* at 173. “The label affixed to a case, whether it be civil or criminal, is not the dispositive consideration. Rather we look to the infringement upon the person’s due process rights to guide our decision.” *Id.* at 174.

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

**State Statutes and Court Decisions Interpreting Statutes**

N. J. Stat. Ann. § 30:4-24 allows for both voluntary and involuntary commitment of individuals who have tuberculosis. The statute recognizes the severe limitations on personal freedom imposed by involuntary commitment and requires that the state provide clear standards and procedural safeguards to ensure that only individuals who are “dangerous to themselves, to others or to property, are involuntarily committed.” N. J. Stat. § 30:4-27.1.
Included in those safeguards is the right to appointed counsel for indigent individuals who are facing confinement under this section of title 30. N.J. Stat. Ann. § 30:4-27.14. It also includes short-term confinements. N. J. Stat. Ann. § 30:4-27.11(c). The statute provides that a patient admitted to a short-term care facility, either on a voluntary or involuntary basis, or assigned to an outpatient treatment provider, has the right to counsel and if indigent, the right to be provided with an attorney paid for by the appropriate government agency. Id. The statute, however, is not clear whether counsel must be requested or the court will automatically appoint counsel for indigent individuals.

N. J. Stat. Ann. § 30:4-24 provides that a patient admitted to a psychiatric facility or special psychiatric hospital either on a voluntary or involuntary basis, or assigned to an outpatient treatment provider, has a right to counsel at any proceeding related to subjecting the patient to sterilization. N. J. Stat. Ann. § 30:4-24.2(d)(2). If a patient cannot afford counsel, the court shall appoint an attorney not less than 10 days before the hearing, and the appointed attorney shall be entitled to a reasonable fee to be determined by the court and paid by the county from which the patient was admitted. Id.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In McCorkle v. Smith, 242 A.2d 861, 865 (N.J. Super. Ct. App. Div. 1968), the court held that “It would have comported more with fundamental fairness to have assigned an attorney to act on Smith's behalf … [i]n our view, counsel should be provided in every judicial commitment proceeding; this is the proper practice and one that should be pursued.” The “fundamental fairness” language suggests that McCorkle is a pronouncement on due process rights in commitment proceedings (which should include commitments for tuberculosis occurring pursuant to N. J. Stat. Ann. § 30:4-24), although the court did not make it clear whether it was relying on the state or federal constitution. Subsequently, in Matter of S.L., 462 A.2d 1252 (N.J. 1983), the court found a federal constitutional right to counsel in civil commitment, relying upon Vitek v. Jones, 445 U.S. 480 (1980) (defining prisoner’s rights during involuntary transfer to a mental health facility) as well as other federal cases.

4. CHILD CUSTODY

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

State Statutes and Court Decisions Interpreting Statutes

In a child abuse and neglect proceeding, the parents of the child are entitled to appointment of counsel under N. J. Stat. Ann. § 9:6-8.43 (West 2011). The court shall advise the parent or guardian of his right to retain counsel and an indigent parent may apply for an
attorney through the Office of the Public Defender. *Id.* There is also a right to counsel for parents in “any action concerning the termination of parental rights filed pursuant to section 15 of P.L.1951, c. 138”. *N. J. Stat. Ann.* § 30:4C-15.4. In such an action the court must notify the parent of their right to legal counsel. If the parent is indigent and makes a request for assistance, the court shall appoint the Office of Public Defender to represent the parent. *Id.*

“In the case of a child who has been removed from his home by the division within the last 12 months, or for whom the division has an open or currently active case and where legal representation is currently being provided by the Office of the Public Defender either through its Law Guardian Program or Parental Representation Unit”, *N.J. Stat. Ann.* § 30:4C-85(2) provides that an indigent parent shall be afforded the same right to legal counsel as in actions under Title 9 and pursuant to *N. J. Stat. Ann.* § 30:4C-15.4 (discussed *supra* Part 4.A).

**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.”


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3 Despite the fact that the statute ambiguously states that respondent “may apply for an attorney through the Office of the Public Defender” rather than stating outright that there is a right to counsel (as opposed to the TPR statute that says the court “shall appoint” the PD), this ambiguity has no meaningful difference, as counsel is always appointed, according to the New Jersey Public Defender’s Office.

4 This is a pointer to *N.J. Stat. Ann.* § C.30:4C-15.

5 While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(b) states: “In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” These provisions, plus the fact that child welfare proceedings typically occur in state court, suggest that ICWA applies in state law proceedings.
State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Crist v. New Jersey Division of Youth & Family Services, 343 A.2d 815, 816 (N.J. Super. Ct. App. Div. 1975), decided prior to Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the New Jersey Appellate Division held that indigent parents who are subjected to a proceeding which may result in either temporary loss of custody or permanent termination of parental rights were entitled to counsel without cost. The Appellate Division incorporated the reasoning of the trial court, which was based principally on federal due process and equal protection considerations involving the strength of the parental interest, statistics demonstrating that the presence of counsel made a determinative difference, and the rulings of other state courts around the country that found a right to counsel in such circumstances. See Crist v. Div. of Youth & Family Servs., 320 A.2d 203 (N.J. Super. Ct. Law Div. 1974).

Although Crist’s reliance on federal due process considerations may have been upended by Lassiter, the New Jersey Supreme Court has cited Crist for the proposition that parents in proceedings that result in either temporary or permanent loss of parental rights have a right to counsel under the New Jersey Constitution. See e.g. Pasqua v. Council, 892 A.2d 663, 674 n.5 (N.J. 2006) (comparing Lassiter with Crist in a footnote); N.J. Div. of Youth & Family Servs. v. B.R., 929 A.2d 1034,1036 (N.J. 2007) (citing to Pasqua footnote for proposition that that “we recently recognized that the due process guarantee of Article I, paragraph 1 of the New Jersey Constitution serves as a bulwark against the loss of parental rights without counsel being afforded”); N.J. Div. of Youth & Family Servs. v. D.C., 571 A.2d 1295, 1299 (N.J. 1990) (citing to Crist for proposition that “simple justice” requires appointment of counsel for proceedings giving temporary custody to state via guardianship, as such proceedings “entail[] a cessation of visitation. That path leads to freeing the child for adoption.”); New Jersey Div. of Youth and Family Services v. E.B., 644 A.2d 1093 (N.J. 1994) (stating that “Courts have long recognized that parents charged with abuse or neglect of their children have a constitutional right to counsel”, and citing to Crist). In Crist, the court stated that because there are no court rules providing for the payment of compensation to assigned counsel to indigent parents, the counsel must be assigned to serve without compensation. Crist, 353 A.2d at 816-17.

State Court Decisions Addressing Court’s Inherent Authority

In Crist v. New Jersey Division of Youth & Family Services, 343 A.2d 815 (N.J. Super. Ct. App. Div. 1975), the Appellate Division held that although there was a constitutional right to counsel in termination of parental rights (TPR) cases, the trial court did not have the power to order compensation for appointed counsel because the TPR statute and the court rules had no such provision. The court further held that because no funds had been appropriated by the Legislature to pay for such counsel, an order to the Department of Family Services to compensate counsel was an indirect attempt to appropriate funds. Id. at 816-17.
Similarly, in New Jersey Division of Youth & Family Services v. D.C., the Supreme Court of New Jersey found no basis on which to order payment of the costs incurred by lawyers who had been appointed to represent parents in termination of parental rights proceedings. 571 A.2d 1295, 1302 (N.J. 1990). After pointing to its decision in Crist, the court acknowledged that it had ordered payments for criminal attorneys in non-murder cases in State v. Rush, 217 A.2d 441 (N.J. 1966), even though the criminal statute in place at the time of Rush only explicitly provided payment for criminal attorneys in murder cases. D.C., 571 A.2d at 1299. In Rush, the court had created a three part test for such payments: “(A) whether the judiciary has the authority to deal with the subject; (B) if it does, whether that relief should be ordered; and (C) whether authority presently exists for payment by the county or some agent of the State.” 217 A.2d at 446. The Rush court found all three prongs to be met, and the third prong specifically met by a statute requiring the county to pay for “all necessary expenses incurred by the prosecutor,” which it held reached appointment of counsel for defendants.6 Id. at 448-49. The D.C. court then found no similar statutory authorization for the appointments in TPR cases, refusing to utilize the DHS general appropriations statute. Id. at 1302-03.

The D.C. court conceded that “Rush explicitly left open the question of whether in the absence of statutory authority this Court has the inherent power to order the disbursement of public funds for appointed counsel.” Id. at 1301 (citing Rush, 217 A.2d 441 at 448-449). The Court continued:

[s]ubsequent decisions, however, answered that question. ‘No money may be drawn from the State treasury but for appropriations made by law. The judiciary could not order the Legislature to appropriate money, or the Governor to approve an appropriation if one were made’ … New Jersey courts have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government. There can be no redress in the courts to overcome either the Legislature’s action or refusal to take action pursuant to its constitutional power over state appropriations. That principle applies even if a party is clearly entitled to compensation.

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6 Notably, the followup to Rush reflects both the court’s recognition of its power and its restraint in exercising it: “Despite the rejection of [various] constitutional claims, we decided in Rush as a matter of policy to exercise our power to relieve the bar of its pro bono obligation to defend indigents accused of crime … We did so because the obligation had become oppressive, even if not unconstitutional, and was likely to become even more so. The decision was read as requiring the counties thereafter to bear the costs.” Madden v. Twp. of Delran, 601 A.2d 211, 214-15 (N.J. 1992). “In Antini, although we declared that our power in accordance with Rush to compel payment of assigned counsel for juveniles would apply, we declined to exercise that power because the Legislature, prior to our decision, had required the Public Defender to handle matters in the juvenile courts where counsel was constitutionally required.” Madden, 601 A.2d at 214-15 (citing In re Antini, 251 A.2d 291 (N.J. 1969).
Id. (citing City of Camden v. Byrne, 411 A.2d 462 (N.J. 1980)). The court created one large exception, however, by noting that “[t]hat principle is qualified, however, when funds are constitutionally mandated.” Id. at 1301 (citations omitted). In other words, the court held that the payment of counsel, and not simply the appointment of counsel, had to be constitutionally mandated. The court then found that compensation was not constitutionally mandated, rejecting arguments that the uncompensated appointments were a taking, a deprivation of property without due process, or a violation of equal protection (due to the fact that other court “employees” were authorized to be paid). D.C., 571 A.2d at 1301–02.7

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

State Statutes and Court Decisions Interpreting Statutes

With respect to adoptions (which can raise the specter of the termination of parental rights), N. J. Stat. Ann. § 9:3-53 (West 2011) explicitly states that the payment of costs by the plaintiff in an adoption “shall not include the provision of counsel for any person, other than the plaintiff, entitled to the appointment of counsel ...”

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

State Statutes and Court Decisions Interpreting Statutes


“In the case of a child who has been removed from his home by the division within the last 12 months, or for whom the division has an open or currently active case and where legal representation is currently being provided by the Office of the Public Defender either through its Law Guardian Program or Parental Representation Unit”, N.J. Stat. Ann. § 30:4C-85(2) provides that a child shall be afforded the same right to legal counsel as in actions under Title 9 and pursuant to N. J. Stat. Ann. § 30:4C-15.4 (discussed supra note 4.C).

Federal Statutes and Court Decisions Interpreting Statutes

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

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7 See also State v. Frankel, 293 A.2d 196, 197 (N.J. Super. Ct. App. Div. 1972) (affirming lower court finding of contempt against attorney who refused to be appointed without pay; “the assignment and the system on which it was based was lawful and proper, and appellant was under a duty to accept it.”).
court,\(^8\) 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


\(^8\) While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(b) states: “In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” These provisions, plus the fact that child welfare proceedings typically occur in state court, suggest that ICWA applies in state law proceedings.
to these proceedings requires the assistance of able counsel, no less should be required to protect the interests of a minor incapable of speaking for himself.”). *Wandell* was subsequently cited with approval (albeit in a case where a child was appointed counsel pursuant to statute) in *Matter of Adoption of a Child by E.T.*, 695 A.2d 734 (N.J. Super. Ct. App. Div. 1997).

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

*State Court Rules and Court Decisions Interpreting Court Rules*

N.J. R. 5:8A states that “[i]n all cases where custody or parenting time/visitation is an issue, the court may, on the application of either party or the child or children in custody or parenting time/visitation dispute, or on its own motion, appoint counsel on behalf of the child or children.” Appointed counsel may apply for fees and costs based on an affidavit of services, and the court shall assess them against either or both parties. *Id.*

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

New Jersey courts have found that children in contested custody proceedings should be provided with independent counsel. *Doe v. Div. of Youth & Family Servs.*, 398 A.2d 562 (N.J. Super. Ct. App. Div. 1979) (applying to removal of child from foster parents and return to natural parents); *Wilke v. Culp*, 483 A.2d 420 (N.J. Super. Ct. App. Div. 1984) (in case involving visitation of natural father; child was represented by stepfather’s counsel, which the court found was not independent counsel); *Matter of Adoption of Mercado*, 442 A.2d 1078 (N.J. Super. Ct. App. Div. 1982) (applying to involuntary adoption). The courts in these cases did not state the basis for their holdings, although they appeared to fall under the same “fundamental fairness” test used in other cases.

**5. MISCELLANEOUS**

**A. Civil Contempt Proceedings**

*State Court Rules and Court Decisions Interpreting Court Rules*

New Jersey Directives Dir. 15-08⁹ provides an explicit right to appointed counsel with respect to civil contempt matters, as per the New Jersey Supreme Court’s decision in *Pasqua v. Council*, 892 A.2d 663 (N.J. 2006) (establishing due process right to appointed counsel for indigent parents facing incarceration at child support enforcement hearings).

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State Court Decisions Addressing Constitutional Due Process or Equal Protection

In *Pasqua v. Council*, the New Jersey Supreme Court considered *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), in more depth in its determination that state and federal due process clauses guaranteed indigent parents the appointment of counsel when they faced incarceration at child support related contempt proceedings. 892 A.2d 663, 671-72 (N.J. 2006). In its federal due process analysis, the court noted that *Lassiter* created a “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Id.* at 672 (quoting *Lassiter*, 452 U.S. at 25). However, the court distanced itself from *Lassiter* by observing that, “[g]enerally, the right to appointed counsel for indigent litigants has received more expansive protection under our state law than federal law.” *Pasqua*, 892 A.2d at 674 n.5. It gave termination of parental rights as an example. *Id.* The court acknowledged that the right to counsel is necessary in ability-to-pay hearings because of the “high risk of . . . wrongful incarceration,” but also stressed that in other non-contempt contexts, “[u]nder the due process guarantee of the New Jersey Constitution, the right to counsel attaches even to proceedings in which a litigant is not facing incarceration.” *Id.* at 675. It gave as an example *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995) (holding that due process and fundamental fairness under state constitution guaranteed right to counsel for convicted sex offenders at Megan's Law tier classification hearings).

The *Pasqua* court used the *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), balancing test\(^{10}\) in its federal constitutional analysis, but not in its state constitutional analysis. The state right to counsel was based simply on the previously expansive interpretation of the due process clause:

We can find no principled reason why an indigent facing loss of motor vehicle privileges or a substantial fine in municipal court, termination of parental rights in family court, or tier classification in a Megan’s Law proceeding would be entitled to counsel under state law but an indigent facing jail for allegedly willfully refusing to pay a child support judgment would not.

*Pasqua*, 892 A.2d at 676.\(^{11}\) As noted earlier, the *Pasqua* court declined to require appointed attorneys in enforcement cases to work without pay, saying that it was certain the legislature would provide funding in response to the court’s decision. Because *Pasqua* appears to have a sufficiently independent state constitutional ground, it likely would not be negatively impacted by *Turner v. Rogers*, 131 S.Ct. 2507 (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”).

\(^{10}\) See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding due process analysis requires consideration of “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.”).
State Court Decisions Addressing Court’s Inherent Authority

In *Pasqua v. Council*, discussed *supra*, after finding a right to counsel in contempt proceedings, the New Jersey Supreme Court declined to exercise its inherent authority to require attorneys to serve as appointed counsel without compensation. 892 A.2d 663, 678 (N.J. 2006) (“We will not use our authority to impress lawyers into service without promise of payment to remedy the constitutional defect in our system. The benefits and burdens of our constitutional system must be borne by society as a whole. In the past, the Legislature has acted responsibly to provide funding to assure the availability of constitutionally mandated counsel to the poor …. We trust that the Legislature will address the current issue as well.”)

B. Paternity Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection


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

State Statutes and Court Decisions Interpreting Statutes

One statute formerly conferred the right to counsel *if requested* by a minor seeking a waiver of parental notification for an abortion. N.J. Stat. Ann. § 9:17A-1.7(b) (“[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.”). The Parental Notification for Abortion Act, however, has since

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been held unconstitutional, negating the need to obtain a waiver (and, therefore, the need for counsel). See Planned Parenthood of Central New Jersey v. Farmer, 762 A.2d 620 (N.J. 2000).

D. Proceedings Involving Persons in Military Service

State Statutes and Court Decisions Interpreting Statutes

N. J. Stat. Ann. § 38:23C-6 provides that "in any action or proceeding in which a person in military service is a party, if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him...."

E. Juvenile Delinquency, Status Offenses, or Child in Need of Supervision Proceedings

State Statutes and Court Decisions Interpreting Statutes

N. J. Stat. Ann. § 2A:4a-39(a) provides for counsel for juveniles “at every critical stage in the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile.”

F. Parole Revocation Proceedings

State Statutes and Court Decisions Interpreting Statutes

Indigent litigants in parole revocation proceedings have a statutory right to appointed counsel. NJ ADC 10A:71-7.7.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

The court in Bolyard v. Berman, 644 A.2d 1122 (N.J. Super. A.D. 1994), refused to require appointed counsel for all parole revocation cases. The court acknowledged that it had the power (as per prior New Jersey Supreme Court decisions) to extend the state constitution beyond the requirements of the federal constitution, but held that “plaintiffs have failed to demonstrate that the Gagnon standards provide inadequate procedural protections to indigent parolees charged with violations of parole.”

G. Driver’s License Suspension or Revocation Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

12 Under the U.S. Supreme Court’s decision in Gagnon v. Scarpelli, 411 U.S. 778 (1973), the right to counsel under the federal constitution is on a case-by-case basis.
In *State v. Moran*, 997 A.2d 210, 219 (N.J. 2010), the New Jersey Supreme Court held: “The loss of driving privileges for a reckless-driving conviction constitutes a consequence of magnitude that triggers certain rights, such as the right to counsel .... The suspension of a driver's license is a consequence of magnitude because a license to drive in this State ‘is nearly a necessity,’ as it is the primary means that most people use to travel to work and carry out life's daily chores.” The court relied on *Rodriguez v. Rosenblatt*, 277 A.2d 216 (N.J. 1971) (establishing the “consequences of magnitude” test for appointment of counsel).
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. § 522(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 § 522(d)(2) states: “If the court refuses to grant an additional stay of proceedings under paragraph (1), the court shall appoint counsel to represent the servicemember in the action or proceeding.”

State Court Rules and Court Decisions Interpreting Court Rules

N.J. R. 5:3-4(a) states that in all family matters, the court shall advise the juvenile and the juvenile’s parents, guardian, or custodian of their right to retain counsel. If counsel is not otherwise provided for the family and if the matter may result in the institutional commitment or other “consequence of magnitude” to any family member, or if any family member is

13 50 App. U.S.C.A. § 512(a) states, “This Act [sections 501 to 515 and 516 to 597b of this Appendix] applies to-- ... (2) each of the States, including the political subdivisions thereof...”
14 50 App. U.S.C. § 521(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.”
15 50 App. U.S.C. § 522(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.”
16 According to D.N. v. K.M., 61 A.3d 150 (N.J. Super. A.D. 2013), “[i]n municipal court matters, the Court has provided guidelines defining ‘consequences of magnitude.’ See Guidelines for Determination of Consequence of Magnitude, Pressler & Verniero, Current N.J. Court Rules, Appendix to Part VII to R. 7:3–2 at 2465 (2013) (the Guidelines). In addition to possible incarceration and loss of driving privileges, the Guidelines direct judges to consider ‘[a]ny monetary sanction imposed by the [municipal] court of $750 or greater in the aggregate,”...
constitutionally or by law entitled to counsel, the court shall refer the family member to the Office of the Public Defender, if appropriate, or assign other counsel to represent the juvenile or family member. Id. 17 The court must also assign counsel to represent indigents in all family actions where a party is by constitution, state or federal, or by law entitled to counsel, even where there is no publicly-funded source of representation available (in other words, appointed counsel goes unpaid), except in child support enforcement hearings. 18 Id. Depending upon the financial circumstances of the parents, guardian or custodian, the court may order them to pay the fee of assigned counsel in such amount as it fixes. Id.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Rodriguez v. Rosenblatt, 277 A.2d 216, 223 (N.J. 1971), an indigent defendant charged with violations of the municipal code (classified as petty offenses) argued that she was entitled to appointed counsel. The court held that “no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.” Id. at 223. The court made no explicit mention of due process, resting its decision instead on “considerations of fairness” and “simple justice.” Id. Nevertheless, the court had in mind protections far more expansive than those under federal law, as its notion of a “consequence of magnitude” included such penalties as the “substantial loss of driving privileges.” Id. The court expressed that wherever the particular nature of the charge could result in a consequence of magnitude, an indigent defendant should have counsel assigned to him, with the rare exception being if the defendant chose to proceed pro se with his plea of guilty or his defense at trial. Id. But, the

including fines, costs, restitution, penalties and/or assessments.’ Ibid.” The Guidelines also note that “if a defendant is alleged to have a mental disease or defect, and the judge, after examination of the defendant on the record, agrees that the defendant may have a mental disease or defect, the judge shall appoint the municipal public defender to represent that defendant, if indigent, regardless of whether the defendant is facing a consequence of magnitude, if convicted.”

17 N.J.S.A. 2B:24-1 et seq. (the public defender statute) addresses providing counsel for defendants facing a “consequence of magnitude,” but it is unclear whether it reaches family law proceedings.

18 The “except in child support hearings” was an amendment added in response to Pasqua v. Council, 892 A.2d 663 (N.J. 2006), which established the due process right to appointed counsel of indigent parents facing incarceration at child support enforcement hearings under N.J. R. 1:10-3. In terms of compensation for the newly recognized right, the Pasqua Court stated, “[w]e will not use our authority to impress lawyers into service without promise of payment to remedy the constitutional defect in our system. The benefits and burdens of our constitutional system must be borne by society as a whole. In the past, the Legislature has acted responsibly to provide funding to assure the availability of constitutionally mandated counsel to the poor ... We trust that the Legislature will address the current issue as well.” 892 A.2d at 678. In other words, because the Pasqua court essentially forbade the use of pro bono attorneys for child support cases, the Legislature amended the statute to exclude child support cases from the types of cases where non-state-funded (i.e., pro bono) counsel is appointed.
court declined to create a universal rule for the assignment of counsel to all indigent
defendants, finding the lack of appointed counsel “tolerable in the multitude of petty municipal
cases.”  Id.  

Although the New Jersey Supreme Court has not definitively\(^\text{19}\) applied the
“consequences of magnitude” test beyond cases involving “convictions” (such as criminal cases
and DWI proceedings), the court has stated the following: “[T]he adverse consequences of a
particular civil proceeding can be as devastating as those resulting from the conviction of a
crime .... Under the due process guarantee of the New Jersey Constitution, the right to counsel
attaches even to proceedings in which a litigant is not facing incarceration.”  Pasqua v. Council,
892 A.2d 663, 671, 675 (N.J. 2006) (holding that the due process guarantee of the New Jersey
Constitution requires the assignment of counsel to indigent parents who are at risk of
incarceration at child support enforcement hearings), discussed supra Part 5.A. Moreover,
since Rodriguez, the court has acknowledged that, generally, “the right to appointed counsel
for indigent litigants has received more expansive protection under our state law than federal
law.”  Pasqua, 892 A.2d at 674 n.5.  See also State v. Hrycak, 877 A.2d 1209, 1216 (N.J. 2005)
(providing for right to counsel in DWI cases pursuant to “consequence of magnitude” analysis in
Rodriguez); State v. Sanchez, 609 A.2d 400, 407 (N.J. 1992) (“So steadfast has been our
commitment that we have secured the right to counsel in settings in which that right has not
been assured by federal law. For example, the right to counsel of indigent defendants has
existed in this state since 1795-more than 150 years before the United States Supreme Court
put the indigent’s right to counsel on a federal constitutional basis ... To assure a defendant’s
right to counsel, we presumed prejudice from the potential conflict of interest arising from the
representation of multiple defendants, although the United States Supreme Court required an
App. Div. 1994) (fines of $1,800 pursuant to municipal ordinance violation constitute
“consequence of magnitude” requiring assignment of counsel under Rodriguez); M. v. S., 404
A.2d 653, 656 (N.J. Super. Ct. Law Div. 1979) (indigent defendant in paternity proceedings
“must be assigned counsel without cost” because “paternity action can result in consequences
of magnitude”), discussed supra Part 5.B.  

State Court Decisions Addressing Court’s Inherent Authority

Article 3, paragraph 1 of the New Jersey Constitution states: “The powers of the
government shall be divided among three distinct branches, the legislative, executive, and
judicial. No person or persons belonging to or constituting one branch shall exercise any of the

\(^{19}\) Note, however, that in Crespo v. Crespo, 972 A.2d 1169 (N.J. Sup. Ct. 2010), a lower court commented that
“[d]ue process principles have been found to require the appointment of counsel in civil or quasi-criminal matters
when an indigent party faces imprisonment or some ‘other consequence of magnitude,’” and cited to Pasqua v.
Council, 892 A.2d 663 (N.J. 2006).
powers properly belonging to either of the others, except as expressly provided in this Constitution.” N.J. Const. art. 3, ¶ 1.

In light of separation of powers concerns, the New Jersey courts have taken a limited view of their power to order compensation for appointed attorneys, even where such appointments are constitutionally based. See Crist v. New Jersey Division of Youth & Family Services, 343 A.2d 815 (N.J. Super. Ct. App. Div. 1975) (court has no inherent authority to order compensation for appointed attorneys in termination of parental rights case, despite constitutional right to appointed counsel, absent statute or court rule authorizing such payment); New Jersey Division of Youth & Family Services v. D.C., 571 A.2d 1295, 1302 (N.J. 1990) (same), discussed supra Part 4.A.

In New Jersey Division of Youth & Family Services v. D.C stated:

‘No money may be drawn from the State treasury but for appropriations made by law. The judiciary could not order the Legislature to appropriate money, or the Governor to approve an appropriation if one were made’ … New Jersey courts have consistently adhered to the principle that the power and authority to appropriate funds lie solely and exclusively with the legislative branch of government. There can be no redress in the courts to overcome either the Legislature’s action or refusal to take action pursuant to its constitutional power over state appropriations. That principle applies even if a party is clearly entitled to compensation.

Id. (citing City of Camden v. Byrne, 411 A.2d 462 (N.J. 1980)). The court created one large exception, however, by noting that “[t]hat principle is qualified, however, when funds are constitutionally mandated.” Id. at 1301 (citations omitted). In other words, the court held that the payment of counsel, and not simply the appointment of counsel, had to be constitutionally mandated. While the limitations on the inherent power to order compensation for appointed counsel discussed by the courts in Crist and D.C. clearly apply in the specific type of proceeding at hand, it is not clear from the decisions whether such limitations may also apply across the board in all civil proceedings.

In Pasqua v. Council, 892 A.2d 663, 678 (N.J. 2006), discussed supra Part 5.A, after finding a right to counsel in contempt proceedings, the New Jersey Supreme Court declined to exercise its inherent authority to require attorneys to serve as appointed counsel without compensation. While the limitation on inherent power discussed by the court in this case clearly applies in the specific type of proceeding at hand, it is not clear from the decision whether such power to appoint may also apply across the board in all civil proceedings.