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

PENNSYLVANIA

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# PENNSYLVANIA

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Preface

Important Information to Read Before Using This Directory

The ABA Directory of Law Governing Appointment of Counsel in State Civil Proceedings (Directory) is a compilation of existing statutory provisions, case law, and court rules requiring or permitting judges to appoint counsel for civil litigants. The Directory consists of 51 detailed research reports—one for each state plus D.C.—that present information organized by types of civil proceedings. Prior to using the Directory, please read the Introduction, at the Directory’s home page, for the reasons behind the development of the Directory, the various sources of authority from which judicial powers to appoint counsel in civil proceedings may derive, and the structure used to organize information within each of the research reports.

Terms of Use/Disclaimers

This Directory should not be construed as providing legal advice and the ABA makes no warranties concerning the information contained therein, which has been updated to reflect the law through early 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The Directory attempts to identify as “unpublished” any court decisions not published within an official or unofficial case reporter. Discussion of unpublished cases appears only for those jurisdictions where court rules currently permit their citation in briefs or opinions. Limitations on the use of unpublished opinions vary by jurisdiction (e.g., whether unpublished cases have value as precedent), and such limits were not exhaustively researched.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).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Com. v. Real Property and Improvements at 2338 N. Beechwood Street, 65 A.3d 1055, 1067 n.24 (Pa. Cmwlth. 2013), a lower level court suggested that a forfeiture case involving a personal residence might “skirt the boundaries of due process implicating the right to counsel.” The court stated:

When a person's home and homelessness are at stake, which also implicates liberty interests, the three factors to be balanced pursuant to Mathews would likely balance differently. For, unlike in [Commonwealth. v. $9,847.00 U.S. Currency, 704 A.2d 612, 613 (Pa. 1997), which found no right to counsel for forfeiture of money], Claimant's interest in her home is different than an interest in cash, and the risk of an erroneous decision or deprivation is not minimal here, but great, because the homeowner has never been charged or alleged to be involved in the underlying criminal activity. It does not appear that Claimant understood or appreciated that she could assert the innocent owner defense or that she could raise the Eighth Amendment argument that the forfeiture of her home would constitute an excessive fine in this case. Claimant also did not have any notice from any source that she had the right to a jury trial. Moreover, the allocation of burdens and standards of proof requires that Claimant prove a negative, thereby creating a great risk of erroneous deprivation. Indigent claimants who have been charged with criminal violations may have access to counsel as a result of those charges; however, claimants who face the loss of a home without having been charged for any underlying violations for which forfeiture is authorized by statute presently have no right to counsel under the Forfeiture Act or case law in Pennsylvania.
Id. The court also noted that “[c]oncern about the potential for due process violations in the federal forfeiture procedures motivated Congress to enact the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. § 983, which provides a right to counsel for indigent homeowners.”

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 Statutes and Court Decisions Interpreting Statutes

At least two Pennsylvania decisions have stated that the right to be represented by counsel at a Protection From Abuse Act (PFAA) proceeding, described in 23 Pa. Cons. Stat. Ann.

B. Conservatorship, Adult Guardianship, or Adult Protective Proceedings

State Statutes and Court Decisions Interpreting Statutes

In guardianship proceedings, the notice of the guardianship proceeding must include “the right to request the appointment of counsel and to have counsel appointed if the court deems it appropriate and the right to have such counsel paid for if it cannot be afforded.” 20 Pa. Stat. Ann. § 5511(a). According to 20 Pa. Stat. Ann. § 5512.2, the same rights given in guardianship establishment proceedings apply to review proceedings, which means the discretionary appointment of counsel system should apply as well. Additionally, if guardianship is sought for a person in a state mental hospital, “[t]he alleged incompetent and his guardian shall be represented by counsel and, unless private estate counsel exists or is appointed by the Court of Common Pleas, the Court Administrator shall take necessary steps to insure that such counsel is provided.” 204 Pa. Code § 29.41(3).

C. Civil Commitment or Involuntary Mental Health Treatment Proceedings

State Statutes and Court Decisions Interpreting Statutes

The Mental Health Procedures Act creates a right to counsel in hearings concerning court-ordered involuntary treatment. 50 Pa. Stat. Ann. § 7304(c)(3) (“Upon a determination that the petition sets forth such reasonable cause, the court shall appoint an attorney to represent the person and set a date for the hearing as soon as practicable. The attorney shall represent the person unless it shall appear that he can afford, and desires to have, private representation.”) In In re Hutchinson, the Supreme Court of Pennsylvania interpreted Section 7304 to require that an alleged mental incompetent is entitled to effective representation by competent private or court-appointed counsel in civil commitment proceedings. 454 A.2d 1008, 1011 (Pa. 1982).

Minors have a right to appointed counsel when being subjected to involuntary drug or alcohol treatment. 71 Pa. Stat. Ann. § 1690.112a (West 2011).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

in Commonwealth ex rel. Finken v. Roop, 339 A.2d 764, 770 (Pa. Super. Ct. 1975), the court examined the civil commitment statute and noted (in dicta, because the appellant was

1 The Weir court avoided the question of whether a constitutional right to counsel in PFA cases might exist. 631 A.2d at 658.
actually represented by counsel): “[Section 406 of the Mental Health Act] does not require that the subject of a civil commitment petition be represented by counsel. Nor does it require that the final commitment order follow an evidentiary hearing. If neither were read into the statute, § 406 would be blatantly unconstitutional.” The court found, however, that it had the power to read such basic due process requirements into the statute. *Id.* Yet, the court did not specify the constitution under which it was ruling.

D. Sex Offender Proceedings

*State Statutes and Court Decisions Interpreting Statutes*


E. Involuntary Quarantine, Inoculation, or Sterilization Proceedings

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

4. CHILD CUSTODY

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

*State Statutes and Court Decisions Interpreting Statutes*


The Pennsylvania Adoption Act provides a right to counsel in proceedings to involuntarily terminate parental rights for parents who are unable to pay. In most states, adoption proceedings are entirely separate from termination of parental rights proceedings stemming from an abuse or neglect finding. However, it appears that in Pennsylvania, the state only uses the Adoption Act to file termination of parental rights petitions based on
abuse/neglect. See, e.g., In re Adoption of J.N.F., 887 A.2d 775, 778 (Pa. Super. Ct. 2005). The Adoption Act requires the court to appoint counsel for a parent in an involuntary termination proceeding if, upon petition of the parent, the court determines that the parent is unable to pay for counsel or if payment would result in substantial financial hardship. 23 Pa. Cons. Stat. Ann. § 2313(a.1).

Federal Statutes and Court Decisions Interpreting Statutes

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

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


State Court Rules and Court Decisions Interpreting Court Rules

With regard to dependency proceedings, Pa. R. J. C. P. 1151(E) states: “If counsel does not enter an appearance for a party, the court shall inform the party of the right to counsel prior to any proceeding. If counsel is requested by a party in any case, the court shall assign counsel for the party if the party is without financial resources or otherwise unable to employ counsel. Counsel shall be appointed prior to the first court proceeding.”

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In In re Adoption of R.I., the Supreme Court of Pennsylvania cited a string of U.S. Supreme Court decisions for the principle that an individual is entitled to counsel at any proceeding that may lead to the deprivation of “substantial rights,” such as a termination of parental rights case. 312 A.2d 601, 602 (Pa. 1973). Although the court acknowledged that the

2 While the ICWA does not appear to have a definitive statement about jurisdiction, 25 U.S.C. § 1912(b) refers to state law not providing for appointment of counsel. Additionally, 25 U.S.C. § 1912(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.
referenced cases were all criminal, it stated that “the logic behind them is equally applicable to a case involving an indigent parent faced with the loss of her child.” *Id.* The court cited to a New York Court of Appeals case, *In re Ella B.*, to support its position that due process requires that an indigent parent facing potential involuntary termination of parental rights must be appointed counsel, as such a proceeding implicates the “parent’s concern for the liberty of the child, as well as for his care and control . . . .” *Id.* at 602 (citation omitted). 3 The *R.I.* case involved a petition by foster parents, so the court’s holding would apply to either state or privately-initiated termination actions. *Id.* The court stated that it would be “grossly unfair to force appellant to defend against the appellees' case without the assistance of someone, trained in the law, who could test the appellees' case by the rules of evidence and the techniques of cross-examination.” *Id.* at 603. The court did not explicitly indicate whether the right to counsel was predicated upon the due process guarantees of the U.S. or Pennsylvania Constitution. However, in identifying the basis of its threshold statement that counsel is required in a proceeding that may lead to the deprivation of “substantial rights,” it cited numerous U.S. Supreme Court decisions interpreting the U.S. Constitution's Due Process Clause. *Id.* at 602.

The U.S. Supreme Court’s subsequent decision in *Lassiter v. Dep’t of Soc. Serv. of Durham Cty.*, 452 U.S. 18 (1981), cast doubt on the validity of *In re Adoption of R.I.*, because it is unclear whether the Pennsylvania Supreme Court was employing federal or state constitutional standards. As one judge noted:

*Lassiter* has undermined *Adoption of R.I.*, at least insofar as *Adoption of R.I.*’s broad right to counsel holding was based on the federal due process clause. It is unclear, however, whether *Adoption of R.I.* was decided solely on federal grounds. This court has previously suggested that *Adoption of R.I.* could be viewed as a state constitutional law decision. [Citation omitted.] I would find that the Pennsylvania Constitution provides an adequate and independent basis for extending the right to appointed counsel in involuntary termination proceedings to all indigent parents.

See also *Corra v. Coll*, 451 A.2d 480, 485 n.7 (Pa. Super. Ct. 1982) (stating that *In re Adoption of R.I.* court was unclear as to whether its final disposition was based on state or federal grounds and that Pennsylvania state courts interpreting the state constitution have the right to increase substantive and procedural minimums set forth in federal decisional law). In *In re Adoption of L.J.B.*, 995 A.2d 1182 (Pa. 2010) (per curiam), the Supreme Court of Pennsylvania “remanded to the trial court for a determination of whether Petitioner is eligible for the appointment of counsel. *See In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973) …. Should the trial court determine that Petitioner is eligible for the appointment of counsel, then counsel shall be

appointed by the trial court.” This suggests that Adoption of R.I. still has vitality under the state constitution.

B. Appointment of Counsel for Parent—Privately Initiated Proceedings

In In re Adoption of R.I., the Supreme Court of Pennsylvania cited a string of U.S. Supreme Court decisions for the principle that an individual is entitled to counsel at any proceeding that may lead to the deprivation of “substantial rights,” such as a termination of parental rights case. 312 A.2d 601, 602 (Pa. 1973). Although the court acknowledged that the referenced cases were all criminal, it stated that “the logic behind them is equally applicable to a case involving an indigent parent faced with the loss of her child.” Id. The court cited to a New York Court of Appeals case, In re Ella B., to support its position that due process requires that an indigent parent facing potential involuntary termination of parental rights must be appointed counsel, as such a proceeding implicates the “parent’s concern for the liberty of the child, as well as for his care and control . . . .” Id. at 602 (citation omitted). The R.I. case involved a petition by foster parents, so the court’s holding would apply to either state or privately-initiated termination actions. Id. The court stated that it would be “grossly unfair to force appellant to defend against the appellees' case without the assistance of someone, trained in the law, who could test the appellees' case by the rules of evidence and the techniques of cross-examination.” Id. at 603. The court did not explicitly indicate whether the right to counsel was predicated upon the due process guarantees of the U.S. or Pennsylvania Constitution. However, in identifying the basis of its threshold statement that counsel is required in a proceeding that may lead to the deprivation of “substantial rights,” it cited numerous U.S. Supreme Court decisions interpreting the U.S. Constitution’s Due Process Clause. Id. at 602.

The U.S. Supreme Court’s subsequent decision in Lassiter v. Dep’t of Soc. Serv. of Durham Cty., 452 U.S. 18 (1981), cast doubt on the validity of In re Adoption of R.I., because it is unclear whether the Pennsylvania Supreme Court was employing federal or state constitutional standards. As one judge noted:

Lassiter has undermined Adoption of R.I., at least insofar as Adoption of R.I.’s broad right to counsel holding was based on the federal due process clause. It is unclear, however, whether Adoption of R.I. was decided solely on federal grounds. This court has previously suggested that Adoption of R.I. could be viewed as a state constitutional law decision. [Citation omitted.] I would find that the Pennsylvania Constitution provides an adequate and independent basis for extending the right to appointed counsel in involuntary termination proceedings to all indigent parents.

In re Adoption of T.M.F, 573 A.2d 1035, 1051 (Pa. Super. Ct. 1990) (Beck, J., concurring). See also Corra v. Coll, 451 A.2d 480, 485 n.7 (Pa. Super. Ct. 1982) (stating that In re Adoption of R.I. court was unclear as to whether its final disposition was based on state or federal grounds and that Pennsylvania state courts interpreting the state constitution have the right to increase substantive and procedural minimums set forth in federal decisional law). In In re Adoption of L.J.B., 995 A.2d 1182 (Pa. 2010) (per curiam), the Supreme Court of Pennsylvania “remanded to the trial court for a determination of whether Petitioner is eligible for the appointment of counsel. See In re Adoption of R.I., 455 Pa. 29, 312 A.2d 601 (1973) ... Should the trial court determine that Petitioner is eligible for the appointment of counsel, then counsel shall be appointed by the trial court.” This suggests that Adoption of R.I. still has vitality under the state constitution.

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

State Statutes and Court Decisions Interpreting Statutes

For children in dependency proceedings, 42 Pa. Cons. Stat. Ann. § 6311 specifies: “When a proceeding, including a master’s hearing, has been initiated alleging that the child is a dependent child under paragraph (1), (2), (3), (4) or (10) of the definition of ‘dependent child’ in section 6302 (relating to definitions), the court shall appoint a guardian ad litem to represent the legal interests and the best interests of the child. The guardian ad litem must be an attorney at law.” Additionally, SB815, enacted in 2012, added 42 Pa. Cons. Stat. Ann. § 6337.1(a), which specifies that “[l]egal counsel shall be provided for a child who is alleged or has been found to be a dependent child in accordance with the Pennsylvania Rules of Juvenile Court Procedure.”

In most states, adoption proceedings are entirely separate from termination of parental rights proceedings stemming from an abuse or neglect finding. However, it appears that in Pennsylvania, the state only uses the Pennsylvania Adoption Act to file termination of parental rights petitions based on abuse/neglect. See, e.g., In re Adoption of J.N.F., 887 A.2d 775, 778 (Pa. Super. Ct. 2005). The Adoption Act requires the court to appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents. 23 Pa. Cons. Stat. Ann. § 2313(a). Pennsylvania courts have held that the Adoption Act creates a right to counsel for a child in involuntary termination proceedings. See In re M.T., 607 A.2d 271, 276 (Pa. Super. Ct. 1992); Barclay v. Barclay, 533 A.2d 143, 147 (Pa. Super. Ct. 1987); In re Adoption of N.A.G., 471 A.2d 871, 874 (Pa. Super. Ct. 1984) (appointment of counsel for child in involuntary termination proceeding when proceeding is being contested by one or both parents is not discretionary; purpose of 23 Pa. Cons. Stat. Ann. § 2313(a) is to “guarantee that the needs and welfare of the children would be advanced actively by an advocate whose loyalty was owed exclusively to them.”). Two courts have stated that it is reversible error for the trial court to fail to appoint counsel for the child, even if this
failure was not raised at trial. \textit{In re E.F.H.}, 751 A.2d 1186 (Pa. Super. 2000) (adding that father could appeal denial despite failure of any party, including child, to raise issue at trial, because “[t]he right to counsel belongs to the child, and there is no appointed counsel for the child who could have raised the child's rights in the proceedings before the trial court”); \textit{In re Adoption of G.K.T.}, --- A.3d ----, 2013 WL 4768378 (Pa. Super. 2013) (agreeing with \textit{E.F.H.}, and rejecting argument that error was harmless because counsel would not have been able to communicate with child due to child’s young age; purpose of appointment statute is to “ensure that the needs and welfare of a child will be actively advanced by an advocate who owes loyalty only to the child,” and “Counsel would still be required to independently advocate for the Child's best interests, regardless of whether the Child can communicate his preference or not. We decline Adoptive Couple's invitation to read an age component into section 2313(a)'s otherwise mandatory text.”)

\textbf{Federal Statutes and Court Decisions Interpreting Statutes}

The Indian Child Welfare Act (ICWA), which governs child welfare proceedings in state court,\footnote{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.} 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 Rules and Court Decisions Interpreting Court Rules

Pa. R. J. C. P. 1151 specifies that children are appointed a guardian ad litem for dependency-type proceedings.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In 1976, the Pennsylvania Supreme Court suggested that appointment of counsel for children in termination of parental rights proceedings may be necessary when the child’s interest is inadequately protected by the court or other parties, but it also noted that “[t]his Court has not been referred to any authority which argues that such representation is constitutionally required.” In re Kapcsos, 360 A.2d at 178 (Pa. 1976). Notably, the litigant relied on In re Gault, 387 U.S. 1 (1967), suggesting the ruling was one based on the U.S. Constitution and not on the Pennsylvania Constitution.

D. Appointment of Counsel for Child—Privately Initiated Proceedings

In actions for custody, partial custody, or visitation of children, “[t]he court may on its own motion or the motion of a party appoint an attorney to represent the child in the action. The court may assess the cost upon the parties or any of them or as otherwise provided by law.” Pa. R. Civ. P. No. 1915.11(a).

5. MISCELLANEOUS

A. Civil Contempt Proceedings

6 But see In re Clouse, 368 A.2d 780, 781 (Pa. Super. Ct. 1976) (“In a child custody case, the hearing judge should receive evidence from all interested parties, and the child should be represented by counsel, for the child's interest may be distinct from any other party's.”). However, Clouse is likely a nullity as a result of Kapcsos.
In *Rittel v. Rittel*, the Pennsylvania Superior Court rejected the argument that the U.S Supreme Court’s holding in *Argersinger v. Hamlin* required appointment of counsel in civil contempt proceedings:

[The U.S. Supreme] Court specifically limited *Argersinger* to those cases in which imprisonment is actually imposed, not merely authorized. In the present case, the court did not hold appellant in contempt, and did not order him imprisoned. Even had the court ordered imprisonment, however, the rule of *Argersinger* would not be applicable, for the contempt proceeding against appellant was civil, not criminal.


**B. Paternity Proceedings**

In *Corra v. Coll*, 451 A.2d 480, 485 n.7 (Pa. Super. Ct. 1982), a lower appellate court held that court-appointed counsel is constitutionally required for indigent defendants in paternity proceedings, grounding its decision in the due process clause in the Fourteenth Amendment of the U.S. Constitution. *Id.* at 485, 488. The court first determined that there was a presumption that court-appointed counsel for the indigent defendant was constitutionally required because there was a risk of loss of liberty should the defendant fail to comply with the order of support entered as a consequence of an adjudication of paternity. *Id.* at 484-85. Then, the court found that *Lassiter* did not mandate a contrary conclusion as to the risk of loss of liberty. *Id.* at 485 n.7 (citing *Lassiter*, 452 U.S. at 27 n.3). The court was not persuaded by the argument that the risk of loss of liberty was too remote from the paternity action to justify appointment of counsel. *Id.* at 485.

The *Corra* court then moved to a procedural due process analysis under the *Mathews v. Eldridge* three-part balancing test. *Id.* at 483 (citing *Mathews*, 424 U.S. 319, 335 (1976)). First, the court determined that the private interests – the creation of a parent-child relationship, the res judicata effect of a finding of paternity, and the property interests involved – were sufficiently weighty alone to justify appointment of counsel. 451 A.2d at 485-86. Second, the court found that the combination of these private interests with the not inconsiderable risk that the absence of counsel might lead to an erroneous determination of paternity literally

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7 Although the court’s final holding is that “the due process clause of the Fourteenth Amendment to the United States Constitution requires the appointment of counsel for indigent defendants in civil paternity actions in Pennsylvania”, *Id* at 488, the court relied in its opinion on the fact that the state prosecuted the action, making it unclear whether the right would extend to a paternity action not involving the state as directly.
mandated appointment of counsel. *Id.* at 486-87. The court noted in particular that its analysis of the risk of error was “further strengthened by the fact that, here in Pennsylvania, a complainant in a support action at which paternity is disputed shall, “upon the request of the court or a Commonwealth or local public welfare official” be represented by the district attorney.” *Id* at 487. Third, the court found that the state’s interest would also be best served by appointment of counsel because future administrative burdens would be lessened by a correct determination of paternity. *Id.* at 487-88. The beneficial aspects of having counsel present, including the increased accuracy of decisions, outweighed the added expense the state would incur. *Id.* Finally, when the court measured the net weight of its *Mathews* analysis against the presumption, it found that the conclusion that due process required the appointment of counsel for indigent defendants in paternity cases was inescapable. *Id.* at 488.

Several cases from the Pennsylvania Superior Court have fleshed out the right to counsel in paternity proceedings. In *Rodriguez v. Rodriguez*, 600 A.2d 589 (Pa. Super. 1991), the court rejected the argument that the right to counsel did not exist where the child is born in wedlock and the defendant is presumed to be the father. The court held that “the same liberty interests which formed the basis for the decision in *Corra v. Coll*, supra, are present in this action in which appellant has been charged with but denies paternity.” *Id.* at 592. In *White v. Gordon*, 460 A.2d 828, 830 (Pa. Super. 1983), the court held that a non-indigent paternity defendant must be given a reasonable opportunity to secure counsel, commenting that “a potential deprivation of liberty confronts any paternity defendant, whether or not indigent, and, since this court has determined that indigent paternity defendants have a right to counsel, non-indigent paternity defendants must, at least, be afforded a reasonable opportunity to secure representation by counsel to assist in the defense of such claims.” Then, in *Banks v. Randle*, 486 A.2d 974, 977 (Pa. Super. 1984), the court concluded:

> Given the recognition of the right to counsel for paternity defendants ... we find it impossible to deny such a defendant the right to effective assistance of counsel. It is axiomatic that the right to the assistance of counsel means the right to the effective assistance of counsel ... Indeed, without the guidance of competent counsel, appellant's right to representation would be rendered worthless ... Thus, were we to hold that a paternity defendant's right to counsel does not require the effective assistance of counsel, we would be exalting form over content.

In *Gardner v. Gardner*, 538 A.2d 4, 9 (Pa. Super. 1988), the court added, “Although today the proceedings pertaining to support and paternity are found in the Pennsylvania Rules of Civil Procedure, the civil-criminal distinction is unavailing in determining whether competent counsel is constitutionally required. Where paternity is denied and a trial is held on that issue, such counsel is necessary.” However, the court held:
We decline to extend the requirement of effective assistance of counsel to the situation where a defendant does not deny that he is the father of the child when an action for support for the child is brought. In the case before us the issue of paternity was never raised in the original support proceeding and the appellant defended only on the grounds that the support was too high. He had the opportunity to deny paternity had he so desired, but chose not to do so. We hold that only where there is a trial on a disputed issue of paternity, is the putative father entitled to counsel. To hold otherwise would be tantamount to providing the right to appointed counsel in support cases. This has never been the law.

Id.

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

State Statutes and Court Decisions Interpreting Statutes

Minors have a right to counsel when seeking judicial waiver of the parental consent requirement for an abortion. 18 Pa. Cons. Stat. Ann. § 3206(e) (“The court shall ... advise her that she has a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel.”).  

D. Proceedings Involving Claims by or Against Prisoners

8 Notably, an earlier version of this statutory right apparently required a request on the part of the minor, but a federal court held that it was not constitutionally infirm on that ground:

Plaintiffs argue that the immature minor is not capable of understanding the importance of legal representation, and therefore the state should not impose upon her the affirmative burden of requesting counsel. Plaintiffs would require the court to appoint counsel for all minors, at least until such time as the court determines that the minor is sufficiently mature to make an intelligent waiver of counsel ... While I agree with plaintiffs that the Commonwealth might have made a more prudent choice by requiring the appointment of counsel in every case, I cannot say that the alternative selected by the Commonwealth is unconstitutional. ... Plaintiffs have pointed to nothing in Bellotti II which requires the appointment of counsel where counsel is not requested by the minor. They have not cited, and I have been unable to find, any authority for the proposition that a judicial bypass procedure must do more than advise the minor of her right to counsel and to appoint counsel whenever the minor so requests.

State Court Rules and Court Decisions Interpreting Court Rules

A Pennsylvania rule of criminal procedure allows a judge to appoint counsel in post-conviction collateral proceedings “whenever the interests of justice require it.” Pa. R. Crim. P. 904(C).

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Johnson v. Desmond, the court held that a prisoner bringing a 42 U.S.C. § 1983 claim against corrections officers had no right to court-appointed counsel. 658 A.2d 375, 376 (Pa. Super. Ct. 1995). Federal law, pursuant to 28 U.S.C. § 1915, permits counsel to be appointed to represent an indigent prisoner having a meritorious civil rights claim. Id. The court went on to note, however, that the statute was not applicable in state courts. Id. Had the court stopped at that point, it would seem that it based its decision solely on the applicability of the federal statute to state courts. However, it went on to assert that there was “no authority in this Commonwealth for the appointment of counsel to represent parties in civil actions.” Id. (citing Weir, 631 A.2d at 656). The court thereafter acknowledged that Pennsylvania law recognizes the right to counsel in certain civil proceedings, including dependency hearings, proceedings to terminate parental rights, and involuntary civil commitment proceedings. Id.

In May v. Sharon, the appellant, a convicted defendant, sought the appointment of counsel for a civil lawsuit against his attorney for negligence in the handling of his criminal case. 546 A.2d 1256 (Pa. Super. Ct. 1988). The court spoke generally about the Pennsylvania approach to the civil right to counsel:

While it is true that in some instances counsel will be appointed for a plaintiff in a civil action, generally it is a situation involving broad policy considerations implicating a state interest of a civil rights nature such as a fair housing violation, sexual or other job discrimination or where liberty interests are implicated. The state has reasonably adjusted to these necessities by providing legal agencies to fulfill due process requirements, which will assist indigent persons who are wronged, or the courts have called upon pro bono services of the bar associations absent public resources. Each class of case and in some respects each case is scrutinized to determine if the right to counsel is required under the due process provisions of federal and state constitutions. The requirements are more clearly stated and more generally applicable when a party is a defendant in certain civil actions, rather than a plaintiff.

Id. at 1258. The court then concluded that for custody proceedings:

By statute in Pennsylvania, our legislature has deemed it necessary to have indigent parents represented by counsel (as well as the child) in dependency proceedings.
However, in termination and custody proceedings, indigent parents are not provided the right to counsel as it is assumed the court will act in the best interest of the child. . . . In divorce actions, the [U.S.] Supreme Court has promulgated a requirement which requires the state courts to provide means of entry into the system for indigents by eliminating filing fees, court costs, process service fees and other costs related to the proceeding. *Boddie v. Connecticut Supreme Court*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). This ruling did not go so far as to require assignment of counsel.

*Id.* at 1258-59. Oddly, the *May* court made no mention whatsoever of *Adoption of R.I.*, which preceded it and had held that parents were entitled to counsel in termination of parental rights proceedings. The court also examined a New York case, *In re Smiley*, where the New York Court of Appeals denied counsel in a divorce action (although apparently one that did not involve a custody battle) because of the impact it would have on the state and the bar:

The court [in *Smiley*] listed an array of causes, including matrimonial cases, such as evictions from homes, revocation of licenses, mortgage foreclosures and repossession of important assets, which could seriously and adversely effect indigents where right to appointed counsel is equally at issue. It went on to hold that since much indigent litigation is handled by the bar, pro bono, it is a limited resource which must be judiciously engaged or it will be overwhelmed. Widespread application of such an approach would increase litigation and suggests policy and fiscal impact which the courts should not venture to decide.

*Id.* at 1259 (citing *In re Smiley*, 36 N.E.2d 433 (N.Y. 1975)). The *May* court concluded by applying a *Mathews* test and focusing almost entirely on the government’s interest:

[A]ppellant cannot establish that he was denied due process, but it is clear the government's interests would be adversely affected by requiring representation. It is unique to the criminal justice system that great protective forces are present, such as appeal rights and Post Conviction Relief and Habeas Corpus actions, to correct errors caused by counsel and/or the court, thereby drastically limiting the need of corrections on the civil side. These are the provisions in law and under the constitution which provide for the protection of the appellant’s liberty interests. To provide right to counsel to convicted defendants to pursue civil actions, when liberty is not at stake, would lead to such a torrent of civil actions that the already overwhelmed civil side of the court would most surely go under, not to mention the added burden to the appellate process. Additionally, the strained resources of government in providing constitutionally mandated services to criminal defendants would further be diluted, placing the criminal justice system in crisis. Neither the constitution nor public policy demands the assistance requested by appellant. Such a claim is better met by the
mechanisms established in civil law, for representation on a contingent fee basis. There, in electing to represent a client, the meritorious cases would be screened from the large number which were frivolous.

E. Marriage Dissolution/Divorce Proceedings

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Rich v. Acrivos, the court held that failure to appoint counsel in divorce proceedings does not constitute error, as there “is no right to counsel in civil cases.” 815 A.2d 1106, 1108 (Pa. Super. Ct. 2003). The same conclusion was reached in Karch v. Karch, 879 A.2d 1272 (Pa. Super. 2005). However, the Rich and Karch courts relied entirely without discussion on Witt v. LaLonde, 762 A.2d 1109 (Pa. Super. Ct. 2000). In Witt, the appellant contended that the Sixth Amendment guaranteed her a right to counsel in a custody/visitation case. Id. at 1110. The Witt court denied the appellant’s claim, stating that the Sixth Amendment right to counsel applies only to criminal cases. Id. While the Witt appellant only raised the right to counsel claim under the Sixth Amendment (at least, according to the court), it is unclear whether the Rich or Karch litigants argued that the right existed under the Sixth Amendment or under due process guarantees. See also Wilson v. Wilson, 280 A.2d 665, 666 n.1 (Pa. Super. Ct. 1971) (“Appellant . . . asks not only for free access to the courts and free service fees, but also asks that he be provided free investigative and legal services. Boddie, of course, makes free access a right; however, there is no obligation to provide investigative and legal services to one seeking a divorce.”). Conversely, in Kelly v. Kelly, a Court of Common Pleas held in a divorce proceeding that:

There can be no equality before the law unless representation is afforded to those persons who are financially unable to employ a lawyer. . . . It is conceivable that under unusual circumstances a husband-plaintiff might not be required to pay fees for counsel to represent his wife. However, in such a situation it is the responsibility of the court and the bar to see that counsel is available for a wife unable to employ one.


F. Civil Forfeiture Proceedings

State Court Rules and Court Decisions Interpreting Court Rules

In Com. v. $519.00 US Currency/Coin, 2012 WL 8685271 (Pa. Cmmw. 2012) (unpublished), a case involving forfeiture of currency, the court noted that Pa. R. Crim. P. No. 122 specifies that the trial court may appoint counsel to represent a defendant “when the interests of justice require it.” The court held that the trial court’s order requiring the public
defender to continue representing defendant in the forfeiture proceeding even after the underlying criminal complaint was dismissed was appropriate under the rule.

State Court Decisions Addressing Constitutional Due Process or Equal Protection

In Commonwealth v. $9,847.00 U.S. Currency, 704 A.2d 612, 613 (Pa. 1997), the Supreme Court of Pennsylvania weighed the right to appointed counsel in civil forfeiture cases under the Due Process Clause of the U.S. Constitution, and ultimately reversed the lower court’s decision by finding that there was no such right (at least where the property at issue was cash). Applying the Mathews v. Eldridge balancing test and citing to the U.S. Supreme Court, the court commented, “property interests do not require the same level of due process protection as when interests in life or liberty are at stake.” Id. at 615. The court also noted that the state had a strong financial interest in not providing counsel (owing to the large number of forfeiture cases) as well as “an additional interest in deterring illegal drug transactions by depriving those who illegally deal in controlled substances of the ill-gotten profits of those endeavors and of the instrumentalities used in aiding violations of controlled substance laws.” Id. at 615-16. The court went on to find a minimal risk of erroneous deprivation, given that those subject to forfeiture were previously subjected to a full criminal trial that found them guilty. Id. at 616. The court then weighed these factors against the Lassiter presumption, which it described as “a heavy one which is not easily overcome.” Id. at 616. The court finally concluded that “[b]ecause civil forfeiture does not implicate a person’s liberty interest and only implicates a person’s property interest,” there was no right to counsel in such proceedings. Id. at 613. See also Harris v. Pennsylvania Dep’t of Corr., 714 A.2d 492 (Pa. Commw. Ct. 1998) (relying on $9,847.00 U.S. Currency to find no right to appointed counsel for prisoner defending against claim of damages brought by state for his involvement in stabbing; court relies on fact that only interest is financial, that state has strong interest in deterring conduct in question, and that risk of error is minimal).

In Com. v. Real Property and Improvements at 2338 N. Beechwood Street, 65 A.3d 1055, 1067 n.24 (Pa. Cmwlth. 2013), a lower level court suggested that a forfeiture case involving a personal residence might “skirt the boundaries of due process implicating the right to counsel.” The court stated:

When a person’s home and homelessness are at stake, which also implicates liberty interests, the three factors to be balanced pursuant to Mathews would likely balance differently. For, unlike in $9,847.00 U.S. Currency, Claimant's interest in her home is

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9 With respect to the state constitution, the court noted, “[b]ecause appellee did not claim that he had a right to court-appointed counsel under the Pennsylvania Constitution in his appeal to the Commonwealth Court, this issue was waived below.” 704 A.2d 612, 617 n.10.

different than an interest in cash, and the risk of an erroneous decision or deprivation is not minimal here, but great, because the homeowner has never been charged or alleged to be involved in the underlying criminal activity. It does not appear that Claimant understood or appreciated that she could assert the innocent owner defense or that she could raise the Eighth Amendment argument that the forfeiture of her home would constitute an excessive fine in this case. Claimant also did not have any notice from any source that she had the right to a jury trial. Moreover, the allocation of burdens and standards of proof requires that Claimant prove a negative, thereby creating a great risk of erroneous deprivation. Indigent claimants who have been charged with criminal violations may have access to counsel as a result of those charges; however, claimants who face the loss of a home without having been charged for any underlying violations for which forfeiture is authorized by statute presently have no right to counsel under the Forfeiture Act or case law in Pennsylvania.

Id. The court also noted that “[c]oncern about the potential for due process violations in the federal forfeiture procedures motivated Congress to enact the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 18 U.S.C. § 983, which provides a right to counsel for indigent homeowners.”
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\(^1\) and to all civil proceedings (including custody),\(^2\) 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),\(^3\) 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 Decisions Addressing Incorporation of English Common Law and Statutes

In 1985, in Zerr v. Scott, a malpractice/ineffective assistance of counsel case, the Court of Common Pleas for Berks County held that the Act of 11, Henry VII, chapter 12 (1494) “remains in effect as a part of the Common Law of Pennsylvania,” and that the statute “requires us, sitting with the discretionary power in this limited area of a Chancellor of England, to determine whether or not he should have free counsel appointed for him.” 39 Pa. D. & C.3d 459, 461 (Ct. Com. Pl. 1985) (citing Report of the Judges, 3 Binney 617 (1808)). While acknowledging that “there may be some question as to whether the above-mentioned statute meets our present day concepts of constitutionality (it concerns itself with poor plaintiff’s [sic

\(^{1}\) 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...”

\(^{2}\) 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.”

\(^{3}\) 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.”
but ignores poor defendants, for example),” the court identified the progression of legislative and judicial determinations that keep this English chapter in force in Pennsylvania and concluded that it was, in fact, still effective.14 Id. at 461-62. The court accepted that it was “fundamental that no lay person can adequately represent himself pro se in civil litigation. For a lay person to have meaningful access to our courts, he must have a skilled lawyer to represent him.” Id. at 462. The court nonetheless made the discretionary determination that appointment of counsel was not required under the circumstances of the case, because it concluded that the claim the indigent plaintiff sought to bring was time-barred by the applicable statute of limitations. Id. at 465. See also Madden v. City of York, 59 Pa. D. & C.2d 367, 370 (Ct. Com. Pl. 1972) (“[T]he statute of 11, Henry VII, quoted above is to be incorporated in the statute laws of Pennsylvania.”); Sturgeon v. Ely, 6 Pa. 406 (Pa. 1847) (relying upon 11 Hen. 7, c. 20).

14 Legislation appears to have been introduced in the Pennsylvania Senate in 1981 calling for this provision to no longer be effective under Pennsylvania law, but such legislation was not enacted. S.B. No. 1162, 165th Leg., Reg. Sess. (Pa. 1981).